Year in Review:
Wait – What Just Happened?

33rd Annual Labor & Employment Conference

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CASE LAW DEVELOPMENTS

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WHAT IS “SEX”?

- Title VII – prohibits discrimination in the workplace because of an individual’s sex
- Title IX – requires schools receiving federal funds not to exclude, separate, deny benefits to, or otherwise treat differently students or employees on the basis of sex
- Whether the prohibition on sex discrimination extends to discrimination on the basis of sexual orientation, gender identity or expression is an issue of conflict among the federal courts

HIVELY V. IVY TECH COMMUNITY COLLEGE (04/04/17)

- The plaintiff is openly lesbian who worked part-time at the College as an adjunct professor
- Over the course of five years, she applied for six different positions at the College and was selected for none of them. In 2014, her position was eliminated.
- She filed a lawsuit claiming that she was discriminated against on the basis of her sexual orientation
- The College filed a motion to dismiss on the basis that she failed to state a claim for sex discrimination, because discrimination on the basis of sexual orientation is not protected by Title VII. The District Court granted the motion based on established legal precedent.
- On appeal, the Seventh Circuit overturned its prior precedent and held that discrimination on the basis of sexual orientation is discrimination based on sex for the purposes of Title VII

GRIMM V. GLOUCESTER CTY. SCH. BD. (03/06/17)

- The high school student plaintiff was born biologically female, but identifies as male. Beginning in his sophomore year, he used the boys' bathroom for approximately two months
- Shortly thereafter, the School Board adopted a policy requiring students to use the restrooms and locker rooms corresponding to their biological gender
- The plaintiff sued under Title IX. The District Court upheld the School Board's policy, but the Fourth Circuit Court of Appeals reversed, deferring to the Department of Education's interpretation of the word "sex" under Title IX to require schools to "treat transgender students consistent with their gender identity."
- The U.S. Supreme Court granted the School Board's petition for Writ of Certiorari in October 2016
- However, on March 6, 2017, the Supreme Court vacated the decision in light of a DOE guidance document reversing its position. The case has been remanded back to the Fourth Circuit.

SCOPE OF EEOC SUBPOENA POWERS

- When the EEOC receives a charge, it must investigate to determine whether there is reasonable cause to believe the charge is true
- To enable the EEOC to make informed decisions, Title VII "confers a broad right of access to relevant evidence"
- It provides the EEOC "shall . . . have access to, for the purposes of examination, . . . any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by" Title VII and "is relevant to the charge under investigation." 42 U.S.C. § 2000e–8(a).
- The statute enables the EEOC to obtain that evidence by issuing subpoenas and to seek an order enforcing the subpoena
- If the EEOC seeks an order of enforcement, a District Court's role is to "satisfy itself that the charge is valid, that the subpoena is not "too indefinite," has not been issued for an "illegitimate purpose," is not unduly burdensome and that the material requested is "relevant" to the charge.'"

MCLANE CO., INC. V. EEOC (04/03/17)

- McLane requires employees taking physically demanding jobs—both new employees and employees returning from medical leave—to take a physical evaluation. According to McLane, the evaluation "tests . . . range of motion, resistance, and speed" and "is designed, administered, and validated by a third party."

- Upon returning from maternity leave, the plaintiff took the test three times, but failed each time. As a result, her employment was terminated.

- The plaintiff filed a Charge alleging sex discrimination

- In response to the EEOC's request for information, McLane produced basic information about the evaluation, and a list of anonymous employees that McLane had asked to take the evaluation

MCLANE CO., INC. V. EEOC (04/03/17)

- McLane's list included each employee's gender, role at the company, and evaluation score, as well as the reason each employee had been asked to take the evaluation
- But the company refused so-called "pedigree information": the names, Social Security numbers, last known addresses, and telephone numbers of the employees who had been asked to take the evaluation
- The EEOC issued a subpoena and sought enforcement in District Court
- In the District Court's view, the pedigree information was not "relevant" to the charges because "an individual's name, or even an interview he or she could provide if contacted, simply could not shed light on whether the [evaluation] represents a tool of . . . discrimination"

MCLANE CO., INC. V. EEOC (04/03/17)

- Upon *de novo* review, the Ninth Circuit reversed
- The U.S. Supreme Court granted the petition for Writ of Certiorari to determine this issue
- HELD: A district court's decision to enforce an EEOC subpoena should be reviewed for abuse of discretion, not *de novo*
- As a practical matter, this means that the real battle over subpoena enforcement will take place only once in the trial court
- Depending on the circumstances, it may make sense to try to negotiate a resolution, if possible, with the EEOC in the face of an overly broad request for information

DEFERENCE TO AGENCY INTERPRETATIONS?

- In *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, the U.S. Supreme Court held that when an agency is authorized by Congress to issue regulations and promulgates a regulation interpreting a statute it enforces, the interpretation receives deference if the statute is ambiguous and if the agency's interpretation is reasonable

- The concept of Agency interpretations has been given new scrutiny

ENCINO MOTORCARS, LLC V. NAVARRO (06/20/16)

- The Fair Labor Standards Act contains an exemption from its overtime provisions for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles" for an auto dealer
- In 1978, the Department of Labor issued an opinion letter interpreting the exemption to include dealership "service advisors" who sell "repair and maintenance services" for vehicles
- In 2008, the Department issued a notice of proposed rulemaking to implement regulations to cover service advisors under the exemption
- But in 2011, the Department changed course and issued a final rule that took the opposite position from the proposed rule, interpreting the statute **not** to exempt service advisors from the overtime rules
- The Department provided no explanation for the change and scarcely any justification for the new position

ENCINO MOTORCARS, LLC V. NAVARRO (06/20/16)

- The Court of Appeals for the Ninth Circuit applied *Chevron* deference to the Department's 2011 interpretation and held that it was valid
- The Supreme Court reversed, holding the regulation was arbitrary and capricious
- The Court explained that the "decades of industry reliance on the Department's prior policy" meant the Department had a "duty" to offer more than a "summary discussion" of "why it deemed it necessary to overrule its previous position"
- Here, "the Department offered barely any explanation" for the change and "did not analyze or explain why the statute should be interpreted" to exempt auto salesmen but not service advisors
- "This lack of reasoned explication for a regulation that is inconsistent with the Department's longstanding earlier position results in a rule that cannot carry the force of law. It follows that this regulation does not receive *Chevron* deference."
- This is just part of a growing trend away from *Chevron* deference

EMPLOYER LIABILITY FOR OFF DUTY CONDUCT

- Most state laws provide that employers have a duty to act reasonably in hiring, supervising, and retaining their employees
- To recover for a breach of that duty, a plaintiff must prove:
  - The defendant-employer knew or should have known that an employee had a particular unfitness for his or her position so as to create a danger of harm to third persons
  - Such particular unfitness was known or should have been known at the time of the hiring, retention, or failure to supervise
  - This particular unfitness proximately caused the plaintiff's injury

ANICICH V. HOME DEPOT U.S.A., INC. (03/24/17)

- Male supervisor had a history of sexually harassing his young female subordinates
- He became fixated on one female employee in particular, Alisha. He started calling her his girlfriend, swearing and yelling at her, and calling her names in front of customers. These outbursts came to include throwing and slamming things.
- The supervisor's behavior was known to senior management. Alisha had repeatedly complained and expressed fear about being alone with him.
- The supervisor asked her to go to his sister's wedding in Wisconsin with him. She refused. But, after he threatened to fire her if she did not go, she went.
- After the wedding, the supervisor took Alisha to a hotel room where he killed her and her unborn child and raped her.

ANICICH V. HOME DEPOT U.S.A., INC. (03/24/17)

- Home Depot filed a motion to dismiss on two bases
- First, it argued that it did not owe a duty of care to Alisha, because the murder occurred off premises and the supervisor didn't commit the crime using store property
- Second, it argued that it was not reasonably foreseeable based on the supervisor's past conduct that he would commit such a horrendous act
- The District Court agreed and dismissed the case
- The Seventh Circuit reversed. While the murder occurred off-site, the supervisor misused his supervisory authority by threatening Alisha's job if she did not attend the wedding. The Court also held that it was a question of fact as to whether some harm was foreseeable based on what the employer knew about the supervisor's conduct.

NICHOLS V. TRI-NAT'L LOGISTICS, INC. (01/04/16)

- The female truck driver was repeatedly sexually harassed by her male driving partner. The harassment occurred both during work and during mandatory rest periods.
- She reported the conduct to management in the middle of a work trip, but stated that she did not want to change assignments before she could find another driving partner because she needed to work to pay her bills. The employer took no steps to find another codriver for the plaintiff until after she returned from the work trip.
- Not long after, she was fired for safety violations. She sued alleging claims for hostile work environment and sex discrimination.
- The District Court granted summary judgment to the employer. In doing so, it refused to consider any conduct that occurred during the rest period because it was not work time.

NICHOLS V. TRI-NAT'L LOGISTICS, INC. (01/04/16)

- The Eight Circuit reversed, holding that "offensive conduct does not necessarily have to transpire at the workplace in order for a juror reasonably to conclude that it created a hostile working environment"
- Here, the rest period was part of the total work trip and should have been considered
- In addition, the Court found that a question of fact existed as to whether the employer took prompt, remedial action because it waited seven (7) days to arrange for a different codriver for the plaintiff

PROMPT, REMEDIAL ACTION?

- To impose liability on an employer for the harassing conduct of a plaintiff's co-worker, a "plaintiff must show that the employer's response to the plaintiff's complaints manifested indifference or unreasonableness in light of the facts the employer knew or should have known"

- A plaintiff must therefore show that the employer "knew or should have known of the harassment" and "failed to take prompt and appropriate corrective action"

- Generally, a response is adequate if it is reasonably calculated to end the harassment

SMITH V. ROCK-TENN SERVICES, INC. (02/10/16)

- The plaintiff's male co-worker pinched and/or slapped his buttocks and grinded his pelvis into the plaintiff's backside

- The plaintiff reported the conduct, but was told nothing could be done until the Operations Manager returned from vacation the following week. Ten days later, the plaintiff wrote to management to document the incidents and request leave. Only then, did the defendant initiate an investigation.

- HELD: The employer failed to take prompt and remedial action based on its total inaction for 10 days

EQUAL PAY FOR EQUAL WORK

- The Equal Pay Act requires that men and women in the same workplace be given equal pay for equal work
- If a plaintiff can show he or she is receiving different wages for equal work, the burden shifts to the employer to establish one of the EPA's four affirmative defenses
- One affirmative defense is that the pay differential is based on any factor "other than sex"
- The case law is mixed on when a plaintiff's prior salary can constitute a factor other than sex under the EPA
- The concern is that decisions based on a plaintiff's prior salary can propagate a systemic pay disparity between the sexes

RIZO V. YOVINO (04/27/17)

- The County had a Step/Level compensation policy. To determine which step within Level 1 a new employee would begin, the County considered the employee's most recent prior salary and placed the employee on the step corresponding to his or her prior salary, increased by 5%.

- This resulted in the female plaintiff being paid less than all of her male co-workers who performed the same job

- The County conceded the disparity, but filed a motion for summary judgment because the differential was based on a factor other than sex (i.e., prior salary)

- The District Court denied the motion. It said "prior salary alone can never qualify as a factor other than sex" because "a pay structure based exclusively on prior wages is so inherently fraught with the risk . . . that it will perpetuate a discriminatory wage disparity between men and women"

RIZO V. YOVINO (04/27/17)

- On appeal, the Ninth Circuit reversed
- It held that an employer can maintain a pay differential based on prior salary (or based on any other facially gender-neutral factor), if it can show the factor "effectuates some business policy" and the employer "uses the factor reasonably in light of the employer's stated purpose as well as its other practices"
- The Court remanded the case for the District Court to evaluate the four business reasons offered by the County:
  - The policy is objective
  - The policy encourages candidates to leave their current jobs, because they will always receive a 5% pay increase over their current salary
  - The policy prevents favoritism and ensures consistency in application
  - The policy is a judicious use of taxpayer dollars

ADMINISTRATIVE AGENCIES

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NLRB ACTION TOWARD NON-UNION EMPLOYEES

- Whether your workforce is represented by a union or not, most private employers are covered by the National Labor Relations Act

- Section 7 of the National Labor Relations Act guarantees employees:

  "the right to self-organization, the right to join, form or assist labor organizations, the right to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities"

- Activity must be **protected** (right to organize, statements or activity regarding wages, working conditions or other terms of employment) and **concerted**

- Concerted activity: When "the employee is engaged with or on the authority of other employees, and not solely on behalf of the employee himself" or "individual employees seek to initiate or to induce or to prepare for group action"

BANNER HEALTH SYSTEM V. NLRB (03/25/17)

- In 2012, the NLRB determined that Banner Health violated the NLRA by asking an employee who was the subject of an internal investigation to refrain from discussing it while the investigation was pending

- The Board held: "[T]o justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees' Section 7 rights"

BANNER HEALTH SYSTEM V. NLRB (03/25/17)

- The NLRB held that in any given investigation, employer must first determine if:
  - Witnesses need protection
  - Evidence was in danger of being destroyed
  - Testimony was in danger of being fabricated, or
  - There was a need to prevent a cover up
- The Board found that a general assertion of protecting the integrity of an investigation "clearly failed to meet" that burden
- ***Compare*** – EEOC's position to keep harassment investigations as confidential as possible

BANNER HEALTH SYSTEM V. NLRB (03/25//17)

- On March 25, 2017, the D.C. Circuit Court refused to enforce the NLRB's Order
- The Court set forth a different, more employer-friendly test:
  - The employer must show, on a case by case basis, that confidentiality is necessary based on objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality

NLRB V. MURPHY OIL USA, INC. (01/13/17)

- In *Murphy Oil USA*, the NLRB held that the employer violated the NLRA by implementing and enforcing an arbitration policy that required employees to waive their right to pursue class actions for any employment-related disputes
- The Fifth Circuit rejected this position, but the Seventh and Ninth Circuit have agreed with the NLRB's position

NLRB V. MURPHY OIL USA, INC. (01/13/17)

- On January 13, 2017, the U.S. Supreme Court agreed to review the following issue:
  - Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice under 29 U.S.C. § 158(a)(1), because they limit the employees' right under the National Labor Relations Act to engage in "concerted activities" in pursuit of their "mutual aid or protection," 29 U.S.C. § 157, and are therefore unenforceable under the savings clause of the Federal Arbitration Act, 9 U.S.C. § 2

OSHA RULE ON RECORDING AND REPORTING OCCUPATIONAL INJURIES AND ILLNESSES

- On October 19, 2016, OSHA issued a Final Rule designed to improve tracking of workplace injuries and illnesses
- Requires that some of this information be submitted electronically for posting on OSHA website

OSHA REPORTING RULE

Employer Requirements:

- Employers must amend injury and illness policies to:
  - Expressly inform employees of their right to directly report work-related injuries and illnesses
  - Assure employees of non-discrimination and non-retaliation for doing so:
    - Must include an explicit prohibition
    - OSHA can issue direct citations for retaliation without an employee complaint
  - Clarify that the reporting method procedure for employees to report workplace injuries and illnesses must be reasonable

OSHA REPORTING RULE

Employer Requirements

- Delete any rule deemed “unreasonable” restriction on reporting:
  - Rules requiring immediate reporting with discipline for failure to do so
  - Use a “as soon as reasonably known or recognized” standard
- Employer can not deter or discourage employees from reporting injuries and illnesses
- Rules may not contain any incentives or disincentives to cause a “reasonable” employee to fail to report a workplace injury or illness:
  - Raffle drawing or safety bonus when no injuries are reported
  - Perfect attendance bonuses

OSHA REPORTING RULE

- Automatic requirement (or threatening) submission to drug or alcohol tests, post accident is deemed an unreasonable restriction on reporting
  - OSHA comments target “blanket” post-injury drug testing policies
  - Need a “reasonable possibility” that drug use by the reporting employee was a contributing factor to the reported injury or illness
  - Individualized assessment now necessary

EEOC STRATEGIC ENFORCEMENT PLAN (SEP)

- On October 17, 2016, EEOC released its updated five year SEP
- Continued focus on many of the same issues from last five year plan (2012)
- Priorities:
  - Eliminating barriers in recruitment and hiring
  - Protecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination
  - Addressing selected emerging and developing issues
  - Ensuring equal pay protections for all workers
  - Preserving access to the legal system
  - Preventing systemic harassment

EEOC STRATEGIC ENFORCEMENT PLAN (SEP)

- The SEP adds two areas to the emerging and developing issues priority:
  - Issues related to complex employment relationships in the 21st century workplace
    - Joint employment
    - Gig economy
    - Independent contractor vs. employee
  - Discrimination against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups

EEOC STRATEGIC ENFORCEMENT PLAN (SEP)

- Eliminating barriers in recruitment and hiring includes the following "areas of particular concern":
  - The growth of the temporary workforce
  - The increasing use of data-driven selection devices
  - The lack of diversity in certain industries and workplaces such as technology and policing

EEOC STRATEGIC ENFORCEMENT PLAN (SEP)

- Ensuring equal pay protections for all workers
  - EEOC will continue to focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act and Title VII
  - "Because pay discrimination also persists based on race, ethnicity, age, and for individuals with disabilities, and other protected groups, the Commission will also focus on compensation systems and practices that discriminate based on any protected basis, including the intersection of protected bases, under any of the federal anti-discrimination statutes"

EEOC STRATEGIC ENFORCEMENT PLAN (SEP)

- Preserving access to the legal system
  - Focus on:
    - Overbroad waivers, releases and mandatory arbitration provisions
    - Employers' failure to maintain and retain applicant and employee data and records required by EEOC regulations
    - Significant retaliatory practices that effectively dissuade others in the workplace from exercising their rights
- Preventing systemic harassment
  - Focus on strong enforcement through monetary and injunctive relief, as well as the promotion of training and outreach to deter future violations

EEOC RETALIATION GUIDANCE

- On August 25, 2016, the EEOC issued *EEOC Enforcement Guidance on Retaliation and Related Issues* which updates its1998 Guidance
- 45% of discrimination claims brought before the EEOC are retaliation claims
- A retaliation claim challenging action taken because of EEO-related activity has three elements:
  - **Protected activity**: "Participation" in an EEO process or "opposition" to discrimination
  - **Materially adverse action** taken by the employer
  - Requisite level of **causal connection** between the protected activity and the materially adverse action

EEOC RETALIATION GUIDANCE

- Two categories of **protected activity: Participation & Opposition**
  - Participation:
    - The anti-retaliation provisions make it unlawful to discriminate because an individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII, the ADEA, the EPA, the ADA, the Rehabilitation Act, or GINA
    - The participation clause broadly protects EEO participation regardless of whether an individual has a reasonable, good faith belief that the underlying allegations are, or could become, unlawful conduct
    - Playing any role in an internal investigation should be deemed to constitute protected participation

EEOC RETALIATION GUIDANCE

- Opposition:
  - An individual is protected from retaliation for opposing any practice made unlawful under the EEO laws
  - Protected "opposition" activity broadly includes the many ways in which an individual may communicate explicitly or implicitly opposition to perceived employment discrimination
    - The manner of opposition must be reasonable **AND**
    - The opposition must be based on a reasonable good faith belief that the conduct opposed is, or could become, unlawful

EEOC RETALIATION GUIDANCE

- Materially Adverse Action:
  - Any action that might well deter a reasonable person from engaging in protected activity
  - Examples provided:
    - Exclusion from team lunches
    - Workplace surveillance
    - Threats to report immigration status
    - Workplace sabotage, assignment to unfavorable location, and abusive scheduling practices
    - Disclosure of confidential EEO information and assignment of disproportionate workload

EEOC RETALIATION GUIDANCE

- Causation (perhaps the biggest change for employers in the Guidance):
  - A materially adverse action does not violate the EEO laws unless there is a causal connection between the action and the protected activity
  - The causation standard requires the evidence to show that "but for" a retaliatory motive, the employer would not have taken the adverse action
    - EEOC also adopts the position that retaliation can be established by creating "a 'convincing mosaic' of circumstantial evidence" that would support the inference of retaliation
    - This standard is less stringent than the "but for" test

EEOC RETALIATION GUIDANCE

- Suggested Best Practices:
  - **Written Employment Policies**
    - Written, plain-language anti-retaliation policies
    - Provide practical guidance on the employer's expectations with user-friendly examples of what to do and not to do
  - **Training**
    - For all managers, supervisors, and employees
  - **Review Employment Actions**
    - Consider designating an HR or EEO specialist, management official, in-house counsel, or other person to review proposed employment actions
  - **Follow Up**
    - HR or management to follow up with complaining party or others involved in protected activity

FTC'S 2016 REPORT ON BIG DATA

- Types of people analytics:
  - Software programs that source and match candidates to employers' job postings based on certain words used in the candidates' applications, resumes, and/or social media profiles
  - Automated online reference checking tools that assess the "fit" of applicants for an employer's culture
  - Computer game tests that estimate applicants' cognitive abilities

FTC'S 2016 REPORT ON BIG DATA

- Human resources/data analytics is used for the following purposes:
  - Quickly gathering vast amounts of historical employee data
  - Finding better candidates and predicting their success in given role
  - Diagnosing performance flaws in current employees
  - Identifying employees likely to resign or about to steal your trade secrets
  - Improving workflow and productivity

FTC'S 2016 REPORT ON BIG DATA

- What are the legal risks in using Big Data/People Analytics in hiring?
  - Disparate impact
    - The legal standard: Any screening device that produces a statistically significant disparity between men and women, whites and blacks, etc. creates liability unless it is justified by "business necessity" *Griggs v. Duke Power Co*., 401 U.S. 424 (1977) (holding that education requirements and written tests created such a disparate impact)
- Many programs make selection "decisions" based on factors that are not shown to be job related and consistent with business necessity

FTC'S 2016 REPORT ON BIG DATA

- The FTC's 2016 Report listed "Best Practices" for the use of Big Data in employment and consumer transactions
  - Does the People Analytics vendor have reasonable procedures in place to ensure the maximum possible accuracy of the information they provide?
  - Does the vendor allow applicants/employees to access information the vendor has about them?
  - Does employer certify People Analytics info will not be used to violate EEO laws?
  - Does the employer provide disclosures and obtain authorization as required by the FCRA?
  - Does the employer provide pre-adverse action notice to applicants and employees, and thereafter provide post-adverse action notices to those same applicants and employees?
  - Does the people analytics process have an adverse effect or impact on a member of a protected class?
  - Is the employer and vendor maintaining reasonable security over the data used?

DOJ AND FTC ANTITRUST GUIDANCE FOR HR

- In October 2016, the DOJ and FTC released a guidance document titled "Antitrust Guidance for Human Resources Professionals"
  - Provides guidance for HR as they represent their companies to avoid violating the antitrust laws when communicating with competitor companies
    - Avoid sharing sensitive information with competitor companies as it relates to comp and benefits
    - Agreements not to solicit or hire a competitor's employees should be avoided
  - Warns that the DOJ intends to criminally prosecute employers and individuals engaged in wage-fixing or no-poaching agreements

LOOKING AHEAD

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FATE OF THE DOL OVERTIME RULES

- Department of Labor issued Final Rule on overtime exemptions -- raising salary level, automatic adjustments every three years
- Rule was to take effect on December 1, 2016
- A nationwide injunction was issued after a challenge to the Rule
- Challenge based on allegations the DOL did not have the authority to:
  - Raise the salary level
  - Create automatic three year adjustments
  - Grant employee rights not spelled out in the statute

FATE OF THE DOL OVERTIME RULES

- On April 14, 2017 the DOL asked for an additional 60 days, to June 30, to submit its final brief
- The additional time will presumably allow Alexander Acosta, new Secretary of Labor, to assess the government's position on the appeal
- President Trump has not publicly stated a position regarding the overtime rule or regarding the appeal of the district court injunction

FATE OF THE DOL OVERTIME RULES

- What to do?
  - For employers that have already implemented changes, no need to take action, regardless of outcome of appeal
  - For employers that have not implemented changes, stay tuned:
    - If the appeal is withdrawn or denied, no action need be taken
    - If the appeal is granted and the trial court decision reversed, there will be a period of time for employers to come into compliance
  - The controversy surrounding the change has prompted investigation into proper classification of employees

FATE OF THE NLRB

- Composition of the Board
  - NLRB currently consists of three members – two Democrats and one Republican
  - President Trump has two vacancies to fill
  - Likely appointees will be pro-business Republicans
  - Nominations are unlikely before July 2017
  - New Board could reverse many of the decisions of the Obama Board

FATE OF THE NLRB

- NLRB budget cuts
  - $274 million budget in fiscal year 2017
  - President Trump's "skinny budget" did not include a proposal on the NLRB. Proposed cuts of up to $75 million are rumored.
  - This could effectively moot the "quickie" election rules if the pipeline slows enough
  - Investigators may look into charges less thoroughly, conduct interviews over the phone and/or issue fewer subpoenas

PAID LEAVE – FEDERAL CONTRACTORS

- On September 7, 2015, President Obama signed Executive Order 13706 requiring paid leave for federal contractors
- Applies to government contracts awarded on or after January 1, 2017
  - Does not apply to contracts for the manufacture or furnishing of materials, supplies, articles or equipment to the federal government
- Requires that employees accrue one hour of paid sick leave for every 30 hours worked on or in connection with a covered contract
- Contractors may limit accrual to 56 hours
- Paid leave must be allowed for illness, injury, preventative care, domestic violence, sexual assault, or stalking of employee or employee's child, parent, spouse, domestic partner, or closely-associated individual
- For now, the Trump administration has not made it a priority to revise or repeal this Executive Order

PAID LEAVE – STATE AND LOCAL LAWS

- Over the last 10 years, more than 30 state and local laws have been enacted mandating that employers provide paid sick leave
- Varying requirements from jurisdiction to jurisdiction are making administration of leave programs increasingly complex for multistate employers
- In response to this trend, 14 states have enacted statewide bans on paid sick leave mandates

PAID LEAVE – ALL PRIVATE EMPLOYERS?

- On the campaign trail, President Trump proposed a plan for six weeks of paid maternity leave per child
- On February 28, 2017, in his first official address to Congress, President Trump said: “My administration wants to work with members in both parties to make child care accessible and affordable, to help ensure new parents have paid family leave, to invest in women’s health…”
- Stay tuned!

FATE OF THE AFFORDABLE CARE ACT

- On the campaign trail, President Trump promised to repeal and replace the Affordable Care Act
- In January, President Trump issued an Executive Order to "minimize the economic burden" of the ACA:
  - Agencies will exercise authority and discretion to waive, defer, grant exemptions from, or delay implementation of ACA that impose a cost, fee, tax, penalty or burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance or makers of medical devices
- On March 6, 2017, the Republican House released the American Health Care Act, but were unable to obtain the necessary votes to pass the legislation
- According to Speaker Ryan, efforts to repeal the Affordable Care Act are still underway

DISCRIMINATION BASED ON IDENTITY OR EXPRESSION

- Race Identity?
  - Rachel Dolezal, the former head of the Spokane, Washington NAACP, told reporters: “I feel like the idea of being trans-black would be much more accurate than ‘I’m white.’ Because, you know, I’m not white . . . Calling myself black feels more accurate than saying I’m white.”
- Age Identity?
  - The Minnesota Court of Appeals recently rejected a request by an unnamed plaintiff to shave seven years off the birth date listed in state records. The plaintiff claimed the severe mental health struggles during adolescence left him with an age identity that is inconsistent with his actual age.

TELECOMMUTING AS AN ACCOMMODATION

- The ADA does not require employers to have telecommuting programs
  - However, the EEOC recognizes telecommuting as a reasonable accommodation in certain cases
  - Will working from home be accomplished without imposing an undue hardship on the employer?
- The same FLSA standards (for minimum wage, overtime pay, and recordkeeping) are applied whether an employer works on-site or is telecommuting
- It is harder to monitor telecommuters

TELECOMMUTING AS AN ACCOMMODATION

- Telecommuting refusals without use of interactive process will be suspect
- Employers can take measures to reduce the risk of unpaid overtime provisions such as:
  - Requiring non-exempt employees to agree in writing that no overtime can be worked without prior written consent of a supervisor
  - Employer to monitor when the employee is signing on or off a work computer
  - Establish procedures such as requiring the submission of daily timesheets or clocking in/out via software

TELECOMMUTING AS AN ACCOMMODATION

- Employers are not required to risk compromising the confidentiality of internal information to accommodate an employee's disability
  - If employee is telecommuting the employer must:
    - Secure customer and client data through secured computer systems and secured Internet connections
    - Train employees to use technology in a safe way
    - Consider difficulty and cost as part of “undue hardship” analysis

QUESTIONS?

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THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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