Is Your Head Spinning From the Recent Round of U.S. Supreme Court Decisions, Proposed Overtime Regulations and Agency Guidance?

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WHAT WE WILL COVER

- Recent United States Supreme Court Cases Affecting Employers:
  - *EEOC v. Abercrombie.*
  - *King v. Burwell.*
  - *Obergefell v. Hodges.*
- Recent Agency Guidance for Employers:
  - OSHA Guidance on Bathroom Access for Transgender Employees.
  - EEOC Revised Guidance on Pregnancy Discrimination.
- Proposed Overhaul of the Overtime Regulations.

RECENT U.S. SUPREME COURT DECISIONS

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EEOC v. ABERCROMBIE – RELIGIOUS ACCOMMODATION

On June 1, 2015, the United States Supreme Court issued its decision in *EEOC v. Abercrombie*:

- Muslim woman wearing a hijab interviewed for a salesperson position at Abercrombie.
- Neither the applicant, nor the hiring manager spoke about the hijab during the interview, though the hiring manager assumed the applicant wore the hijab for religious reasons.
- The hiring manager consulted with the District Manager, who said the company could not make any exceptions to its "Look Policy" which prohibited wearing "caps." The applicant was not hired on this basis.
- The Tenth Circuit Court of Appeals held that summary judgment in favor of Abercrombie was necessary because the applicant never told Abercrombie that she wore the hijab for religious reasons, nor did she explicitly request an accommodation for that practice.

EEOC v. ABERCROMBIE – RELIGIOUS ACCOMMODATION

The question posed to the Supreme Court was narrow: "Whether an employer can be liable under Title VII for refusing to hire an applicant or for discharging an employee based on a religious observance and practice only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee?"

The Court answered in the negative, holding:

- A job applicant with a bona fide need for a religious accommodation need only prove that a prospective employer's desire to avoid the accommodation was a motivating factor in its decision not to hire the applicant.
- The applicant need not prove that the employer had actual knowledge of the need for a religious accommodation. (Unlike the ADA).
- Title VII affirmatively obligates employers to make exceptions to neutral employment policies to accommodate employees' religious beliefs and practices.

EEOC v. ABERCROMBIE – RELIGIOUS ACCOMMODATION

Employer best practices:

- Review job descriptions and job postings to ensure that they clearly identify essential job functions and policies, including scheduling requirements, use of PTO, dress codes, and other areas typically impacted by religious accommodations. This is especially important for positions where common types of religious accommodations (dress codes, time off, etc.) might be difficult to provide.
- Train hiring managers to identify situations where an accommodation may be required.
  - During an interview, the manager should describe the job requirements and ask whether the applicant can meet those requirements.
    - Managers should not ask about any protected characteristics during an interview.
  - If the applicant states that he or she requires an accommodation, the manager should gather sufficient information to evaluate whether the accommodation can be provided.
  - Human resources should conduct further analysis.

KING v. BURWELL – ACA

On June 25, 2015, the Supreme Court issued its decision in *King v. Burwell*, upholding a key provision of the Patient Protection and Affordable Care Act (ACA).

- The ACA :
  - Requires most individuals to maintain health coverage (or pay a penalty).
  - Provides financial assistance in the form of premium tax credits for lower income individuals (household income between 100% and 400% of federal poverty line).
  - Establishes Exchange/Marketplace where individuals can compare and shop for health insurance.
- With respect to premium tax credits, the law states: premium tax credits are allowed for individuals who have enrolled in insurance through "an Exchange established by the State."
  - Many states did not establish an Exchange (federal government established Exchange in those states).

KING v. BURWELL – ACA

- Issue – Are Premium tax credits available to individuals in states that have a federal Exchange?
- Court found language to be ambiguous when read in context of the entire law and held that premium tax credits are available to individuals in states that have a federal Exchange.
- Impact:
  - Premium tax credits continue.
  - Individual and employer-shared responsibility provisions continue.

OBERGEFELL v. HODGES – SAME SEX MARRIAGE

On June 26, 2015, the Supreme Court issued its decision in *Obergefell v. Hodges*, in which it held that same sex couples have a Constitutional right to marry in every state, and states must recognize same-sex marriages performed in other states.

- Biggest impact is on employee benefit plans.
- Retirement plans:
  - Required to recognize same-sex spouses for many purposes under retirement plans following *United States v. Windsor*. Under *Obergefell*, same-sex couples can be married in any state and have marriage recognized under retirement plan.
    - Beneficiary designations:
      - Same-sex spouse must consent to a participant's designation of any beneficiary.
      - A same-sex spouse will be the default beneficiary.

OBERGEFELL v. HODGES – SAME SEX MARRIAGE

Retirement plan implications, continued:

- QDROS.
- QJSA/QPSA.
- Same-sex spouse recognized as spouse for purposes of:
  - Hardship withdrawals.
  - Required minimum distributions.
  - Eligible rollover distributions.

OBERGEFELL v. HODGES – SAME SEX MARRIAGE

Health and welfare benefit plan implications:

- ERISA/IRC/PHSA/ACA does not require coverage of spouses under health and welfare plans or define spouse for purpose of health and welfare plans.
- Insured plans - state laws likely will require that same-sex spouses be covered.
- Self-insured plans – currently, law does not require that same-sex spouses be covered, but proceed with caution due to state discrimination laws prohibiting employment discrimination based on either sexual orientation or gender identity.
- Governmental employers - likely required to recognize same-sex marriage under *Obergefell* decision.

OBERGEFELL v. HODGES – SAME SEX MARRIAGE

Health and welfare plan implications, continued:

- Federal tax issues:
  - Not required to impute income to employees on value of benefits provided to same-sex spouse.
  - Employees can pay for same-sex spouse's coverage using pre-tax dollars through a cafeteria plan.
  - Employees may take tax-free reimbursements from health flexible spending accounts, health reimbursement arrangements and health savings account for expenses incurred by same-sex spouse.
  - Retroactive tax treatment.
- State tax issues:
  - Will take time for state income tax departments to issue guidance.

OBERGEFELL v. HODGES – SAME SEX MARRIAGE

Health and welfare plan implications, continued:

- Enrollment/Cafeteria plan restrictions:
  - IRC restricts ability to change election mid-year, exception for a new spouse.
  - Federal law provides a special enrollment opportunity due to marriage.
  - IRS created exception post *Windsor*; may issue additional guidance soon.
- Plan document language and employee communication.

OBERGEFELL v. HODGES – SAME SEX MARRIAGE

Health and welfare plan implications, continued:

- Domestic partners:
  - Domestic partnerships, civil unions, or other relationships that are not treated as "marriage" are not required to be recognized.
    - State and federal income tax treatment remains same as before – employees have imputed income unless domestic partner qualifies as a tax dependent.
    - Plan sponsors may decide to no longer recognize domestic partners now that they are free to marry.
      - End program.
      - Freeze enrollment.
    - If continue, consider same-sex and opposite-sex domestic partners.

OBERGEFELL v. HODGES – SAME SEX MARRIAGE

Health and welfare plan implications, continued:

- Considerations:
  - Whether to offer spouse coverage.
  - If offering spouse coverage, open to same-sex spouses now or at open enrollment for 2016.
  - Change in election restrictions.
  - If fully-insured, discuss with insurer.
  - Apply same procedures to verify opposite and same-sex marital status.
  - Review plan document language.
  - Consider need to communicate changes to participants.
  - Whether to offer domestic partner coverage.

OBERGEFELL v. HODGES – SAME SEX MARRIAGE

Other implications for employers:

- Employees must be permitted to take FMLA leave to care for a same sex spouse with a serious health condition:
  - In light of the U.S. Supreme Court's decision in *United States v. Windsor*, which found the Defense of Marriage Act (DOMA) to be unconstitutional, the Department of Labor announced that the definition of "spouse" under the FMLA will be revised to include employees in legal same-sex marriages regardless of where they live.
  - Although a federal court stayed enforcement of the new regulations in several states, this is moot after *Obergefell*.

OBERGEFELL v. HODGES – SAME SEX MARRIAGE

Other implications for employers:

- Workplace discrimination:
  - While the Court's ruling does not expand protection to employees against workplace discrimination on the basis of sexual orientation or gender identity, employers should expect substantial activity around this issue in both Congress and state legislatures.
  - For example, on July 23, 2015, bicameral group of Democrats introduced the Equality Act, which would amend the Civil Rights Act of 1964 to include prohibitions on sexual orientation and gender identity discrimination in places of public accommodation, public education, employment, housing, federal funding, and jury service. It would also prevent employers, housing providers, public schools, banks and other covered entities from using the Religious Freedom Restoration Act as a shield against discrimination claims.

AGENCY GUIDANCE

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OSHA: GUIDE TO RESTROOM ACCESS FOR TRANSGENDER WORKERS

Background:

- The EEOC identified furthering "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply," as a top enforcement priority in its December 2012 Strategic Enforcement Plan. Consistent with that objective, it has:
  - Begun tracking charges filed alleging discrimination related to gender identity and/or sexual orientation.
  - Issued *Macy*, where it held "discrimination against a transgender individual because that person is transgender is, by definition, discrimination based on sex, and such discrimination therefore violates Title VII".
  - Filed three lawsuits alleging discrimination against transgender individuals
  - Issued *Lusardi*, where it held denying employees use of a restroom consistent with their gender identity and subjecting them to intentional use of the wrong gender pronouns constitutes discrimination because of sex, violating Title VII.

OSHA: GUIDE TO RESTROOM ACCESS FOR TRANSGENDER WORKERS

The EEOC's activity in this area has caused other agencies to get in the game…

On June 9, 2015, OSHA issued A Guide to Restroom Access for Transgender Workers:

- Core principle: All employees, including transgender employees, should have access to restrooms that correspond to their gender identity.
- As a best practice, employers may offer (but should not require) use of:
  - Single-occupant gender-neutral facilities, and/or
  - Multiple occupant gender-neutral restroom facilities with lockable single occupant stalls.
- As a best practice, employers should not ask employees to present medical or legal documentation of their gender identity.

EEOC: REVISED GUIDANCE ON PREGNANCY DISCRIMINATION

On June 26, 2015, the EEOC issued revised guidance on pregnancy discrimination in light of the U.S. Supreme Court's decision in *Young v. UPS*.

- Prior Guidance was issued in July 2014, and covered a variety of topics:
  - The PDA's application to current, past and potential pregnancy.
  - Prohibited employment actions based on pregnancy.
  - Application of PDA to lactation and breastfeeding.
  - Prohibition of forced leave policies.
  - The obligation to treat men and women the same with respect to parental leave policies.
  - Access to health care.
  - Interplay between ADAAA and PDA.

EEOC: REVISED GUIDANCE ON PREGNANCY DISCRIMINATION

- In *Young*, the Supreme Court held that employer policies that are not intended to discriminate on the basis of pregnancy may still violate the PDA if the policy imposes significant burdens on pregnant employees without a sufficiently strong justification.
- The Court's decision does not affect most of the EEOC's initial guidance, which remains intact. However, the EEOC backed down on its prior position that the PDA requires employers to accommodate pregnant employees. Compare:
  - Prior Guidance: the EEOC rejects the position that the PDA does not require an employer to provide light duty for a pregnant worker if the employer has a policy or practice of limiting light duty to workers injured on the job and/or to employees with disabilities under the ADA.
  - New Guidance: one way a pregnant employee could demonstrate a significant burden is to show that her employer accommodates a large percentage of nonpregnant employees with limitations under its policy while denying accommodations to a large percentage of pregnant employees. If the employer did not have a sufficiently strong justification for such a policy, an inference of discrimination would arise.

PROPOSED AGENCY REGULATIONS

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DOL TO EXPAND OVERTIME ELIGIBILITY VASTLY

What Happened?

- Over a year ago, President promised new regulations, including to simplify and streamline.
- Result: a long delay, and then a dramatic shift in the income requirements for exempt status.
- Notice came the night of June 29, 2015, via Huffington Post blog from the President.
- June 30, 2015 – new proposed regulations issued on DOL website.
- July 6, 2015 – formal Notice of Proposed Rulemaking published in the *Federal Register*.
  - *Kicks off 60-day comment period, which closes Friday, September 4, 2015 – just before Labor Day weekend.*

WHAT THE DOL IS PROPOSING

1. Minimum annual salary level to be boosted.

   - New salary threshold for exempt status: approximately $50,440 (or about $970 per week).
   - 113% increase from the current $23,660 ($455 per week) (from the 2004 Final Rule).
   - To be felt more in certain job lines, industries, and operations in more rural areas.
   - Effect will revolutionize workforces in retail, hospitality, food service, education, social services, and sectors within healthcare and manufacturing.
   - The FLSA does not contain an exemption for most small businesses, most non-profits, states or local governments.

WHAT THE DOL IS PROPOSING

2. Raise the minimum salary for those covered under the "highly compensated employee" exemption, from $100,000 in total compensation annually, to $122,148 - an increase of 22%.

    - Even if doesn't meet the normal duties tests, need only perform one exempt duty and not be engaged regularly in manual labor.

WHAT THE DOL IS PROPOSING

3. New salary level will not stay put.

   - The DOL proposes to "automatically update" – a.k.a. INCREASE – the floor annually.

   - By tying them annually and ad infinitum to the newly-proposed fortieth percentile national measure (as defined) of earnings for full-time salaried employees, or based on changes in inflation, as measured by the CPI for all Urban Consumers.

WHAT THE DOL IS PROPOSING

4. DOL may include nondiscretionary (e.g., some performance or production) bonuses to satisfy a portion of the new salary level test.

    - Some employers asked for this, and the DOL seeks comments on it.

WHAT THE DOL IS PROPOSING

5. Possible changes to the standard duties tests for "white collar" exempt employees.

   - These may include limits, or new sorts of limits, upon the amount of "nonexempt work" that can be performed by an exempt employee.

   - The DOL heard requests to make changes and has invited comments on this.

HAD ENOUGH DOL ACTIVITY? THERE'S MORE!

BONUS ROUND: DOL Administrator's Interpretation 2015-1

- Dr. David Weil on July 15, 2015, declared, in an interpretation "promised" by the Executive Branch, that the DOL officially deems just about every "worker" across the land an "employee" under the FLSA.
- Focus of the AI is a very broad reading of the economic realities test.
- Concludes, inter alia, an independent contractor agreement "is not relevant to the analysis of the worker's status."
- No notice-and-comment process or new regulations here; but a declaration of the DOL's position on the issue.

DEVELOPMENTS TO WATCH REGARDING OVERTIME REGULATIONS

- Efforts to extend deadline for comments/implementation.
- DOL taking in comments regarding the duties tests, and implementing changes quickly.
- DOL changes duties tests could mean:
  - A 50% rule?
  - Other limits on time spent doing "non-exempt work".
  - Possible limits on concept of multi-tasking.

WHAT CAN I DO?

- Count to 10 and breathe.
- Consider reviewing your workforce for all exempt positions:
  - Who is an "employee" and how many?
  - What effect on your pension and welfare benefit plans and/or coverage of workforce via the exchanges. Medical, prescription drug, disability (STD and LTD), 401(k), severance pay plans, etc.
  - What is your exposure to increased OT?
  - Consider tracking hours of exempt executive, administrative, and professional employees to see what exposure exists.
  - What jobs can be made hourly or otherwise OT eligible, resulting in some benefits to employers? Note: need not convert employees to hourly to allow OT.
  - What additional job requirements might be considered in restructuring a workforce, especially for new hires?

CONSIDER TAKING A STAND AND CALL FOR HELP

- Use our DOL Comment Team. Any comments must be received by the DOL by September 4, 2015, and should be coordinated through counsel and/or others.
- Use our DOL Audit Team, which includes Lean Six Sigma expertise in time studies.

QUESTIONS?

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THANK YOU

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