

2016 HOT TOPICS: EMPLOYMENT AND LABOR ISSUES YOU SHOULD BE PAYING ATTENTION TO

Arizona Labor & Employment Conference

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SOURCES OF NEW EMPLOYMENT LAW

- Those who make laws: Legislative branch
 - State: Arizona Legislature
 - Federal: Congress
- Those who enforce laws: Executive branch
 - President
 - NLRB
 - DOL
 - EEOC
 - OSHA
- Those who interpret laws: Judicial branch
 - State: Arizona Supreme Court; Arizona Court of Appeals (trial courts)
 - Federal: United States Supreme Court, Ninth Circuit Court of Appeals (trial courts)

LEGISLATIVE BRANCH

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ARIZONA LEGISLATURE – NEW STATUTES

ARIZONA LEGISLATURE – BILLS

Minimum Wage (HCR 2014)

Year	Arizona	Federal	AZ Tip	Federal Tip
2016	\$8.05	\$7.25		
2015	\$8.05	\$7.25	\$5.05	
2014	\$7.90	\$7.25	\$4.90	\$2.13
2013	\$7.80	\$7.25	\$4.80	\$2.13
2012	\$7.65	\$7.25	\$4.65	\$2.13
2011	\$7.35	\$7.25	\$4.35	\$2.13
2010	\$7.25	\$7.25	\$4.25	\$2.13
2009	\$6.75	\$7.25	\$3.75	\$2.13
2008	\$6.75	\$6.55	\$3.75	\$2.13
2007	\$6.75	\$5.85	\$3.75	\$2.13
2006	--	\$5.15	--	\$2.13

MINIMUM WAGE (CONT.)

- Existing
 - \$6.75 to \$8.05 in 10 years (\$1.30 increase)
 - Increase announced each January (CPI)
- Proposed
 - \$8.05 to \$9.50 in four years (\$1.45 increase)
 - Increase after that based on previous two years CPI
 - Prohibit cities from regulating wages
- Tips
 - Existing: MW minus \$3.00 (at \$8.05, would be \$5.05)
 - Proposed: 60% of minimum wage (at \$8.05, would be \$4.83)

ARIZONA LEGISLATURE – BILLS (CONT.)

- Employment Security (H 2222)
 - Looking for work (one times per day four days a week)
 - More easily appealed to court
- Workers Compensation (H 2240)
 - Change of ALJ
 - Vexatious litigants (pro per litigants) (also S1323)
 - Medical translation services
- Employee Benefits (H 2579)
 - Broadens categories cities cannot regulate (fringe benefits, sick/vacation pay, severance pay, commissions, bonuses, etc.)

CONGRESS – NEW STATUTES

EXECUTIVE BRANCH

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PRESIDENT - EXECUTIVE ORDERS

- 13706: Paid sick leave for federal contractors (and subs)
- At least one hour for each 30 hours worked
- Can limit accrual to 56 hours
- Uses
 - Employee's illness
 - Caring for child, parent, spouse/domestic partner
 - Domestic violence
- Certification if more than three consecutive days
- No need to pay at termination

FEDERAL AGENCIES – NLRB

- Speedy elections
- Joint employers
- Policies and handbooks

NLRB – SPEEDY ELECTIONS

- Historically, once a Union notifies the Board that it has at least ½ of the workers signatures, both parties engage in an education period
 - Employer trains supervisors (not to commit ULPs)
 - Employer educates R&F (rebut Union statements)
 - Agreement or litigation over appropriate unit (store vs. department, e.g.)
- New rule effective 8/14/15
 - Purpose: Cut the time it takes to hold a union representation election
 - Old rule: 38 days
 - New rule: As few as 10 days

NLRB - SPEEDY ELECTIONS (CONT.)

- Little time to rebut after notice, so must be proactive
- Immediately respond if suspect union activity
- Work with counsel to
 - Review your policies: Are they NLRA compliant? Will they legally company?
 - Legally communicate company union philosophy

NLRB – JOINT EMPLOYERS

- Old rule: Company only needs to negotiate with union (and be responsible for ULPs) for its own employees
- New rule: Company can be pulled into negotiations of contractor

Browning Ferris

- Hired company to staff a recycling facility
- NLRB held that BR was the “employer” of the staff, even though it did not have an employment relationship with them

McDonalds

- NLRB position: Franchisor is the “employer” of franchisee’s employees, even though it had no employment relationship with them
- Facts: Alleging franchisee engaged in ULP; include McDonalds corporate as a defendant

NLRB – POLICIES AND HANDBOOKS

- NLRB has been scrutinizing policies and handbooks
- Striking down anything that might impinge on Section 7 rights
- Section 7: Right to engage in “concerted activity” for “mutual aid and protection”
- Concerted: More than one (or on behalf of others)
- Mutual Aid and Protection (broad)
 - Unionize
 - Complain – wages, supervisors, coworkers, etc.
- Applies to all workforces (even if no union)

NLRB – POLICIES AND HANDBOOKS (CON'T)

- Social media (Board enforcement priority)
 - Reasons for having policy: Protect company reputation
 - Protect employees from bullying
 - Board has scrutinized and struck down policies that
 - Prohibit posting of job-related information that could lead to poor morale (Landry's, Inc.)
 - Prohibit posting information that could be detrimental to company (Landry's)
 - Offensive language?
 - Describing supervisor as “nasty mother f***er” was protected speech (Pier Sixty LLC)
- If you feel you need a policy, work with counsel to carefully craft one that will address your legitimate concerns while complying with these mandates

NLRB – POLICIES AND HANDBOOKS (CONT.)

- Other types of policies that are under scrutiny
 - Policies governing confidentiality
 - Policies governing employee communications
 - Policies governing employee conduct
 - Policies governing employee interaction with third parties
 - Policies governing use of company logo, etc.
 - Policies governing use of cameras and recording devices
 - Policies governing an employee's right to leave work
 - Policies governing conflicts of interest
 - Policies governing solicitation and distribution (employees, third parties)
- All of these policies (and more) may be overbroad

FEDERAL AGENCIES – DOL (FLSA / FMLA)

- Exemptions – salary increase
- Exemptions – duties
- Independent contractors
- Joint employers

DOL – FLSA EXEMPTIONS FOR SALARIED WORKERS

- Current rule: If an employee meets the duties test and is paid a salary, exempt from OT (Executive, Managerial, Professional)
- For employees who are now salaried exempt
 - Current salary requirement: \$23,660
 - Expected salary requirement: \$50,400
 - Each year, expected to rise (40th percentile of f/t salaried workers)
- For highly paid salaried exempt employees (Executive, Managerial, Professional)
 - Current salary requirement: \$100,000
 - Expected salary requirement: \$122,148
 - Each, expected to rise (90th percentile of f/t salaried workers)

DOL - FLSA (CONT.)

- “Primary duty”
 - Second part of salaried, exempt test (Executive, Managerial, Professional)
 - Currently: Look at whether “exempt duties” are more important than “nonexempt duties”
 - DOL considering quantitative rule (80/20, 75/25, etc.)
- Use of nondiscretionary bonuses
 - Current rule: Non discretionary bonuses are not considered part of the salary of a salaried, exempt employee
 - DOL considering whether to allow a portion to be considered

FLSA – TO DO

- Expect new rules later this year
- Expect that DOL will allow “implementation period,” but not long
- Evaluate all employees (W&H Workshop)
- Keep accurate time records; pay overtime for all except those you know are exempt
- For anyone who is salaried exempt, either raise their salary or start treating them as non-exempt

DOL – INDEPENDENT CONTRACTORS

- New guidelines 7/15/15
- “Clarified” that the definition of employee under the FLSA is much broader than some employers believe (even some courts)
- Use “economic realities test”
 - Is work an integral part of employer’s business?
 - Does workers “managerial skill” affect opp. for profit/loss?
 - Is worker making a financial investment?
 - Is the relationship short-term?
 - Does employer control how, when and work is performed?

DOL - INDEPENDENT CONTRACTORS (CONT.)

What employers should do

- If I/C status is being considered, do full analysis
- Unless you are certain person is an I/C, pay them as an employee
- Keep records (how was determination made)
- IF you have a legitimate I/C
 - Get their GL insurance certificate
 - Get their WC insurance certificate
 - Have a contract
 - Get their employer ID#

I/C – COMMON SENSE RULES

- Am I paying a company? (individual more likely to be an employee)
- Does the contractor choose the workers it sends? (If you're hiring a company, you're buying results, not particular workers)
- Does the person offer services to the public? (If person works only for you, more likely employee)
- Is the person working FOR (not in) the business? (Washing your windows vs. making/selling your widgets)
- Am I paying a monthly invoice amount? (Paying hourly / commission, more likely to be an employee)

If you answered “NO” to any of these questions, you're in the gray zone

DOL – JOINT EMPLOYERS (FLSA/FMLA)

- Even if you hire I/C company – can still be liable to workers
- “Employ”: Suffer or permit to work
- New “guidance” 1/2016
- Defines “joint employment”: When an employee works for two or more employers
- Two likely scenarios
 - Employee has two employers who are technically separate but actually related (horizontal)
 - One employer provides laborers to a second employer (vertical)

DOL – JOINT EMPLOYERS (CONT.)

Horizontal

- Focuses on degree of association between two employers
- E.g. One employee works for two restaurants owned by same management group

Important facts

- Who owns the companies?
- Do they have overlapping officers, directors, executives., managers?
- Do they share control over the operations?
- Are the operations intermingled?
- Does one employer supervise employee(s) of the other employer?
- Do employers share supervisory authority over the employee?
- Do companies share clients/customers?
- Are the agreements between the company?

DOL – JOINT EMPLOYERS (CONT.)

Vertical

- Us: Staffing agency provides workers to company
- E.g. Construction projects, leased employees
- Factors
 - Do both employers direct, control or supervise the worker?
 - Do both employers have the power to hire/fire the worker, change their conditions, determine pay?
 - How permanent is the relationship?
 - Is the worker unskilled or doing repetitive work?
 - Is work integral to both employers' business?
 - Where is the work performed?
 - Who handles the payroll functions? Benefits?

DOL – JOINT EMPLOYERS (CONT.)

- Responsibilities of Joint Employers
 - Both employers responsible for FLSA compliance
 - Employee gets OT if works more than 40 hours total
 - FMLA: Staffing company responsible for implementing; client company must accept person back

- To Do
 - Read your contracts – Are you indemnifying the other employer's errors?
 - Have the parties allocated risk between them?
 - Can you audit others' compliance?

FEDERAL AGENCIES – EEOC (TITLE VII, ADEA, ADA)

- 50th anniversary (1965 – 2015)
- Technology
- Litigation increase
- Gender identity / LGBT
- Pregnancy

EEOC – TECHNOLOGY

- 2015: Respondent Portal
- 2016: Claimant Portal (not yet out)

EEOC – LITIGATION

- 2015 - 142 merits lawsuits
- Individual vs. Systemic
 - 100 individual
 - 15 systemic
 - 26 non-systemic, multiple claimants
- Types of discrimination
 - 83 Title VII
 - 53 ADA
 - 14 ADEA
 - 7 EPA
 - 1 GINA

EEOC – ARIZONA STATISTICS (THRU 2014)

Type	2009	2011	2014
Race	536	613	560
Sex	676	865	751
National Origin	352	420	382
Religion	105	130	110
Color	54	47	46
Retaliation	902	1254	1206
Age	547	675	620
Disability	555	888	908
EPA	30	39	36
GINA	0	13	6
ALL	2178	2854	2655

EEOC – GENDER IDENTITY

- Lakeland Eye Clinic: 4/9/15 EEOC entered into first conciliation agreement regarding trans-gender employee
 - EEOC has identified as enforcement priority
 - Title VII “Sex” – EEOC position is that it protects anything relating to sex or gender (gender identity, sexual preferences, gender changes) (LGBT)

EEOC – GENDER IDENTITY (CONT.)

Examples of LGBT-Related Sex Discrimination Claims

- Failing to hire an applicant because she is a transgender woman
- Firing an employee because he is planning or has made a gender transition
- Denying an employee equal access to a common restroom corresponding to the employee's gender identity
- Harassing an employee because of a gender transition, such as by intentionally and persistently failing to use the name and gender pronoun that correspond to the gender identity with which the employee identifies, and which the employee has communicated to management and employees

EEOC – GENDER IDENTITY (CONT.)

- Denying an employee a promotion because he is gay or straight
- Discriminating in terms, conditions, or privileges of employment, e.g.
 - Lower salary
 - Denying spousal health insurance benefits to a female employee because her legal spouse is a woman, while providing spousal health insurance to a male employee whose legal spouse is a woman
- Harassing an employee because of his or her sexual orientation, e.g.
 - Derogatory terms, sexually oriented comments, disparaging remarks

EEOC – PREGNANCY

EEOC boasts that since 2011, it has recovered approximately \$3.5 million for victims of pregnancy discrimination through its litigation program

- \$90,000 settlement. *EEOC v. Benhar Office Interiors* (S.D.N.Y.)
- \$100,000 settlement. *EEOC v. Platinum P.T.S. Inc.* (S.D. Tex.) (fired employee for taking five days off to recover from miscarriage)
- \$370,000 settlement. *EEOC v. Founders Pavilion, Inc.* (W.D.N.Y.) (three women – filed to hire one, withdrew offer to second and terminated third because they were pregnant)
- \$186 Million jury verdict for pregnancy-related harassment (under California law) *Juarez v. AutoZone Stores, Inc.* (C.D. Cal.) (plus expected attorney fees) (subjected to closer scrutiny and criticism)

EEOC – PREGNANCY

- Young v. UPS
 - Pregnant delivery person
 - Held: Should have allowed her light duty (allowed to men with various issues, including DUI)
- June 2015: Enforcement Guidance on Pregnancy Discrimination and Related Issues Highlights
 - Must accommodate condition
 - Cannot discriminate
 - Cannot subject to increased scrutiny and harsher discipline
 - Cannot force person to take leave
 - was pregnant / might get pregnant / fertility treatments / abortion
 - Lactation / breast feeding

FEDERAL AGENCIES - OSHA

- Leading cause of workplace fatalities: MV crashes
- Leading cause of MV crashes: Distracted drivers
- OSHA partnering with DOT to combat distracted driving
- OSHA calls upon employers to prohibit any policy or practice that encourages texting while driving
 - Do not require employees to text while driving
 - Do not organize work so that employees feel obligated to text while driving
- BEST PRACTICE: Have a policy that prohibits using hand-held device while driving; voice only with hands-free

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ARIZONA CASES – DISCRIMINATION AND HARASSMENT

Kelly v. Canyon Ranch

- Allegations
 - Kelly had a successful employment (17 years, promotions)
 - Supervisor resigned; she applied
 - About same time, 360 degree review not favorable
 - She did not receive the promotion; a male coworker did
- Ruling
 - Summary judgment for employer
 - Irregularities in 360 review not enough
 - Company had honest belief that she was not performing well
 - Okay to supplement EEOC information
 - Denied fees to employer
- SIGNIFICANCE: Hope for employers!

ARIZONA CASES (CONT.)

Rounds v. Porter

- Allegations
 - Rounds was office manager for dentist Porter
 - Rounds fired after complaining that Porter sexually harassed her
- Held
 - Evidence that Porter previously harassed others was admissible
 - Court upheld verdict
- \$85,000 in compensatory damages
- \$414,000 in punitive damages
- SIGNIFICANCE
 - AZ law: Only one employee
 - Still take sexual harassment seriously

ARIZONA CASES (CONT.)

Anzures v. La Canasta Mexican Food

- Allegations
 - Employee complaint about various things; employer addressed some of the OSHA issues, but told him to ignore the hiring of undocumented workers
 - Employee resigned and filed EEOC charge (dismissed)
- Held (reversing dismissal by trial court)
 - EPA: Employee could bring action under Arizona Protection Act for wrongful termination
 - Defamation: Employer's statements were protected
 - IIED: Not "extreme and outrageous"
- SIGNIFICANCE: If employee engages in protected activity – BE CAREFUL

UNITED STATES SUPREME COURT (CONT.)

Young v. UPS

- Pregnancy
- Cannot force person to take leave
- Must provide light duty (if offered to others)

EEOC v. Abercrombie & Fitch

- Employee did not have A&F “look” because she wore religious headscarf (hijab)
- Held: Did not matter whether A&F knew headscarf was religious
- Admitted it had a suspicion

SUPREME COURT 2015-16 DOCKET

Friedrichs v. California Teachers Association

- Can public school teachers be required to pay mandatory dues for union activities? (3/28/16: yes) (affirmed by divided court)

Zubik v. Burwell

- Latest challenge to the Affordable Care Act – can employers refuse to offer birth control for religious reasons?

Tyson Foods v. Bouaphakeo

- FLSA collective actions. Can plaintiffs use statistical sampling for overtime damages?

Green v. Donahoe

- When does cause of action accrue for constructive discharge? (when employee quits, or earlier when last discriminatory action)

NINTH CIRCUIT – DISCRIMINATION AND HARASSMENT

EEOC v. McLane (EEOC Subpoena enforcement)

- Claimant alleged sex discrimination (she was subject to strength test after returning from maternity leave)
- EEOC subpoenaed information of all employees who took the test; employer refused
- Held: Employer must turn over all information
- SIGNIFICANCE: EEOC has broad powers

France v. Johnson (ADEA)

- France was 54 years old; person selected for position was eight years younger
- Held: Age difference of less than 10 years creates a “rebuttable presumption” that age is not substantial (therefore, > 10 years is)
- SIGNIFICANCE: Carefully document decision-making process; the more objective, the better

NINTH CIRCUIT – DISCRIMINATION AND HARASSMENT

Mayo v. PCC Structural

- Allegation: Terminated because of disability
- Held: One who threatens to kill co-workers is not a “qualified individual” under the ADA
- SIGNIFICANCE: Not many limits; this is one

NINTH CIRCUIT – FLSA

Cesarz v. Wynn Las Vegas / National Restaurant Ass'n v. DOL

- Allegations: Casino paid workers full minimum wage (no tip credit)
- Held: Casino could not force workers to share tips with those who do not regularly receive tips
- SIGNIFICANCE: Have asked Supreme Court to Review; this is not what the law says

Rosenfield v. Globaltranz Enterprises

- Allegations: Manager of HR complained about overtime violations and was fired; employer argued her complaints were not “clear notice”
- Held: Manager could bring claim
- SIGNIFICANCE: If HR person (or other employee) raises concerns about potentially illegal conduct, that is protected activity

DISTRICT COURT – FLSA

Richardson v. Mountain Range Restaurants (etc.)

- Allegations: Restaurant servers should be paid full minimum wage if they spend more than 20% of their time doing non-tip producing tasks
- Held: Dismissed (many cases on appeal before Ninth Circuit)
- SIGNIFICANCE: Restaurant owners stay tuned

Poehler v. Fenwick

- Allegations: Collective action should include cleaning crew and supervisors
- Held: All that is necessary is that they were subjected to “an illegal policy or practice”
- SIGNIFICANCE: Collective actions on the rise; beware

DISTRICT COURT – FLSA (CONT.)

Durnez v. R.I.E.

- Allegations: Restaurant (Vintage Bar) took improper tip credit
- Held: Employer cannot take tip credit
- SIGNIFICANCE: For any tipped employee
 - Must notify them of tip credit
 - Must allow to keep tips (or share with limited group who routinely receive tips)

Kesley v. Entertainment U.S.A.

- Allegations: Defendants sought discovery of opt-in plaintiffs
- Held: Only limited discovery available (damages)
- SIGNIFICANCE: Collective actions are on the rise and can be expensive

QUESTIONS?



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THANK YOU

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