LABOR AND EMPLOYMENT OUTLOOK FOR 2017

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PREDICTING THE FUTURE

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PREDICTING THE FUTURE

Prediction is very difficult, especially if it's about the future.

- Niels Bohr

I try not to get involved in the business of prediction. It's a quick way to look like an idiot.

- Warren Ellis

I've been wrong on everything about Trump . . . But allow me – with that caveat – to make the prediction that Donald Trump will not be the President of the United States. It just will not happen.

- Cory Booker

DEVELOPMENTS AT THE U.S. SUPREME COURT IN 2017

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DEVELOPMENTS AT THE U.S. SUPREME COURT IN 2017

Composition of Supreme Court

- With the death of Justice Antonin Scalia in February 2016, the Court is composed of only eight justices
  - Court is currently viewed as equally divided between conservative and progressive judges
- President-Elect Trump has stated that he would appoint justices in the Scalia mold - strict constructionists

DEVELOPMENTS AT THE U.S. SUPREME COURT IN 2017

Case with Employment Implications on 2016-2017 Docket

- *Grimm v. Gloucester County School Board* (petition for Writ of Certiorari granted October 28, 2016)
  - Facts
    - Plaintiff was born as a biological female, but identifies as male
    - Plaintiff attends Gloucester High School in Virginia
    - During high school, Plaintiff legally changed his name to Gavin Grimm, to conform to his sexual identity
    - Beginning in his sophomore year (2014), he used the boys' bathroom at Gloucester High School for approximately two months

DEVELOPMENTS AT THE U.S. SUPREME COURT IN 2017

- *Grimm v. Gloucester County School Board*
  - Facts (cont.)
    - School board adopted policy in December 2014, requiring students to use the restrooms and locker rooms appropriate to their biological gender, but providing for alternative private facilities for students who had gender identity issues
    - Grimm sued under Title IX: District court upheld school district policy, but U.S. Court of Appeals for Fourth Circuit reversed
    - Fourth Circuit: Schools must treat transgender students consistent with their gender identity
    - School board filed petition for Writ of Certiorari; U.S. Supreme Court granted petition on October 28, 2016

DEVELOPMENTS AT THE U.S. SUPREME COURT IN 2017

- Likely outcome of *Grimm*
  - Fourth Circuit decision will likely be affirmed
  - Schools and employers will likely be required to allow individuals to use restrooms/locker rooms consistent with the individuals' perception of their gender identity

DEVELOPMENTS AT THE U.S. SUPREME COURT IN 2017

- What employers will need to do as a result of expected *Grimm* decision
  - Employers will need to implement policies consistent with *Grimm*, to allow employees to use restrooms and locker rooms consistent with the employees' perception of their gender identity
  - Employers should expand their discrimination and harassment policies to prohibit discrimination and harassment based on gender identity and sexual orientation
  - Employers should expand their anti-harassment training to include training on harassment against transgender employees

DEVELOPMENTS AT THE U.S. SUPREME COURT IN 2017

Employment case for which review has been requested

- *NLRB v. Murphy Oil USA, Inc*., U.S., No. 16-307 (cert. petition filed 09/09/16)
  - Facts
    - Employee signed "Binding Arbitration Agreement and Waiver of Jury Trial"
    - Agreement required employee to resolve all employment-related disputes by binding arbitration
    - Agreement required employee to waive right to pursue class or collective claims
    - Despite agreement, employee and others filed collective action under FLSA
    - Employer moved to dismiss, pursuant to arbitration agreement
    - Employee filed ULP, alleging that arbitration agreement interfered with employees' Section 7 rights
    - NLRB, relying on *D.R. Horton, Inc*., 357 NLRB 184 (2012), held that agreement requiring employees to resolve all employment claims through individual arbitration, and attempting to enforce the agreements in court, was unlawful
    - U.S.D.C. for Fifth Circuit held that agreement was unlawful, only to the extent that it could be construed as prohibiting employees from filing ULP charges

DEVELOPMENTS AT THE U.S. SUPREME COURT IN 2017

- *NLRB v. Murphy Oil USA, Inc*., (cont.)
  - Issue: Whether class action waivers in employment arbitration agreements are valid under the NLRA

DEVELOPMENTS AT THE U.S. SUPREME COURT IN 2017

Status of *Murphy Oil* case

- NLRB filed Petition for Writ of Certiorari in September 2016
  - Split of Circuits: Fifth and Eighth Circuits have held that employers may require employees to waive class claims in favor of individual arbitration
  - Seventh and Ninth Circuits have held that employers may not require employees to waive class claims
  - Decision regarding whether Supreme Court will hear case should be made in next few weeks

DEVELOPMENTS AT THE EEOC IN 2017

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DEVELOPMENTS AT THE EEOC IN 2017

- On October 17, 2016, EEOC released its updated SEP for 2017-2021
- Continued focus on many of the same issues from 2012
- Some new or refocused areas
  1. Eliminating barriers in recruitment and hiring
  2. Protecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination
  3. Addressing selected emerging and developing issues
     - Qualification standards and inflexible leave policies that discriminate against individuals with disabilities
     - Accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA)
     - Protecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex
     - Discriminatory practices 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, arising from backlash against them

DEVELOPMENTS AT THE EEOC IN 2017

4. Ensuring equal pay protections for all workers
   - Addressing pay discrimination based on sex, race, ethnicity, age, and disability
5. 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
6. 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

DEVELOPMENTS AT THE EEOC IN 2017

- Pay equity continues to be a focus of EEOC
- Final rules revising the EEO-1 report to add W-2 earnings and work hours are scheduled to go into effect in early 2018

DEVELOPMENTS AT THE EEOC IN 2017

Issues to watch

1. Enforcement activity generally may decrease
2. EEO-1 pay and hours reporting requirements may be rescinded or revised to ease employer administrative burden
3. 2016-2012 SEP may be amended and reissued
4. Enforcement activity regarding systemic discrimination
5. Enforcement position on the ADA, Title VII, and the Pregnancy Discrimination Act
6. Position on Title VII's application to LGBT issues

DEVELOPMENTS AT THE NLRB IN 2017

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DEVELOPMENTS AT THE NLRB IN 2017

Composition of the NLRB

- NLRB currently consists of three members – two Democrats and one Republican
- President-Elect 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

DEVELOPMENTS AT THE NLRB IN 2017

Issues the NLRB may revisit

- Employee use of employer email system for union activity
  - *Purple Communications*, 361 NLRB No. 126 (2014): With limited exceptions, employers must allow their employees to use company email systems for union-organizing activity
- Social media policies
  - *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012): Policy prohibiting postings that "damage the Company, defame any individual or damage any person's reputation" is unlawful

DEVELOPMENTS AT THE NLRB IN 2017

Issues the NLRB may revisit (cont.)

- Employee use of recording devices
  - *Whole Foods Market Group, Inc.,* 363 NLRB No. 87 (2015): Audio and video recording in the workplace is protected Section 7 activity, unless the employer has a compelling business reason to prevent recording
- Employee conduct policies
  - *Knauz BMW,* 358 NLRB No. 164 (2012): "Courtesy policy" was unlawful, where it required employees to be "courteous, polite and friendly" to customers, vendors, suppliers, and co-workers

DEVELOPMENTS AT THE NLRB IN 2017

Issues the NLRB may revisit (cont.)

- Policies relating to confidentiality of investigations
  - *Banner Health System,* 358 NLRB No. 93 (2012): Employer request that employees not discuss, with co-workers, matters under investigation was unlawful
- Policies relating to confidentiality of business information
  - *Lily Transportation Corp.,* 362 NLRB No. 54 (2015): Conduct rule providing for discipline for "Disclosure of confidential information and employee information maintained in confidential personnel files" was unlawful

DEVELOPMENTS AT THE NLRB IN 2017

Issues the NLRB may revisit (cont.)

- Appropriateness of bargaining unit in co-employment situation
  - *Miller & Anderson, Inc.,* 364 NLRB No. 139 (2016): Employees of employer, and temporary employees supplied by temporary employment firm, may be combined into a single bargaining unit, even if the employer and temporary employment firm do not agree
- Class action waivers
  - *Murphy Oil*

DEVELOPMENTS IN 2017 REGARDING OSHA

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DEVELOPMENTS REGARDING OSHA IN 2017

Recent OSHA-related activity

- Rules require employers to comply with electronic submission of injury and illness data
- Rules require employers to inform employees of their right to report work-related injuries and illnesses free from retaliation
- Rules require that an employer's procedure for reporting work-related injuries and illnesses be reasonable and not deter or discourage employees from reporting
  - Rules prohibit an employer from having a blanket post-accident drug testing policy
  - Rules do not prohibit drug testing of employees but do prohibit employers from using drug testing, or the threat of drug testing, as a form of retaliation against employees who report injuries or illnesses
- Rules prohibit incentive programs that are solely based on providing employees with incentives for not having workplace injuries
- Increase in the time period during which a prior citation may be used as the basis of a repeat violation from three years to five years
- Increase in the penalties for OSHA violations

TRUMP ADMINISTRATION'S LIKELY RESPONSE TO RECENT OSHA-RELATED ACTIVITY

- Revision or elimination of overly burdensome administrative requirements, such as electronic injury reporting
- Revision of the recent final rules regarding drug testing and anti-retaliation
- Change of the repeat violation rule back from five years to three years
- Repeal of the increase in monetary penalties for violations
- Refocus OSHA on enforcement in high-hazard industries

DOL OVERTIME REGULATIONS

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LIKELY FATE OF DOL OVERTIME REGULATIONS IN 2017

Background

- DOL issued Final Rule on May 18, 2016
  - Rule would increase minimum salary level for applicability of FLSA exemption from $455 per week to $913 per week
  - Rule would increase the minimum salary for FLSA exemption for highly–compensated employees from $100,000 to $134,004 or the 90th percentile of full-time salaried workers nationally
  - Rule would establish an automatic updating mechanism that would adjust the minimum salary level every three years
  - Rule was to take effect on December 1, 2016
  - Legal challenges were filed, which employment law experts scoffed at as unlikely to succeed

LIKELY FATE OF DOL OVERTIME REGULATIONS IN 2017

State of Nevada v. United States Department of Labor, C.A. No. 4:16-CV-00731 (E.D. Tex., Nov. 22, 2016)

- Nationwide injunction issued
- Plaintiffs had established a prima facie case that DOL lacked statutory authority to increase the salary level, or to automatically increase salary level in the future
- Plaintiffs had established all of the elements of entitlement to a preliminary injunction
- DOL filed appeal to U.S. Court of Appeals for Fifth Circuit on December 1, 2016

LIKELY FATE OF DOL OVERTIME REGULATIONS IN 2017

Appellate process

- To date, DOL has not requested an expedited schedule for appeal
- No timetable set for appeal
- Typical appeal process runs six-to-eight months
- President-Elect Trump has not publicly stated a position regarding the overtime rule or regarding the appeal of the district court injunction
- Possibility of further appeals

LIKELY FATE OF DOL OVERTIME REGULATIONS IN 2017

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 appeal is withdrawn or denied, no need to take action
  - If appeal is granted and trial court decision is reversed, there will be a period for employers to come into compliance

MINIMUM WAGE

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PRESIDENT-ELECT TRUMP'S MINIMUM WAGE POSITIONS

- Initially opposed an increase in the federal minimum wage above its current level of $7.25 (August 2015)
- Suggested that an increase in the minimum wage was appropriate, but did not specify the amount of an increased minimum wage that he would support (May 2016)
- Suggested that states should set their own minimum wage (May 2016)
- Suggested that federal minimum wage should be increased to $10.00, with states being free to raise their own minimum wage above that floor (July 2016)

LIKELY ACTION ON MINIMUM WAGE

- Congressional action on minimum wage is unlikely
- Presidential/Congressional position will likely be that increases in the minimum wage should be left to the states
- States/municipalities will continue to set their own minimum wages, higher than the federal level

IMMIGRATION IN THE WORKPLACE

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PRESIDENT-ELECT TRUMP'S CAMPAIGN POSITION ON IMMIGRATION ISSUES

- Immigration reform was a key component of presidential campaign
- "Prioritizing the jobs, wages, and security of the American people"
- "Establishment of new immigration controls to boost wages and to ensure that open jobs are offered to American workers first"
- Has indicated that the use of the E-verify program – an internet-based system that verifies the employment authorization and identity of employees – would be mandatory nationwide

PRESIDENT-ELECT TRUMP'S LIKELY ACTION WITH RESPECT TO IMMIGRATION ISSUES

- Will likely require that employers use E-verify to determine work eligibility
- Will likely see changes to temporary work visa programs, such as H-1B visas
  - Could accomplish change by decreasing the number of temporary work visas available
  - Could also accomplish change by significantly increasing the prevailing wage to be offered to workers
- Will likely see increased enforcement activity relating to issues such as I-9 documentation and raids by U.S. Immigration and Customs Enforcement Agency

PAID LEAVE

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PRESIDENT-ELECT TRUMP'S CAMPAIGN PROPOSAL REGARDING PAID LEAVE

- Guarantee of six weeks of paid maternity leave, per child
- Paid leave would apply only to married women who give birth
  - No paid leave for single mothers
  - No paid paternity leave
  - No leave for parents who adopt or for foster parents
- Federal paid maternity leave benefit would apply only when an employer does not offer paid maternity leave
- Administered through state unemployment insurance programs
- Funded by eliminating fraud in the programs

LIKELY OUTCOME OF PRESIDENT-ELECT TRUMP'S CAMPAIGN PROPOSAL REGARDING PAID LEAVE

- No action in 2017
- Expansion of paid leave will be left to the states

PAID SICK LEAVE FOR FEDERAL CONTRACTORS

Background

- On September 7, 2015, President Obama signed Executive Order 13706, requiring paid leave for federal contractors
- On September 30, 2016, DOL issues the final rule implementing the executive order
- Applies to government contracts awarded on or after January 1, 2017
- Applies to most construction and service contracts with the federal government

PAID SICK LEAVE FOR FEDERAL CONTRACTORS

Background (cont.)

- 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

PAID SICK LEAVE FOR FEDERAL CONTRACTORS

Implications

- Rule affects approximately 1.15 million workers
- Provides further reason for employers to maintain PTO policies, rather than separate vacation, sick, and other time-off policies
- Example of the use of federal government's procurement authority to enact, by executive order, laws that would not pass in Congress

FAIR PAY AND SAFE WORKPLACES ACT

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FAIR PAY AND SAFE WORKPLACES ACT

On July 31, 2014, President Obama signed the Fair Pay and Safe Workplaces Act

- Requires prospective federal contractors to disclose their labor law violations for the past three years ("Disclosure Rules"), and provides the government with guidance and discretion to determine whether an employer is responsible enough to hold a federal contract

- Requires contractors to provide their employees information concerning hours worked, overtime hours, pay, and any additions to or deductions made from pay ("Paycheck Transparency Rules")

- Requires that contractors agree that the decision to arbitrate claims arising under Title VII or any tort related to or arising out of sexual assault or harassment may only be made with the voluntary consent of employees or independent contractors after such disputes arise ("Complaint and Dispute Transparency Rules")

LIKELY FATE OF FAIR PAY AND SAFE WORKPLACES ACT IN 2017

Associated Builders and Contractors of Southeast Texas, et al. v. Anne Rung, Administrator, Office of Federal Procurement Policy, Office of Management and Budget, et al., C.A. No. 1:16-CV-00425 (E.D. Tex., Oct. 24, 2016)

- Nationwide injunction issued
- Plaintiffs had established a prima facie case that:
  - The Disclosure Rules (1) are preempted by other federal labor laws, which have their own remedial schemes, and (2) violate the First Amendment
  - The Complaint and Dispute Transparency Rules violate the Federal Arbitration Act
- Plaintiffs had established all of the elements of entitlement to a preliminary injunction with respect to the Disclosure Rules and Complaint Transparency Rules
- Paycheck Transparency Rules are expected to go into effect for contracts entered into on or after January 1, 2017
- No appeal has yet been filed, but must be filed by December 23, 2016

LIKELY ACTION WITH RESPECT TO FAIR PAY AND SAFE WORKPLACES ACT

- If no appeal is filed, Disclosure Rules and Complaint and Dispute Transparency Rules will not go into effect
- Appeal process, if an appeal is filed, is a lengthy one
- President-Elect Trump has not stated a position with respect to the Act, but seems unlikely that his administration would further pursue an appeal
- Could repeal the Paycheck Transparency Rules

AFFORDABLE CARE ACT

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LIKELY ACTION WITH RESPECT TO THE AFFORDABLE CARE ACT

Background

- Key provisions of the Affordable Care Act (in a very small nutshell)
  - The individual mandate requires individuals to have qualifying health insurance (or face a penalty)
  - The employer mandate requires that employers with 50 or more full-time and/or full-time equivalent employees must offer “affordable” and “minimum value” health care coverage to full-time employees and their dependent children, or face penalties

LIKELY ACTION WITH RESPECT TO THE AFFORDABLE CARE ACT

- President-Elect Trump pledged during the campaign that he would repeal the Affordable Care Act and replace it with something great
- President-Elect Trump has indicated that there are some good parts of the Affordable Care Act, such as the ban on pre-existing condition limits and allowing children to stay on their parents' plans until age 26
- Unlikely that the Affordable Care Act can or will be repealed in its entirety, at least in the short term
- The employer mandate and the individual mandate could be repealed or modified
  - Could increase the number of hours for a full-time employee from 30 to 40
  - Could instead provide incentives, such as tax breaks for small employers that offer health insurance to employees

QUESTIONS?

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THANK YOU

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