2018: The Year of the Dog ... Or Is It the Year of the Employer?

By **Stephanie K. Rawitt** | January 18, 2018 at 12:35 PM, Pennsylvania Law Weekly

With the Trump administration settled into the White House and honing in on its one-year anniversary, we have begun to see an expected shift from a heavily administrated workplace to a more hands off, employer-friendly regulatory environment. It is expected that this trend will continue in 2018. This article explores current issues that employers will likely face in the workplace this year.

Cybersecurity Employment Law

Cybersecurity and privacy issues have become issues of concern for all businesses. In 2017, we saw an increase in both external and internal cyberattacks and threats upon data privacy. There is a significant intersection between cybersecurity and employment law given that employees and business leaders alike have access to proprietary information as well as confidential data. The news has already begun to highlight cases where disgruntled executives depart and expose their former company to privacy attacks. Also, innocent actions of an employee, i.e., opening a suspicious email which installs a virus on the company's system can create not only and IT nightmare, but can carry legal implications if any protected data is

compromised. In 2018, there will be an increased focus upon cybersecurity and data privacy in both legislation and litigation. Employers should learn how to—and why to—assess their current cyberpreparedness (both internally against careless use of email, Internet, and electronic data and equipment, rogue employees and externally against cybercriminals). Only by realizing the importance and necessity of maintaining, reviewing and constantly updating policies, procedures, and training will a business be able to face any cyber-related issue without delay or major institutional damage.

More Employer-Friendly DOL

Alexander Acosta was appointed and confirmed as the new Secretary of the Department of Labor in the spring 2017. Given the current political climate, the DOL is likely to take a less hands-on and more employer-friendly approach to enforcement. As an example, on Friday Jan. 5, the DOL resuscitated 17 Bush-era FLSA opinion letters. Opinion letters allow businesses to ask the DOL for formal answers to their specific questions pertaining to the FLSA. The practice of issuing such letters was curbed during the prior administration in favor of broader administrative interpretation, but Acosta announced last year that the DOL would be returning to this practice. Additionally, the DOL will likely not seek liquidated damages or civil money penalties unless a case proceeds to court; potentially softening its stance on independent contractors, joint employers and franchisees; give more consideration to employers' actions before imposing the third year of back pay for willful violations in FLSA matters; and also give more consideration to employers who accept responsibility for wage errors as part of back pay settlements. While it is unlikely that the district offices will pull back on their wage and hour worksite assessments, especially in the industries that each district has decided to focus upon, there will likely be more leniency for first time offenders provided that they own up to their errors and agree to correct them.

Proposed New Overtime Rule

The DOL is hard at work on the creation of a new proposed overtime rule. Recently the DOL indicated that it intends to issue the proposal by October 2018, after carefully reviewing all submitted comments. The new proposal will raise the salary threshold for white-collar exemptions, but this hike will not be as significant as the one proposed by President Barack Obama's administration in 2016 (which nearly doubled the salary threshold). Presently, the salary threshold stands steady at $23,660 ($455/week). Many groups have provided their recommendations to the DOL in advance of the new proposed hike. In fact, the DOL received over 160 comments concerning this issue in response to its request for comment in July 2017. For example, the Society for Human Resource Management recommended an $8,340 salary increase to $32,000. Nonprofit organizations voiced their concerns regarding the impact that the rule will have on nonprofits with government grants and contracts. It is important for employers to follow this developing issue as any increase in the current salary threshold will require employers to evaluate their white collar exempt employees' salaries and to determine how best to manage their employee classifications and remain in compliance with the FLSA.

More Employer-Friendly NLRB

At the end of 2017 the NLRB reversed several controversial decisions of the Obama-era board, all of which significantly impact employers. The cases addressed the joint employment standard, employee handbook rules and collective bargaining issues. It is clear from the decisions that the new NLRB is systematically returning to more employer-friendly standards.

For example, the board altered the test for determining when multiple businesses are joint employers under the NLRA, and returned to the traditional joint employer test, which requires that a company must exercise actual, direct and immediate

control (instead of control that is limited and routine as defined by the Obama-Era board) over the terms and conditions of employment in order for that company to be considered a joint employer.

Additionally, the NLRB created a new test for determining whether employee handbook rules/policies violate federal labor law. Clearly moving away from the prior administrations view that many employee handbook policies can violate Section 7 of the NLRA, the new test balances employer and employee interests by requiring an evaluation of the nature and extent of the challenged rule's potential impact on NLRA rights and the employer's legitimate justifications associated with the rule.

The board also struck down the Obama-era standard permitting unions to organize employees using micro-units and returned to its prior approach of evaluating whether petitioned-for employees share a common interest "sufficiently distinct" from excluding employees to warrant their own unit. This decision may make it more difficult for unions to organize small groups of employees.

The board also overturned a much-criticized ruling from 2016 requiring employers to provide notice to and bargain with the union when changing a policy and restored a 50-year-old precedent that allows employers to modify policy without union permission if the employer takes actions that are not materially different from what it has done in the past.

The end of 2017 decisions coincided with the end of former NLRB Chairman Philip Miscimarra's tenure on the board. The board now sits at a 2-2 tie between Republican and Democrat members. It is anticipated that the appointment of a new member will return the board to a 3-2 Republican-Democrat split and that once the new member is in place, other controversial Obama-era decisions will be examined and likely overturned.

Perter Robb, the board's new general counsel, issued Memorandum GC 18-02 listing over 27 issues he wants the board to consider including many of the previous Board's controversial decisions. One of those decisions is *Purple Communications*, which permits employees to use the company email system for concerted protected activity. Robb also indicated that his office will not try to extend the holding in *Purple* to other employer owned communications or electronic systems. Another area he is challenging is the previous board's decisions concerning whether company handbooks and policies violate Section 7 of the act and whether Section 7 protects an employee's use of profane, sexist or racial statements made to a supervisor or another employee. He also wants the board to look at the previous board's decisions regarding off-duty employee access to the employer's premises. It is clear from the memorandum that the GC is taking a more pro-employer stance on many of the issues affecting the employer's control over its employees and premises.

Benefits

On the employee benefits front, the effective date for implementing new disability claims procedures is extended from Jan. 1 until April 1. The new procedures require greater details regarding benefit denials, and impose certain independence and impartiality requirements on disability-related benefit decisions. The new procedures apply beyond disability plans, including any benefit plan that may trigger benefits based on a disability, such as 401(k) or pension plans, and deferred compensation plans. Failure to follow the new procedures can allow a claimant to head to court immediately rather than waiting for the plan's final determination and may limit the employer's defenses.

The tax reform legislation does not dramatically impact employee benefits, but it does eliminate the exclusion of certain job-related benefits from income, such as moving expense reimbursements. Also, while the individual mandate to purchase

health insurance under the Affordable Care Act (i.e., Obamacare) is eliminated beginning in 2019, the tax reform act did not change any of the health care coverage and reporting requirements for employers. However, the IRS has extended the deadline for providing employees with Forms 1095-C or 1095-B, as applicable, reporting the coverage the employees and their dependents were eligible for during 2017. The extension does not change the deadline for filing the reports with the IRS, which remains Feb. 28, for paper filers and April 2, for electronic filers.

In addition, on Jan. 4, the Department of Labor issued a proposed rule permitting unrelated employers to join together for the purpose of providing health care coverage to their employees on a joint basis under an association health plan, as long as the employers share a common industry or geographic area. The measure is expected to provide small employers greater flexibility to offer cheaper coverage to their employees while avoiding the more restrictive administrative regulations that typically have applied to such small business health care arrangements in the past.

Sexual Harassment

The second half of 2017 was marked with a flurry of celebrity sexual harassment complaints as well as swift employer response. Because the claims involved celebrity and highly public industries like the film, news and sports industries, sexual harassment and discrimination became a hot-button issue and remains one. On Sunday Jan. 7, the women and men of the film and TV world all joined together in solidarity and wore black, dubbed a “blackout,” at the Golden Globe Awards in protest of the systematic harassment being unearthed in the entertainment industry and beyond. In response to the outcry, the new tax bill prohibits the tax deduction of any settlement or payment related to sexual harassment or sexual abuse, if such settlement or payment is subject to a nondisclosure agreement, and attorney fees related to such a settlement or

payment. Additionally, congress has launched a proposed bill banning mandatory arbitrations in cases of workplace sexual harassment claims. It is anticipated that this public wave will lead to an increase in the filing of sexual harassment charges at the administrative agencies. Employers should take the time to examine their sexual harassment policies, complaint and investigation procedures, and employee training programs.

Pay Equity

Several states and cities have banned salary history questions during the interview process in an attempt to eradicate gender bias in pay. California, Delaware, Massachusetts, Oregon, New York City, Philadelphia, Puerto Rico and San Francisco already have passed salary history ban laws and other jurisdictions are likely to follow. In fact, Idaho, Maryland, New York, Rhode Island, Texas and Virginia are already considering implementing similar legislation.

Minimum Wage Increases

Beginning Jan. 1, a number of states have increased their minimum wage. While the federal minimum wage remains $7.25 per hour, many states are working to increase minimum wage to rates that exceed the federal minimum. Where state law rates exceed the federal rate, employers must comply with the higher state rate. Increased rates range from $8.25 per hour in Florida to $11.50 an hour in Washington. Employers should make certain to follow this state trend to make certain that their nonexempt hourly salaries remain in compliance with federal and state minimum wage laws in all jurisdictions where they have a presence.

Marijuana Laws and Drug Testing Policies

As the number of jurisdictions that recognize medical and recreational marijuana increase, employers should reevaluate their drug testing practices. This is

especially true in jurisdictions where the state or local laws afford protections to medical marijuana patients in the workplace.

Paid Family Leave

A number of states and cities over the past few years have implemented mandatory paid leave laws and it is expected that more will follow suit in 2018. While all of these laws require employers to provide paid leave, the amounts required reflect the manner in which the leave accrues and the ability to carry over earned leave from year to year vary among the jurisdictions.

Conclusion

In addition to the above-cited issues, wage-and-hour issues continue to receive focus as will claims of retaliation, disability discrimination and family medical leave. Employers could see increased administrative agency filings by employees and former employees in these areas as well as in the area of sexual harassment, gender discrimination and pay equity. Employers should make certain to regularly evaluate their employment practices and to consult with counsel concerning developments and changes in employment laws.

—Doug Ellis, senior counsel at Clark Hill, contributed to the benefits section of this report.

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