The First Six Months: The Trump Administration's Impact on Employers

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WINSTON & STRAWN LLP

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Agenda

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  - Regulatory Background
  - Overtime Regulation
  - The Persuader Rule
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  - The Blacklisting Rule
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Agenda (con’t)

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Agenda (con’t)

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  - National Right to Work Act
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- U.S. Supreme Court Update
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Department of Labor (DOL)

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New Secretary of Labor

- Alexander Acosta
  - Nominated by President Trump on Feb. 16, 2017
  - Confirmed by Senate on April 27, 2017, in a vote 60-38
- Prior Experience
  - U.S. Attorney for Southern District of Florida
  - NLRB member
  - Assistant attorney general in Civil Rights Division of Department of Justice (President George W. Bush Administration)
  - Private practice at Kirkland & Ellis LLP
  - Law clerk to Justice Samuel A. Alito (then third Circuit Court of Appeals)
  - Dean of Florida International University College of Law since 2009
  - Undergraduate degree from Harvard College, J.D. from Harvard Law School

Undersecretary of Labor Nominated

- June 19, 2017: Patrick Pizzella nominated to be Deputy Secretary of Labor
  - Position important in deciding how to allocate budget cuts
  - President Trump: proposed 20% cut to DOL budget
- Currently: head of the Federal Labor Relations Authority
- Previous Experience:
  - Various DOL positions under President George W. Bush
  - Office of Personnel Management
  - U.S. Small Business Administration
  - General Services Administration
- Senate hearing set for July 13

Regulation Background

- "Regulatory Freeze Pending Review" Memorandum (aka Freeze Memo) (Jan. 20, 2017)
  1. Executive departments and agencies should not send regulations to Office of Federal Register until presidential designee reviews/approves regulation (except for emergency regulations)
  2. Regulations sent to OFR but not published should be withdrawn until reviewed and approved by President Trump designee
  3. Regulations that have been published but not gone into effect should be postponed for 60 days (maybe longer) to allow for review
- "Reducing Regulation and Controlling Regulatory Costs," (aka the "two for one") Executive Order (Jan. 30, 2017)
  - Federal agencies should eliminate two regulations for each new one (with new regulations to be funded by eliminated regulations)
  - Litigation initiated raising constitutional challenge – case pending

Overtime Regulation

- May 18, 2016: DOL published Final Rule updating FLSA regulations defining "white collar" exemptions
  - What Final Rule Attempted to Do
    - Raised salary threshold necessary to satisfy "white collar" exemptions to $913 per week (or $47,476 per year)
      - Last update was in 2004 and set a $455 per week (equivalent to $23,660 per year) salary threshold for a full-time employee
    - Tied new salary threshold to the 40th percentile of weekly earnings of full-time salaries workers in the lowest American income region (South)
      - Threshold to automatically update every 3 years to stay on par with 40th percentile
  - Increased threshold for highly compensated employees to equate with the 90th percentile earnings of full time salaried workers, effectively raising the minimum amount from $100,000 to $134,004 per year
    - Automatic increases every three years to stay equivalent to 90th percentile of annual earnings for full-time salaried workers

Overtime Regulation (cont'd)

- Rule was scheduled to take effect December 1, 2016 and would have covered additional 4.2 million workers
- Litigation Ensues
  - September: 21 states and many business groups sued in federal court in Eastern District of Texas to block the rule
    - November 22, 2016, judge issued nationwide injunction blocking the rule
      - Court said rule not based on reasonable construction of statutory provision establishing "white collar" exemption because increase in salary threshold created a "de facto salary-alone test" while Congress intended the exemptions to depend on employee duties
  - December 1, 2016: Government appealed preliminary injunction to Fifth Circuit
  - December 2, 2016: Government sought expedited briefing, which was granted – briefing to be completed by February 7, 2017

Overtime Regulation (cont'd)

- Litigation Ensues (cont'd)
  - January 25, 2017: Government requested 30-day extension of deadline to file its reply brief "to allow incoming leadership personnel adequate time to consider the issues"
  - February 22, 2017: Fifth Circuit granted a 60-day extension for Government to file reply brief
  - April 19, 2017: Fifth Circuit granted 60-day extension to file reply brief in light of pending confirmation of Labor Secretary Alexander Acosta
  - Last deadline to file reply brief was June 30

Overtime Regulation (cont'd)

- Recent actions by DOL give insight:
  - June 27 – DOL requested information from the Office of Management and Budget regarding the Overtime Rule, which suggests that the Department will be reconsidering it
  - June 30 – Government asked Fifth Circuit not to consider actual rule because "the Department intends to revisit [that rule] through new rulemaking" but to confirm that DOL has the right to set a salary threshold for purposes of determining eligibility for overtime
    - DOL will not begin new rulemaking until Fifth Circuit confirms DOL's right to set salary level
- Current Status: Rule is enjoined while on appeal and DOL appears to be reconsidering the salary threshold

The Persuader Rule

- First proposed in 2011
- Published 2016 by DOL's Office of Labor Management Standards (OLMS)
- Rule requires disclosure and reporting by employers and third-party advisors (including attorneys and consultants) of agreements or arrangements involving activities that may persuade employees concerning unionization and collective bargaining activities.

The Persuader Rule (cont'd)

- Disclosure is not new, *per se*
  - Previously: employers and consultants required to disclose "direct persuasion" activities (i.e., activities involving direct contact or communication with employees in an attempt to persuade them)
  - But new rule expanded reporting obligations by requiring disclosure of "indirect persuasion" activities, requiring reports of:
    - Planning or conducting employee meetings
    - Training supervisors or employer representatives to conduct meetings
    - Coordinating, directing supervisor or employer representatives activity
    - Establishing or facilitating employee committees
    - Drafting, revising, or providing speeches
    - Developing personnel policies designed to persuade employees
    - Identifying employees for disciplinary action or reward

The Persuader Rule (cont'd)

- Rule would have been applicable to arrangements, agreements, and payments made on or after July 1, 2016.
- Litigation Ensues
  - National Federation of Independent Business and certain business groups, sued to enjoin Rule
  - June 27, 2016: Court issued nationwide preliminary injunction prohibiting DOL from enforcing the Rule
    - "DOL's new rule is not merely fuzzy around the edges….Rather, the new rule is defective to its core because it entirely eliminates the LMRDA's advice exemption"
- Aug. 25, 2016: DOL appealed preliminary injunction
- Nov. 16, 2016: Permanent injunction invalidating Persuader Rule issued
  - Fifth Circuit dismisses appeal of preliminary injunction

The Persuader Rule (cont'd)

- Litigation Ensues (cont'd)
  - January 12, 2017: DOL appealed the permanent injunction
  - May 2017: DOL notified the OMB of intent to revoke Rule after public review and comment
  - June 2, 2017: DOL asked for six month stay of appeal "to allow the Department of Labor to complete its orderly rulemaking process, which may narrow the issues or eliminate the need for this court's review." Fifth Circuit granted DOL's request for six month stay
- Current Status: DOL apparently reconsidering Persuader Rule, which is in the meantime permanently enjoined

The Fiduciary Rule

- Fiduciary Rule expanded the definition of fiduciary to cover a greater pool of individuals by eliminating prior 5-part test used to define what constituted “investment advice”
  - A person is a “fiduciary” under ERISA if, among other things, he or she “renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan”
- Prior to Fiduciary Rule, the definition excluded brokers and others who sold the investment products because they did not typically meet all parts of the 5-part test

The Fiduciary Rule (cont'd)

- April 8, 2016: DOL adopted the Fiduciary Rule which:
  - eliminated the 5-part test
  - described types of advice and relationships giving rise to fiduciary status
  - adopted two new exemptions
  - amended other existing exemptions
- The Rule made anyone (including brokers, dealers, and others selling investment products) a fiduciary if they communicate with a plan investor and no exception applies
  - Changed standard applicable to those financial professionals redefined as fiduciaries – they now must act in clients' best interests in recommending products

The Fiduciary Rule (cont'd)

- Litigation Ensues
  - Three lawsuits consolidated in federal court in N.D. Texas – arguing:
    - DOL ignored comments from stakeholders, failed to properly analyze costs and benefits
    - the "Best Interest Contract" Exemption violates First Amendment rights
  - Lawsuits also filed in Washington D.C., Kansas, and Minnesota
- Feb. 3, 2017: President Trump instructs the Secretary of Labor to review Rule to determine whether it
  - reduced access to retirement savings options;
  - was likely to disrupt retirement services industry and thereby harm investors; and
  - could lead to more litigation and/or higher prices affecting investors.
  - If any harms found, Secretary of Labor to rescind the rule

The Fiduciary Rule (cont'd)

- Feb. 8, 2017: N.D. Texas court granted DOL summary judgment, denied summary judgment to plaintiffs
- Feb. 24, 2017: Plaintiffs filed Fifth Circuit appeal
- March and April 2017: Both the trial court and Fifth Circuit denied injunction to stay the Rule pending appeal
- May 22, 2017: Sec. of Labor: no further delay of Rule implementation during Pres. Trump-ordered review period
- June 9, 2017: Fiduciary Rule implemented
- June 29, 2017: DOL "seeks public input that could form the basis of new exemptions or changes/revisions to the rule... and input regarding the advisability of extending the Jan. 1, 2018, applicability date of certain provisions"

The Fiduciary Rule (cont'd)

- July 3, 2017: at Fifth Circuit, DOL will defend the Rule as reasonable expansion of fiduciary definition but not the bar on class action waivers in Best Interest Contracts
- Current Status – Fiduciary Rule is in effect
  - DOL issued a temporary enforcement policy:
    - no actions will be taken for potential violations of the Rule until January 1, 2018 (or until update the Rule) if there is a good faith effort to comply
    - With respect to Best Interests Contract Exemption: investment advisor must comply with "impartial conduct standards"
  - The Rule may be subject to change in the future (DOL just issued a request for information)

“Blacklisting Rule”

- July 31, 2014: President Obama signed Fair Pay and Safe Workplaces Executive Order, which:
  - Required disclosures by certain federal contractors and subcontractors of alleged violations of labor law
  - Directed the Federal Acquisition Regulatory Council (FAR Council) to propose and enact regulations necessary to effectuate the EO
  - Required DOL to provide guidance to agencies in their efforts to determine whether labor law violations were issued for “serious, repeated, willful, or pervasive” violations
- August 25, 2016: DOL and FAR published the Rule and Guidance

“Blacklisting Rule” (cont’d)

- The Rule:
  - Required federal contactors bidding on federal contracts of at least $500,000:
    1. To report alleged violations of federal or state labor and employment laws in the prior 3 years (whether or not violations proven or disputed)
    2. To update disclosures every 6 months
    3. To track subcontractor compliance
    4. To provide information to employees about paychecks
  - Prohibited arbitration agreements covering Title VII claims and tort claims stemming from sexual assault and sexual harassment
- Rule would have gone into effect October 25, 2016
- Criticism centered on cost of compliance, mandatory reporting of mere allegations

“Blacklisting Rule” (cont’d)

- Litigation Ensued, Preliminary Injunction Issued
  - Certain industry groups sued to block the rule before initial portions set to take effect in October
  - Oct. 24, 2016: Court issued nationwide preliminary injunction for certain provisions
  - Dec. 22, 2016: Government appeals to Fifth Circuit
- March 27, 2017: President Trump
  - Signed resolution passed by House and Senate pursuant to Congressional Review Act – Resolution blocked Blacklisting Rule
  - Signed EO “The Revocation of Federal Contracting Executive Orders” repealing that part of the Obama EO empowering the DOL’s guidance on paycheck transparency provisions (provision not enjoined)
- Current Status : Blacklisting Rule permanently blocked

Withdrawal of DOL Guidance Memos

- June 7, 2017: Sec. of Labor Acosta withdrew 2015 and 2016 administrator's interpretations
  - July 2015 ("Misclassification Memo"): most workers are employees under FLSA and thus, many independent contractors misclassified
  - January 2016 ("Joint Employment Memo"): memo and NLRB's position will be addressed later in the presentation
- DOL: withdrawal of memos "does not change employers' legal responsibilities" – why no big change?
  - Private litigation will continue
  - States will continue to look for ways to ensure that they are getting maximum contributions to unemployment and state income tax
  - DOL unlikely to ignore flagrant worker misclassification
- But: DOL may not push boundaries on misclassification

DOL Opinion Letters

- June 27, 2017: Secretary Acosta announced DOL would resume issuing opinion letters
  - Seen as welcome development for employers

National Labor Relations Board (NLRB)

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Board

- Background
  - Five seats on the Board
  - Each seat on the Board has a five-year term
  - Expiration of terms are staggered so that one vacancy occurs a year
  - Recent trend has been for vacancies to linger so multiple members appointed at same time. Have to be a recess appointment or confirmed by the Senate
  - Traditionally the President's party is given a 3-2 majority

Board Members

- January 2017
  - Two vacancies
  - Philip A. Miscimarra – only Republican
    - April 26, 2017 – Appointed Chairman by the President
    - Term expires December 16, 2017
    - Dissented in numerous decisions of the Obama Board, including *D.R. Horton* (class action waivers) and *Browning-Ferris* (joint employment standard)
  - Mark Gaston Pearce – Democrat
    - Chairman during Obama administration (August 27, 2011 – January 22, 2017)
    - Term expires August 27, 2018
  - Lauren McFerran – Democrat
    - Term expires December 16, 2019
    - Associate at Bredhoff & Kaiser

New Appointees

- Marvin Kaplan (nominated June 20, 2017)
  - Current counsel to Occupational Safety and Health Review Commission (9/15 to present)
  - Previously served as the Republican Workforce Policy Counsel for the House Education and the Workforce Committee (1/12 to 9/15)
  - 2006 law grad – Washington University
- William Emanuel (nominated June 28, 2017)
  - Current shareholder at management L&E firm Littler Mendelson (since at least 2008)
  - J.D. – Georgetown Law

General Counsel of NLRB

- Controls what cases come before the Board
- Robert Griffin
  - Obama Appointee
  - Former General Counsel of International Union of Operating Engineers (IUOE)
  - Term expires November 4, 2017

Likely Targets For Reversal

- Joint employer standard – *Browning-Ferris Indus.*, 362 NLRB No. 186 (August 27, 2015)
  - Historical test was actual control. *TLI, Inc.*, 271 NLRB 798 (1984)
  - BFI held indirect control or in some cases potential control could be enough
  - Miscimarra dissent – "direct and immediate" control
  - Argued March 9, 2017 at D.C. Cir.
  - Withdrawal of DOL Joint Employer Memo on June 7, 2017
    - Labor Secretary Acosta (March 22, 2017 confirmation hearing): prefers the "direct and immediate" control standard, which he considers the "traditional" standard, rather than the indirect and unexercised control method, which he termed "untraditional"

Likely Targets For Reversal

- Employee handbooks -- *Verizon Wireless*, 365 NLRB No. 38 (Feb. 24, 2017)
  - Miscimarra dissents, advocates for new standard
    - Reject “reasonably construe” standard
    - “Facially neutral” rule unlawful only if legitimate justifications are outweighed by potential adverse impact on Section 7 activity
- Employer email for union organizing – *Purple Communc'ns, Inc., 363 NLRB No. 126 (Dec. 11, 2014)*
  - Miscimarra dissents, advocates return to *Register Guard* standard:
    - Employer can limit use of email system to business purposes
    - Just don’t discriminate against NLRA-protected communications

Likely Targets For Reversal

- *Other decisions that were decided 3-2 or 3-1*
  - *Miller & Anderson, Inc.*, 364 NLRB No. 39 (July 11, 2016) – an add-on to *BFI* decision. Combined single/joint employer bargaining units do not require consent of either employer
  - *Whole Foods Market, Inc.*, 363 NLRB No. 87 (December 24, 2015) – no recording policies
  - *Piedmont Gardens*, 362 NLRB No. 139 (June 26, 2015) – employer's ability to withhold witness statements from disclosure based on confidentiality concerns must be weighed against union's need for information
  - *Specialty Healthcare, 3*57 NLRB No. 83 (2011) – appropriate bargaining units

Equal Employment Opportunity Commission (EEOC)

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Equal Employment Opportunity Commission

- EEOC has five presidentially appointed members:
  - Chair
  - Vice Chair
  - Commissioners
- There is also a General Counsel appointed by the President
  - GC provides direction, coordination, and supervision to the EEOC's litigation program
- Currently:
  - One open commissioner position
  - Second commissioner position will open up next month
  - GC position open

Interim Head of EEOC

- Appointment of Acting Head of EEOC
  - January 25, 2017: President Trump named current Commissioner Victoria A. Lipnic as Acting Chair of EEOC
- Lipnic has been an EEOC Commissioner since 2010
  - Term ends July 2020
- Lipnic's first public comments: EEOC will continue to operate pursuant to the EEOC's enforcement priorities outlined in its strategic enforcement plan for 2017-2021
- Lipnic's prior experience:
  - Assistant Secretary of Labor for Employment Standards (2002 to 2009) overseeing: Wage and Hour Division, OFCCP, the Office of Labor Management Standards and the Office of Workers Compensation Programs

Appointment of Permanent Head of EEOC

- June 28, 2017: Trump nominates Janet Dhillon to be the new chair of the EEOC
- Previous experience:
  - General Counsel – Burlington Stores Inc.
  - Executive vice president and general counsel – JC Penney Company Inc.
  - In-house counsel positions at U.S. Airways Group Inc.
  - 13 years in private practice at Skadden Arps Slate Meagher & Flom LLP
- J.D. from UCLA School of Law (1991)
- Assuming Senate confirmation, Dhillon's term will expire on July 1, 2022

EEO-1 Reporting Requirements

- September 29, 2016: EEOC will require private employers with 100 or more employees to report summary pay data by gender, race, and ethnicity on annual EEO-1 report
  - EEOC believed additional information being reported will:
    - provide needed transparency
    - help EEOC identify existing pay discrepancies
    - prompt employers to evaluate pay practices and identify pay disparities
  - Pay data must be part of EEO-1 report beginning March 31, 2018
- Regulation expected to cover 60,000 employers, 63 million employees
- Critics argue EEOC underestimated time and cost of collecting and reporting the pay data
  - EEOC: information is already in employer possession

EEO-1 Reporting Requirements (cont'd)

- Feb. 9, 2017: Interim Chair of EEOC Lipnic's first public comments after being named acting head:
  - Rule "would fall squarely under" the direction that agencies consider regulations and costs and benefits of the rule should be reconsidered
  - "It's something I look forward to having a conversation with my colleagues about"
- April 12, 2017: Sen. Lamar Alexander and Sen. Pat Roberts sent letter to OMB Director seeking elimination of Rule:
  - Contested EEOC estimated compliance cost
  - Stated that sensitive data regarding worker compensation could cause American companies irreparable harm if obtained by third parties
- Current status: Employers must comply with March 2018 deadline to provide the pay data on the EEO-1 form

The Proposed Budget and the EEOC

- President Trump's budget
  - Proposes merging EEOC and Office of Federal Contract Compliance Programs (OFCCP) to achieve greater government efficiency
    - Mechanics of merger, including post-merger distribution of responsibilities, not clear
    - Target for merger completion is FY 2019
  - EEOC budget is not significantly changed but OFCCP budget is reduced in FY 2018 from $105 million to $88 million

Legislative Update

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Family Leave

- FAMILY Act
  - Feb. 7, 2017: matching House and Senate bills introduced by Democrats providing for paid leave
    - 12 weeks of paid time off regardless of how long employee has worked for employer or even if self-employed or unemployed, provided individual has sufficient earnings and work history
    - Paid leave under FAMILY Act would be at 66% of monthly earnings (capped), and would be funded by employer and employee contributions
    - Employer and employee contributions would not be tied to a particular employee but would operate like nationwide insurance fund under the auspices of the Social Security Administration
- No action to date on the bills

Family Leave – President Trump

- While campaigning, President Trump had advocated 6 weeks of unemployment pay for new mothers
- President Trump's proposed budget includes line item for paid parental leave for new and adoptive parents – $20 billion allocated for creation of national paid parental leave program
  - Program to be administered by each state's unemployment insurance system
  - Specifics not clear from budget proposal:
    - How will program be funded? (employer tax, like unemployment?)
    - Will there be variation in eligibility, duration of benefits from state to state?

Family Leave – President Trump (cont'd)

- July 10 – House Democrats sent President Trump a letter telling him his proposal was appreciated but inadequate because:
  - It provides only 6 weeks of paid leave
  - Funding is unclear but reliance on unemployment compensation system financially imperils that system
  - It does not apply to workers needing time to address their own or family members' serious health conditions
- House Democrats asked the President to support the FAMILY Act

Wage & Hour

- Working Families Flexibility Act
  - Would amend FLSA to provide choice to employees working more than 40 hours – overtime or compensatory time (paid time off)
    - Employees could accrue up to 160 hours of comp time per year
    - Accrual would be at rate of 1.5 hours per overtime hour worked
    - Employees would determine whether they wanted overtime pay or comp time (or it could be part of CBA)
    - At end of year, any unused comp time would have to be paid out

Wage & Hour (cont'd)

- Working Families Flexibility Act (cont'd)
  - Employees:
    - must agree in writing to comp time in lieu of OT pay
    - can change their minds and receive payout for accrued, unused comp time and return to traditional OT pay
    - would need to work 1,000 hours to be eligible for comp time
  - Employers:
    - would not have to offer comp time as alternative to OT pay
    - can stop offering comp time alternative at any point on 30 days' notice
    - must allow employees to use comp time "within a reasonable period" after the worker requests to do so, provided that the use of the paid time off "does not unduly disrupt the operations of the employer"

Wage & Hour (cont'd)

- Working Families Flexibility Act (cont'd)
  - May 2, 2017: Proposal passed House 229–197
  - Republicans largely supported the measure
    - Provides flexibility to private sector employees (federal employees already have the option of earning comp time)
    - Gives employers option to offset higher costs associated with paying OT
  - White House: Bill "help[s] American workers balance the competing demands of family and work by giving them flexibility to earn paid time off – time they can later use for any reason, including family commitments like attending school appointments and caring for a sick child"

Wage & Hour (cont'd)

- Working Families Flexibility Act (cont'd)
  - Democrats largely opposed the bill
    - Cite possibility that employers could force employees to give up overtime pay and would unfairly extend 40-hour work week
  - Bill includes anti-coercion components, including:
    - Requirement that employers respect decisions of employees
    - Prohibition on forcing employees to choose comp time in lieu of OT pay or to use their accrued comp time (employers can't "directly or indirectly intimidate, threaten or coerce")
  - FLSA penalties would apply to violators

Wage & Hour (cont'd)

- Working Families Flexibility Act (cont'd)
  - Potential pitfalls for employers:
    - Keeping track of comp time accrual and use
    - Making sure unused comp time is properly and timely paid out
    - Determining when request to use comp time can be used without unduly disrupting employer operations
    - Possibility for constantly changing employee decisions regarding comp time
- No movement to date on bill in Senate

Wage & Hour (cont'd)

- Raise the Wage Act of 2017
  - April 26, 2017: introduced to Senate by Democrats. Bill would raise the federal minimum wage immediately to $9.25 and then to $15 per hour by 2024
  - May 25, 2017 – matching bill introduced in House
  - Both House and Senate bills referred to Committee

Labor

- National Right-to-Work Act
  - February 1, 2017: National Right-to-Work Act introduced in House
    - Would amend NLRA and RLA to eliminate union security clauses
  - President Trump expressed support for right-to-work laws in campaign
- National Right-to-Work Act bill referred to Committee

Labor – Bills Aimed at Eliminating "Quickie" Union Elections

- 3 Bills Aimed at Eliminating "Quickie" Union Election Rule
  - June 6, 2017 – Workforce Democracy and Fairness Act introduced in House (introduced in Senate June 11, 2017), which would require
    - A hearing within 14 days of filing of representation petition for purpose of "identifying any relevant and material pre-election issues and thereafter making a full record thereon"
    - At least 35 days between filing of petition and holding of election
  - June 6, 2017 – Employee Privacy Protection Act introduced in House (June 14 introduced in Senate), requiring
    - That the list of workers eligible to vote in the union election be provided to the NLRB with no more than one form of contact information chosen by employee (e.g., phone number, email address, cell phone number)

Labor - Bills Aimed at Eliminating "Quickie" Union Elections (cont'd)

- Bills Aimed at Eliminating "Quickie" Union Election Rule
  - May 25, 2017 – Employee Rights Act introduced in House
  - Multiple requirements, some of which are duplicative of those in the above bills, including:
    - Resuming hearings before the election to resolve factual issues
    - Permitting only secret ballot elections
    - Permitting employees to opt-out of appearing in the lists of eligible voters and requiring only names and home addresses on such lists
    - Requiring a majority of eligible unit employees–not just those voting–to vote in favor of union representation
    - Implementing stricter financial penalties for union ULPs
    - Requiring employees to affirmatively approve having union dues used for non-representational activities

U.S. Supreme Court Update

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Class Action Waivers

- The issue is whether Section 7 of the NLRA protecting concerted activity invalidates class action waivers
- Decision only impacts workers covered by the NLRA (*i.e.*, non-supervisory employees)
- Consolidated:
  - *Morris v. Ernst & Young LLP*, 834 F.3d 975 (9th Cir. Aug. 22, 2016) (unenforceable)
  - *Epic Systems Corp. v. Lewis*, 828 F.3d 1147 (7th Cir. May 26, 2016) (unenforceable)
  - *Murphy Oil v. NLRB*, 808 F.3d 1013 (5th Cir. Oct. 26, 2015) (enforceable; following *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. Dec. 3, 2013)
- Anticipated that oral argument will occur in the fall

Arbitration of Collective/Class Claims

- *D.R. Horton, Inc*., 357 NLRB No. 184 (Jan. 3, 2012)
  - Found class waivers in mandatory arbitration agreement unlawful
  - "employees who join together to bring employment-related claims on a class wide or collective basis in court or before an arbitrator are exercising rights protected by Section 7"
  - No conflict with FAA
    - Not hostile to arbitration itself
    - Arbitration agreements cannot deprive of substantive rights
    - Arbitration agreements invalidated on same grounds as other contracts
- Fifth Circuit disagreed, refused enforcement
  - Board failed to give proper weight to FAA, disfavoring arbitration
  - Collective action is procedural right, not substantive

Arbitration of Collective/Class Claims

- Other Relevant Decisions:
  - *NLRB v. Alternative Entertainment, Inc.*, 858 F.3d 393 (6th Cir. May 26, 2017) (unenforceable)
  - *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772 (8th Cir. June 2, 2016) (enforceable)
  - *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. Aug. 9, 2013) (enforceable)
- DOJ – On June 16, 2017, Acting Solicitor filed an amicus brief supporting employers. DOJ previously filed the writ of cert on behalf of the NLRB in *Murphy Oil*
  - July 3, 2017 – in briefing to 5th Cir., DOL also abandoned prohibition on class action waivers in fiduciary rule

Whistleblower Protection

- *Digital Realty Trust v. Somers*, No. 16-1276
- Whether the whistleblower protections of Dodd-Frank extend to individuals who have not reported conduct to the Security and Exchange Commission

Right to Work Issues for Public Employees

- Writ of Certiori filed in:
  - *Yohn v. California Teachers Association*
  - *Janus v. AFSCME*, No. 16-1466
- Speculation is that Cert. will be granted
- Both cases address a 1977 Supreme Court decision [*Abood v. Detroit Board of Educ.*, 431 U.S. 209 (1977)] holding that public-sector workers could be forced to join a union or support one financially as a condition of employment

Issues to Watch

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Issues to Watch

- Repeal of the Affordable Care Act (ACA)
  - Too early to make any definitive statements
- Security and Exchange Commission (SEC) Enforcement
  - Confidentiality Agreements
  - Release Agreements
- Roll Back of Dodd Frank – Financial CHOICE Act
  - Passed the House on June 8, 2017
- Revised OSHA Injury and Illness Recordkeeping and Reporting Rule (29 CFR Part 1904)
  - Challenge Pending in W.D. Okl., Case No. 5:17cv00009 – stayed on July 11, 2017 at request of OSHA to "reconsider, revise or remove portions of the rule"

Conclusion and Takeaways

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Conclusion and Takeaways

- Key Appointments Made or Nominated
- Fewer (Or No) New Regulations
  - And no sea change as of yet in existing regulations
- Focus Appears to Be Labor, Wage and Hour
- Expect a Continued Proliferation of State and Local Laws and Regulations

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