



## ***2018 Employment and Labor Law Update With 2019 Forecast***

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## **Today's Agenda**

- The Trump labor/employment agenda
- 2018 in review
  - The Supreme Court
  - Administrative agencies and regulatory developments
  - Hot topics
- 2019 forecast



# 2018

A rough year on numerous fronts for:

- Congress
- Enforcement Agencies
- Employers
- Employees
- But not the President...



## The Trump Labor Agenda

- Focus on rolling back non-business friendly regulations and Executive Orders, that is, rolling back employee protective rules
- Reform immigration laws
- Weaken labor unions
- Create jobs

## The Trump Labor Agenda

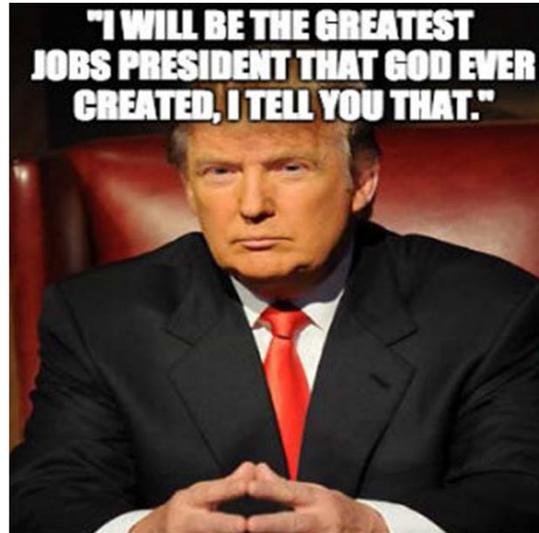
- Fall 2018 Regulatory Agenda released October 17, 2018; identifies agency rulemaking plans and Administration priorities:
  - Wage and Hour Division
  - OFCCP
  - OSHA
  - NLRB
  - EEOC

## Deregulation...





## The Trump Labor Agenda



What Was Special About  
2018?

## Meteoric Rise of #MeToo



## Fight for \$15 Walkouts



## Not Just Fast Food...



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## So What Happened in 2018?

- Trends
- Supreme Court and other cases
- Statutory and regulatory developments
- Hot topics



## The Beat Changed...

- From 2009 through 2016, President Obama's Administration had an extensive impact on labor and employment issues, even without the support of an obstructionist Congress:
  - More focus on employee protections and benefits
  - New and reinterpreted labor and employment laws
  - Increased agency regulatory activity
  - Increased agency enforcement activity
  - More inter-agency cooperation
  - Broader interpretation of what the laws encompass





## For Better or Worse...

- Since 2017, with budget cuts, agency downsizing and roll back of multiple Obama-era Executive Orders and employee protections, the DOL has fewer resources for investigation and enforcement, even as new charges of discrimination and wage violations continue to rise
- Instead, we are seeing:
  - More outreach, education and clarification before cracking down
  - Less punitive, more conciliatory
  - More flexible in interpreting the law
- And we have nine Supreme Court Justices!



## U.S. Supreme Court 2017-2018 Term

Small number of cases, some with big workplace impact:

- ***Encino Motorcars LLC v. Navarro*** (service advisors at auto dealerships are exempt from overtime under FLSA because they are salesmen “primarily engaged in ...servicing automobiles” and were unable to prove that they were misclassified)
- ***Epic Systems Corp. v. Lewis; Ernst & Young LLP et al. v. Morris et al.; NLRB v. Murphy Oil USA, Inc.***, (Class action waivers in employment arbitration agreements do not violate the NLRA and are enforceable)
- ***Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*** (Very narrow holding: conduct by CO CRC in evaluating cake shop owner’s reasons for refusing to design and make wedding cake for same-sex couple violated the Free Exercise Clause; key question unanswered, that is, whether the First Amendment protects the right to deny services to same-sex couples based on religious beliefs)



## U.S. Supreme Court 2017-2018 Term

Small number of cases, some with big impact cont'd

- ***Janus v. American Federation of State, County and Municipal Employees (AFL-CIO)*** (public sector employees who choose not to join union are not required to pay agency fees to the union even if they receive benefits of union negotiations)
- ***China Agritech, Inc. v. Resh*** (once class action certification denied, new class action may not be started beyond applicable statute of limitations)
- ***CNH Industrial N.V. v. Reese*** (collective bargaining agreements must be interpreted in accordance with ordinary principles of contract law)
- ***Digital Realty Trust, Inc. v. Somers*** (plain reading of definition of "whistleblower" and anti-retaliation provisions of Dodd-Frank Act apply only to employees who complain directly to SEC)



## Supreme Court 2018-2019 Term: Cases to Watch

- ***Mt. Lemmon Fire District v. Guido*** (whether ADEA language exempting employers with fewer than 20 employees applies to state governments and subdivisions)
- ***New Prime Inc. v. Oliveira*** (whether FAA's Section 1 exemption is an arbitrability issue that must be resolved in arbitration and whether exemption applies to independent contractor agreements)
- ***Lamps Plus Inc. v. Varela*** (whether FAA forecloses state law interpretation of arbitration agreement authorizing class arbitration)
- ***Henry Schein Inc. v. Archer and White Sales Inc.*** (whether the FAA permits a court to refuse enforcement of an agreement delegating questions of arbitrability to an arbitrator)



## Significant Agency and Regulatory Developments

- Department of Labor Developments
  - Equal Employment Opportunity Commission (EEOC)
  - Office of Federal Contract Compliance Programs (OFCCP)
  - Wage and Hour Division (WHD)
  - Occupational Safety and Health Administration (OSHA)
  - National Labor Relations Board (NLRB)



## Equal Employment Opportunity Commission Enforcement Activity

- EEOC charges for FY 2017
  - **Total charges down by over 7,200 from 2016**
  - **Charges in all sectors fell**
  - For 2017, retaliation, race, disability and sex discrimination charges continue to account for largest proportion of claims



## Equal Employment Opportunity Commission Enforcement Activity

- On the other hand, the **#MeToo Movement** has resulted in a substantial increase in charge receipts for 2018, compelling the EEOC to publish charge statistics for sex-based harassment and sexual harassment:
  - **Total sex-based harassment charges up by over 625 from 2017**
  - **Total sexual harassment charges (including charges filed by males) are up by over 900 from 2017, which is the highest since 2011**



## EEOC Select Task Force

- June 2016 – EEOC Select Task Force on the Study of Harassment in the Workplace issued 88-page report, including findings that:
  - Workplace harassment remains a persistent problem and frequently goes unreported
  - Traditional training has not been sufficiently effective and must change
  - Focus should be on “civility training” and “bystander intervention” training
- Task force reconvened in June 2018 to hear views on topic entitled, “Transforming #MeToo Into Harassment-Free Workplaces”



## Workplace Training Isn't Working...

- EEOC's assessment is that traditional compliance training is not working in part because it concentrates on legal definitions and standards for liability
- EEOC recommends and provides new ***Respectful Workplaces*** training
  - Goal is to prevent workplace harassment by addressing civility, acceptable workplace conduct and other behaviors that contribute to inclusive workplaces



## Executive Orders and Federal Contractors

- President Trump has rolled back some, but not all, of President Obama's Executive Orders directed at federal contractors and subcontractors
  - E.O. 13658 – Minimum Wage (\$10.60/hour 1/1/19)
  - E.O. 13665 – Retaliation and Disclosure of Compensation Information
  - E.O. 13672 – Discrimination – LGBT Protections
  - E.O. 13673 – Fair Pay and Safe Workplaces
  - E.O. 13706 – Paid Sick Leave



## D-E-A-D Under Mr. Trump?

- Office of Federal Contract Compliance Programs (OFCCP) – **Still in Limbo**
- Executive Orders and implementing regulations
  - Fair Pay and Safe Workplaces (“Blacklisting Rule”) **DEAD, Dead, dead**
  - Paid Sick Leave **Still waiting...**



## What Else is New at OFCCP?

- New Directives covering:
  - Incorporation of recent developments in the law regarding the exercise of religion by organizations and individuals
  - Extension of the moratorium on enforcement of the affirmative action obligations required of TRI-CARE subcontractors
  - Planned implementation of an Ombud Service in the national office to facilitate resolution of concerns raised by external stakeholders in coordination with regional and district offices



## Wage & Hour Enforcement Activity

- Back wage collections for FLSA violations for FY 2018
  - Over \$225 million in back wages for over 290,000 workers
    - 14% for minimum wage violations **(10,071 cases)**
    - 86% for overtime violations **(11,018 cases)**
- Continued focus on low wage industries
  - Agriculture, day care, health care, restaurants, hotels/motels, garment manufacturing, guard services, janitorial services, temporary help



## Low Wage Industries Continue to be Targeted

- Agriculture
- Amusement
- Apparel Manufacturing
- Auto repair
- Child care services
- Construction
- Food services
- Guard services
- Hair, nail, skin care services
- Health care
- Hotels and motels
- Janitorial services
- Landscaping services
- Retail
- Temporary help



## Wage and Hour Enforcement Activity

- Government Contractors - Back wage collections for SCA, DBRA and CWHSSA violations for FY 2016
  - > \$64 million in back wages for > 25,500 workers
    - Over \$15 million for DBRA violations **(601 cases)**
    - Over \$40 million for SCA violations **(609 cases)**
    - Over \$6 million for CWHSSA violations **(334 cases)**
- Government contractors included in FLSA violation statistics as well
- Focus on low wage industries



## Where Are We on the White Collar Regulations Overhaul?

- Still D-E-A-D since temporary injunction issued on 11/22/16:
  - “Standard” salary level for exemption from overtime would have been doubled, from \$455/week (\$23,660/year), to \$913/week or \$47,476/year
  - “Highly Compensated Employee” (HCE) salary level for exemption from overtime would have increased, from \$100,000/year to \$134,004/year



## Where Are We on the White Collar Regulations Overhaul?

- Even though the 2016 Final Rule is dead, there WILL be changes in the near future
- DOL has targeted March 2019 for issuing a Proposed Rule on the new salary level for the white collar exemption from overtime
  - Revisited the salary level via a new rule-making process
  - Seeking public input as recently as September and October, 2018 during which it held a number of “listening sessions”
- Time frame has been a moving target and the new Final Rule may be delayed until 2020



## Some Anticipated Changes

- It is anticipated that this process will result in a salary level increase of between \$8,000 and \$13,000 to something in the mid-30's, whether via pure rulemaking or negotiation:
  - Current: \$23,660
  - 2016 Final Rule: \$47,476
  - 2019 Rule: TBD
    - (anticipated range of \$31,000 - \$36,000)



## **Some Anticipated Changes**

- It is also possible that the duties tests for exemption will come under scrutiny in conjunction with reassessment of the salary level test for exemption
- This would be regardless of whether the DOL has the authority to base exemption exclusively on salary level
- If DOL cannot get the salary level high enough, it may attempt to make it harder to pass the duties tests



## **What Else is Happening at the Wage & Hour Division?**

- Joint Employment Guidance
- Revised regular rate calculations
- Tip regulations
- Opinion letters



## What Else?

- Working Families Flexibility Act
  - Passed May 2, 2017 by U.S. House of Representatives
  - Would give workers option of receiving paid time off (PTO) instead of time-and-a-half pay currently mandated by the FLSA
  - House Republicans: bill offers a balance between work and home life for workers
  - Opponents question potential harm to employees
  - Still languishing in the Senate



## OSHA Developments

- Major revision to 2017 rule regarding Electronic Reporting Of Workplace Injuries & Illnesses
- Clarification of new anti-retaliation requirements: safety incentive programs and post-incident drug and alcohol testing are permissible



## What About Legal Use of Marijuana?

- May 17, 2016 – Pa. Medical Marijuana Act took effect
  - Protects workers from discrimination on the basis of their status as registered patients
  - Limits on high-risk activities
  - Employers don't have to allow use on premises



## National Labor Relations Board

- Joint Employer Rule
  - Would reverse Browning-Ferris
  - Restore “substantial direct and immediate control” standard
- Representation elections
  - No plans to modify or eliminate “quickie election rule”



## What Will Happen With Enforcement Activity by Federal and State Agencies?

- **Government Contractors** – With loss of funding, roll back of multiple Executive Orders and the ongoing threat of being rolled into EEOC, the OFCCP must become even more conciliatory
- **EEOC** will continue see a rise in sexual harassment and sexual orientation charges (#MeToo)
- **IRCA (I-9) audits** will increase in view of Trump administration focus on immigration and jobs
- More states setting **higher minimum wages**
- More **wage audits** by state agencies
- More **pre-employment bans** (salary history, credit history, criminal background information)



## What Will Happen With Enforcement Activity by Federal and State Agencies?

- **Wage and Hour Audits** (FLSA, SCA, Prevailing Wage) will continue, but in a more conciliatory fashion
  - Exempt classification audits under what will remain of new overtime regulations
    - Salary level
    - Exempt classifications
  - Overtime and wage calculation audits
    - Training time, waiting time, commissions
    - Catch-up payments
    - Timekeeping
- **Equal Pay Act** audits and litigation (#MeToo)
- Independent contractor, misclassification and joint employer reviews



## What Will We See in 2019?

- Continued weakening of federal labor agency enforcement activity, especially OFCCP and NLRB
- Continued increase in state law-making, especially as to wage rates, equal pay, protected classes, and other employee-protective legislation
- Continued increase in state agency enforcement activity, equal pay, employee misclassification and tax collection issues (UC, WC, etc.)
- More private litigation, especially class/collective actions for discrimination and wages
- More arbitration agreements
- More impact due to the #MeToo movement



## Questions?

