Change is the Only Constant:

Changes in Labor and Employment Laws
You Need to Know

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Change is the Only Constant: Changes in Labor and Employment Laws You Need to Know

Agenda

• DOL Update
• EEOC Update
• Title VII: Sexual Orientation Update
DOL UPDATE

U.S. Department of Labor
DOL Update

Agenda

• New Leadership
• White Collar Overtime Rule
• Intern Rule
• PAID Program
DOL Update
Alex Acosta
New Leadership

Alex Acosta
(Secretary of Labor)

• Background
• Implications for Employers
Background

• Acosta was confirmed by the Senate on April 27, 2017.

• Prior to his appointment, he served as the Dean of the Florida International University College of Law.

• He is also a former U.S. Attorney for the Southern District of Florida.

• In 2002-2003, he served 8 months on the NLRB.
Implications for Employers

• Unlike other Trump appointees, Acosta’s record reveals little about his views on labor and employment.
• During his time on the NLRB, he participated in more than 120 opinions, voting mostly with his Republican colleagues but also siding with Democrats multiple times.
• Wilma Liebman, a Democrat who served on the NLRB with Acosta, described him as “independent, intelligent and not a knee-jerk anti-union or anti-worker, or pro-business for that matter.”
Implications for Employers

• Overall, Acosta is likely to be a pro-employer Labor Secretary and has already backed the Trump administration’s decision to roll back several Obama administration regulatory efforts that expanded workforce protection laws saying the regulations were overreaches that hurt the economy (e.g., overtime rule, fiduciary rule, joint employer rule).

  – Regarding the overtime rule, Acosta said, “The way the rule was changed created a shock to the system.”

  – Acosta was also quoted saying, “The joint employer guidance, for example, had a substantial effect on the franchise model and small business owners across this nation, yet this informal guidance was issued without any public process.”
“White Collar” Overtime Exemption Regulations

• Background

• Discussion

• What Does It Mean?
• Changes to the white-collar overtime exemptions have been in the making for some time after President Obama directed the Department of Labor in 2014 to improve them, which he perceived to be outdated.

• **Common “White Collar” Exceptions:** Executive Employees, Administrative Employees, Outside Sales Employees, Computer-Related Employees and Highly Compensated Employees.

• There are three tests to determine if a White Collar exemption exists:
  – Salary Level Test
  – Salary Basis Test
  – Job Duties Test
The DOL issued and promulgated revised regulations in 2016 pertaining to the white collar exemptions, specifically affecting the salary level test. The increased salary levels were scheduled to go into effect December 1, 2016:

- Executive, Administrative and Professional Exemptions were to increase from $23,660 ($455/week) to $47,476 ($913/week).
- Highly Compensated Employees were to increase from $100,000 to $134,004 total annual compensation.
- Additionally, the salary threshold was to automatically increase every three years, based on U.S. wage growth.

  - For Executive, Administrative and Professional Exemptions, each update would have raised the standard threshold to the 40th percentile of full-time salaried workers in the lowest-wage Census region.
  - The Highly Compensated Employee threshold would have increased to the 90th percentile of full-time salaried workers nationally.
• On November 22, 2016, U.S. District Court Judge Amos Mazzant in Texas issued a nation wide injunction blocking the rule’s implementation just days before its effective date.

• On January 12, 2017, the Department of Labor appealed the injunction to the Fifth Circuit Court of Appeals.

• In June of 2017, the Department filed its brief, which stated that it had decided not to advocate for the specific salary level set by the Final Rule but argued that the Department is entitled to set minimum thresholds for white collar overtime exemptions.
The 2016 regulations were ultimately declared invalid on August 31, 2017 by the same district court that issued the injunction. The court held that Congress intended the exemptions to apply based on an employee’s duties, not just salary. However, by setting the salary level at such a high threshold, the duties test was effectively eliminated. Thus, by making the salary level, rather than an employee’s duties, the primary determining factor in whether an employee qualified for an exemption, the DOL acted contrary to congressional intent.

In July 2017, the Trump administration began a new rulemaking process by issuing a Request for Information and inviting responses to several questions, including:

1. Should the regulations contain multiple standard salary levels? If so, how should these levels be set: by size of employer, census region, censes division, state, metropolitan statistical area, or some other method?
DOL Update
White Collar Overtime Rule

2. Should the Department set different standard salary levels for the executive, administrative and professional exemptions? What would the impact be on employers and employees?

3. To what extent did employers, in anticipation of the 2016 Final Rule’s effective date increase salaries of exempt employees in order to retain their exempt status?

4. Would a test for exemption that relies solely on the duties performed by the employee without regard to the amount of salary paid by the employer be preferable to the current standard test?

• The comment period closed on September 25, 2017.
• In all likelihood, the DOL will make its position known sometime this year through a Notice of Proposed Rulemaking.
  – At his confirmation hearing, Secretary of Labor Alex Acosta said that the salary threshold should be “somewhere around $33,000.”
• Pre-2016 regulations remain in effect.
  – Considering whether an employee is exempt or nonexempt depends on (a) how much they are paid (i.e., salary level test), (b) how they are paid (i.e., salary basis test), and (c) what kind of work they do (i.e., job duties test).

• Salary level test:
  – To be exempt, Executive, Administrative and Professional Employees must be paid at least $23,660 per year.
  – Highly Compensated Employees must be paid at least $100,000.

• Employers should be prepared for the DOL to issue a new rule later this year.

• When this happens, the salary level is likely to increase, but it is uncertain whether the threshold will be as high as that proposed in 2016.
Labor Department Changes Rules on Unpaid Internships

- Background
- Old Rule
- New Rule
- What Does It Mean?
Background

• The Fair Labor Standards Act ("FLSA") sets minimum wage, overtime, recordkeeping, and youth employment standards.

• Under the FLSA, covered employers are required to pay employees for their work.

• Whether employers are required to pay interns or students depends on whether the intern or student is considered an "employee."
Old Rule

• In 2010, the DOL adopted a six-factor test for determining whether an intern was considered an employee.

• Under the six-factor test, an intern was considered an employee unless all of the following criteria were met:
  1. The internship was similar to training which would be given in an educational environment;
  2. The internship was for the benefit of the intern;
  3. The intern did not displace regular employees;
  4. The employer did not derive immediate advantage from the activities of the intern;
  5. The intern was not necessarily entitled to a job at the end of the internship; and
  6. There was an understanding that the intern was not entitled to wages.
New Rule

• On January 5, 2018, the DOL announced that it was abandoning its prior six-part test and will now follow the seven-factor “primary beneficiary test,” derived from the courts.

• Under this test, courts examine the economic reality of the intern to determine which party is the primary beneficiary of the relationship.
New Rule

• Courts have identified the following non-exhaustive seven factors to be considered (not all factors must be met):
  1. Expectation of compensation;
  2. Extent to which the internship provides training similar to that which would be given in an educational environment;
  3. Extent to which the internship is tied to a formal education program;
  4. Accommodation of academic commitments by corresponding to the academic calendar;
  5. The extent to which the duration is limited to the period in which the internship provides beneficial learning;
  6. Extent to which the work complements, rather than displaces, the work of paid employees while providing significant educational benefits;
  7. Understanding of no entitlement to a paid job at the conclusion of the internship.
WHAT DOES IT MEAN?

• The new rule provides increased flexibility because unlike the 2010 DOL Rule, failure to satisfy one of the factors does **not** necessarily classify an intern as an employee.

• If analysis of the circumstances under the “primary beneficiary test” reveals that an intern or student is an employee, then he or she is entitled to both minimum wage and overtime pay under the FLSA.
Payroll Audit Independent Determination

• The DOL has just rolled out its PAID pilot program
• Employers can self-report wage and hour issues to the DOL
• Idea is to encourage employers to come forward so the DOL can quickly and quietly resolve such matters
• Good news – if you raise the issues and the audit goes well – it may be like the Good Housekeeping blue ribbon
• Bad news – if it doesn’t you will be on the hook for backpay (but not liquidated damages or other penalties)
• NOTE – doesn’t bind the employees
• Brings attention to you and your issues
EEOC Update

Agenda

• New Leadership

• Pay Data Rules

• Wellness Regulations Update

• Proposed Enforcement Guidance on Harassment
Victoria Lipnic
(EEOC Chair)

• Lipnic, a Republican, has been an EEOC commissioner since 2010.
• She was named Acting Chair of the EEOC by President Trump on January 25, 2017.
• Prior to joining the Commission, she served as the U.S. Assistant Secretary of Labor for Employment Standards from 2002 to 2009.
Implications for Employers

• Lipnic’s voting record on the EEOC indicates a general preference for decreased regulation.

• With Lipnic in charge, the future for some Obama-era EEOC regulations is unclear, while others have already begun their demise.
Pay Data Disclosure Rule

• Background
• Discussion
• What Does It Mean?
The EEO-1 Report is an annual report that, since 1996, has required employers to report the racial, ethnic, and gender makeup of their workforce.

The EEOC uses this information to investigate possible discriminatory behavior, by assessing disparities between the makeup of a workforce and the makeup of similar workforces in that job category and geographical area.

In 2016, the EEOC released an updated EEO-1 reporting form, which would have required employers to submit detailed pay data categorized by gender, race, and ethnicity beginning in March of 2018.

As a commissioner, Lipnic voted against the new reporting requirements, stating that the updated form “should be relegated to the heap of bad policy ideas once and for all.”
EEOC Update
EEO-1 Pay Data Disclosure Rule

Discussion

• The Pay Data rule is on hold.
• On August 29, 2017 the Administrator of the Office of Information and Regulatory Affairs (OIRA) immediately stayed the rule.
• That decision was based on:
  1. A lack of notice or opportunity for public comment on the rule;
  2. Inaccurate estimates of compliance burdens on employers; and
  3. Impracticability, burdensomeness, and confidentiality issues associated with the collection process of that data.
**EEOC Update**

*EEO-1 Pay Data Disclosure Rule*

**WHAT DOES IT MEAN?**

- The EEOC is reviewing the rule, but it is currently stayed.

- Changes to the EEO-1 report could still be implemented, but those changes aren’t likely to be similar to the changes that were being considered.
Wellness Regulations

- Background
- AARP v. EEOC
- What Does It Mean?
• The EEOC issued regulations over employer wellness programs in May 2016 in an attempt to provide guidance over what incentives (rewards for participation or penalties for non-participation) employers can provide to encourage employees to take part in wellness programs like biometric screenings.

• To be compliant with the ADA and GINA, wellness programs must be “voluntary.”

• The regulations said that wellness programs would still be “voluntary” if the incentives did not exceed roughly 30% of the cost of the coverage, a threshold established by the ACA.
AARP v. EEOC

• The D.C. Circuit recently vacated the EEOC’s rules, saying they did not sufficiently explain how the rules complied with the ADA and GINA’s “voluntary” requirement.

• The court questioned how a 30% penalty on an employee’s plan would still make participation “voluntary.”
WHAT DOES IT MEAN?

• The EEOC must write new rules by the end of 2018.

• The rules will likely allow for smaller incentives to wellness programs.

• What an employer can do to encourage wellness programs will change over the next year as wellness programs continue to become more popular.
EEOC Update
Proposed Enforcement Guidance on Harassment

Proposed Enforcement Guidance on Harassment

• Background
• The Proposed Guidance
• What Does It Mean?
• The EEOC publishes “enforcement guidance” periodically on various legal issues. While the guidelines do not have the force of law, they are instructive for employers because they represent the Commission’s position on important legal issues.

• They also serve as a reference for EEOC investigators and other federal agencies that address harassment.

• The EEOC’s most recent proposed guidance were open for comment until March 21, 2017. The EEOC is now reviewing public input and finalizing the proposed guidance, which is expected to be released in the next month or so.

• The goal of the proposed guidance is to explain the legal standards applicable to claims of unlawful harassment under federal employment discrimination laws.

• Once finalized, the proposed guidance will address many issues for the first time, including LGBT discrimination, religion, age, national origin, disability, and genetic information discrimination issues.
Among numerous issues, the proposed guidance will cover:

– When an employer is liable for sexual harassment, including when an employer can lose their reliance on the Faragher/Ellerth affirmative defense.

– Ways for employers to prevent and avoid sexual harassment.

– Effective anti-harassment policies.

– How to handle harassment complaints and investigations.

– How to effectively train the workforce on anti-harassment measures.
• Sexual harassment allegations are headline news today.
• A recent ABC News/Washington Post Poll found that 83 percent of people think sexual harassment of women is a problem in the workplace.
• 72 percent called it a serious problem.
• Those results are up 6 percent since the Harvey Weinstein allegations in October.
• The news isn’t all bad:
  – 62 percent think the recent attention will create lasting change, compared to only 32 percent who think things will not change.
EEOC Update
Proposed Enforcement Guidance on Harassment

WHAT DOES IT MEAN?

• The upcoming guidance comes at a critical time for employers.

• Employers should aim to be a part of the group wanting to solve the harassment problem.

• The EEOC’s guidance will be necessary reading for employers who want to stay on top of harassment issues in the workplace.
Title VII: Sexual Orientation Update

Federal Court Extends Title VII Workplace Protections to Include Sexual Orientation
Title VII: Sexual Orientation Update

Agenda

• Background

• *Hively v. Ivy Tech*

• What Does It Mean?
Title VII: Sexual Orientation Update

Background

• Title VII’s prohibition on sex discrimination has been extended to “gender stereotyping” discrimination cases.
  – Employee is discriminated against for failing to conform to existing gender stereotypes. *(E.g., female not wearing makeup)*

• Further, in 2013, the EEOC held that sexual orientation discrimination inherently involved sex-based considerations and gender stereotyping, so sexual orientation discrimination was a cognizable Title VII claim.
  – EEOC’s opinions are not binding on federal courts.

• Until last year, no federal appellate courts had ruled that Title VII protects against discrimination based on sexual orientation.
Title VII: Sexual Orientation Update

7th Circuit Court of Appeals

_Hively v. Ivy Tech_

• Facts
• Discussion
• What Does It Mean?
Title VII: Sexual Orientation Update

7th Circuit Court of Appeals

Facts

• Hively was an adjunct professor at Ivy Tech Community College.
• Hively was spotted kissing her girlfriend in a campus parking lot, and subsequently was denied multiple promotions.
• She sued on the basis of sexual orientation discrimination.
• The Northern District of Indiana granted Ivy Tech’s motion to dismiss for failure to state a claim, finding that Title VII did not recognize sexual orientation as a cognizable claim of discrimination.
• On appeal, a Seventh Circuit three judge panel followed precedent and affirmed the decision that Title VII did not prohibit discrimination based on sexual orientation.
• Hively sought en banc review, a full Circuit hearing which is needed to overturn Circuit precedent; the Seventh Circuit agreed to rehear the case.
Discussion

• The Seventh Circuit’s *en banc* panel overturned precedent and held that sexual orientation discrimination is a form of sex discrimination under Title VII.
  – The court reasoned that discrimination on the basis of sexual orientation is necessarily discrimination on the basis of sex.
  – The court reasoned that gay, lesbian, and bisexual individuals break the gender stereotype that people should be in romantic relationships with members of the opposite sex.
  – Because gender stereotyping discrimination is already recognized by courts as a form of sex discrimination, the court noted that sexual orientation discrimination was also a form of sex discrimination.
WHAT DOES IT MEAN?

• In the Seventh Circuit, which includes Indiana, Wisconsin, and Illinois, courts will be bound to follow *Hively*. Under *Hively*, Title VII now allows employees to sue employers for sexual orientation discrimination.

• Other federal appellate courts may follow the Seventh Circuit’s lead and interpret Title VII similarly.

• Supreme Court likely to have final say.
Title VII: Sexual Orientation Update

WHAT DOES IT MEAN?

• Regarding sexual orientation discrimination, Circuit Court split exists with Eleventh Circuit on one side, and Seventh Circuit (and possibly Second Circuit soon) on the other side.

• It is important to note that even in those circuits that do not recognize sexual orientation as a protected class, local ordinances exist throughout the country prohibiting sexual orientation discrimination.
  – (e.g., Indianapolis, Bloomington, Zionsville, etc.)

• Although the Supreme Court has denied cert. in these types of cases thus far, lower courts continue to wrestle with this issue and it is only a matter of time before the Court has the opportunity to consider this issue again.
QUESTIONS
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