2017 AGC Construction HR & Training Professionals Conference
October 11-13, 2017 Phoenix, Arizona

On The Top of Camelback Mountain . . . or Headed to the Desert Floor?

Labor & Employment Law in Year One of the Trump Administration

Has Anything Big Happened in the Last 12 Months?

Want a Hint?

Day One – Freeze Order

- Memo issued by White House Chief of Staff instructs heads of executive departments and agencies to freeze new or pending regulations to provide the new administration time to review them
  - All regulations not yet published in the *Federal Register* are to be immediately withdrawn
  - All regulations which have been published in the *Federal Register* but have not yet taken effect are to be temporarily postponed for at least 60 days for review
  - Consider "proposing further notice-and-comment rulemaking" where the effective date of a regulation "has been delayed in order to review questions of fact, law, or policy"

Since Then . . .

- Tightening **Immigration**
- Changing (some) **EEOC** Initiatives
- Vanishing **FLSA** Regulations
- Reshuffling the **NLRB** Deck
- **Joint Employment** Hanging by a Thread
- Changes for **Federal Contractors**
- And more!!

IMMIGRATION

"Dreamers": Sweet Dreams

- June 2012: Deferred Action for Childhood Arrivals (DACA) implemented through an executive action of prosecutorial discretion signed by President Obama. It is not a statue or regulation and the President can decide to discontinue the program at any time.

"Dreamers": Nightmares

- On September 5, 2017, Attorney General Jeff Sessions announced that the Trump administration would wind down DACA in six months to allow Congress to find a legislative solution.
- According to the Department of Homeland Security (DHS), current DACA beneficiaries will retain their approved period of deferred action and their employment authorization documents (EADs) until they expire.

New I-9 Form

- On July 17, 2017, U.S. Citizenship and Immigration Services (USCIS) released a new version of the Form I-9. Employers have been required to use the new version since September 18, 2017.
- Employers need to use the new form with the 7/17/2017 revision date and to ensure that HR teams and others responsible for completing Section 2 of Form I-9 are aware of the small changes to ensure no inadvertent discrimination or noncompliance in completing I-9s for employees.

Employment Eligibility Verification
Department of Homeland Security
U.S. Citizenship and Immigration Services

USCIS
Form I-9
OMB No. 1615-0047
Expires 08/31/2019

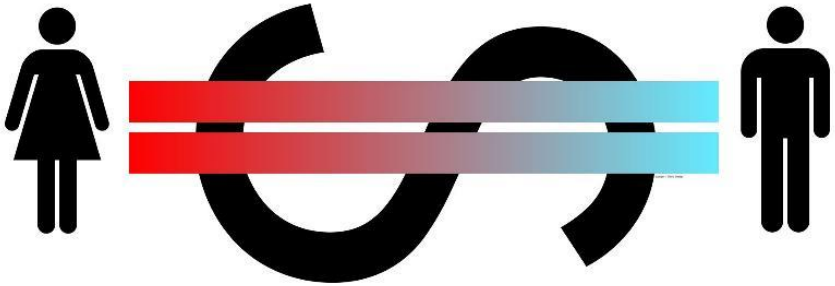
► **START HERE:** Read instructions carefully before completing this form. The instructions must be available, either in paper or electronically, during completion of this form. Employers are liable for errors in the completion of this form.

ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work-authorized individuals. Employers **CANNOT** specify which

EEOC FOCUS ON COMPENSATION ISSUES

EEOC Focus on Compensation Issues

- In January 2016, EEOC and DOL announced significant revisions to EEO-1 Form, requiring employers to add summary pay data by job category to annual disclosure
  - Revised EEO-1 would collect data on employees' total W-2 earnings and hours worked
  - Commission anticipated providing aggregate information to employers (with aspiration of impacting pay decisions) and publishing various reports analyzing collective data



EEOC Focus on Compensation Issues

- EEOC's explanation of need for information:
  - "EEOC and OFCCP are both addressing the continued existence of wage disparities based on gender, race, and ethnicity that limit equal pay and equal opportunities across industries for women and workers of color. Although some pay disparities may be explained by differences in education, career or experience, even when these factors are taken into account, significant unexplained earnings gaps remain between gender, racial, and ethnic groups."

Mixed Messages from the White House

- President Trump is reported as saying that equal pay legislation is like socialism.
- However, Trump's latest pick for Labor Secretary, Alexander Acosta, has said "gender discrimination, which includes pay discrimination, should not occur." – Acosta's testimony before the Senate Health, Education, Labor and Pensions Committee.

But Then . . .

MEMORANDUM

TO: Acting Chair Victoria Lipnic, Equal Employment Opportunity Commission

FROM: Neomi Rao, Administrator, Office of Information and Regulatory Affairs

DATE: August 29, 2017

SUBJECT: EEO-1 Form; Review and Stay

After careful consideration and consultation with the Equal Employment Opportunity Commission (EEOC), and in accordance with the Paperwork Reduction Act (PRA) and its regulations at 5 CFR 1320.10(f) and (g), the Office of Management and Budget (OMB) is initiating a review and immediate stay of the effectiveness of those aspects of the EEO-1 form that were revised on September 29, 2016. These revisions include new requests for data on wages and hours worked from employers with 100 or more employees, and federal contractors with 50 or more employees. EEOC may continue to use the previously approved EEO-1 form to collect data on race/ethnicity and gender during the review and stay.

EEOC FOCUS ON GENDER IDENTITY AND SEXUAL ORIENTATION

- Obama-era EEOC's Position: Sexual orientation and gender identity are already protected classes under Title VII's prohibition of sex discrimination.
  - Can't have sexual orientation discrimination without reference to *sex*.
  - The U.S. Supreme Court has previously held Title VII prohibits sex discrimination based on the failure to conform with *sex stereotypes* and norms (ex., men with long hair, women's "aggressive" mannerisms). Thus, the stereotypical "norm" of forming relationships with the opposite sex (i.e., sexual orientation) is a basis of discrimination already prohibited by courts.
  - Discrimination based on one's sexual orientation punishes employees because of their association with members of a particular *sex*.

- EEOC Charges – FY 2016
  - 1,650 Charges alleging LGBT sex discrimination (up from 1,412 in 2015)
  - Employers paid a total of $4.4 Million for LGBT individuals who filed sex discrimination charges.

- The EEOC under the Obama Administration also pursued litigation to expand judicial interpretation of Title VII to include protections for LGBT persons who allege discrimination based on sex.

What Did the Courts Think?

- On April 4, 2017, a full 11-judge panel of the Seventh Circuit Court of Appeals (whose decisions affect Indiana, Illinois, and Wisconsin employers) reconsidered its prior 3-judge decision which held Title VII does not cover sexual orientation, and this time found **discrimination on the basis of one's sexual orientation is a form of unlawful sex discrimination under Title VII**. Hively v. Ivy Tech Comm. College.
- Dissenting judges criticized the decision as a "statutory amendment courtesy of unelected judges."

What Did the Courts Think?

- Case remanded to trial court, and may ultimately be appealed to the U.S. Supreme Court to resolve a split in the law between various jurisdictions.
  - As recently as March 2017, for example, an Eleventh Circuit panel (FL, GA, AL) ruled that Title VII did not include sexual orientation claims, but a Second Circuit panel (NY, CT, VT) concluded that an openly gay male plaintiff's claim of unlawful gender stereotyping under Title VII survived a motion to dismiss.

What Will the Trump EEOC DO?

- "Protecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex" is one of five "emerging and developing issues" the EEOC will target in 2017-2021.
- New EEOC Acting Chair: expects EEOC will continue to litigate for LGBT individuals seeking anti-discrimination protection under Title VII.

Trump's Stance?

- In pre-election interview with *60 Minutes*, Trump dismissed fears about marriage equality being rolled back. "These cases have gone to the Supreme Court. It's settled, and I'm fine with it," he said.
- Vice President Pence's views may play a role
  - Proponent of RFRA: allows business owners and other private entities to discriminate against LGBT customers if they cite religious grounds to refuse them service.

Trump's Stance?

- In January, President Trump said he wouldn't rescind an Obama administration executive order that said federal contractors can't discriminate against LGBT workers.
  - On March 27, Trump signed an executive order revoking President Obama's Fair Pay and Safe Workplaces Order, which required federal contractors to demonstrate they did not discriminate based on sexual orientation, gender identity, and gender stereotyping for at least three years.

Sexual Orientation/Gender Identity Takeaways

- Current employment policies prohibiting discrimination based on sex (and other protected characteristics) remain lawful.
- Not required to amend policies to include sexual orientation.
  - Caveat: consider whether state and/or local laws expressly prohibit sexual orientation discrimination.
- However, in light of the recent 7th Circuit decision and the potential for increased activity from the EEOC, may consider whether policies and practices adequately ward against sexual orientation discrimination as a subset of sex discrimination.

THE VANISHING FLSA REGULATIONS OF 2017

FLSA Overtime Basics

- Generally, employees must meet the following criteria to be exempt from receiving overtime wages:
  - Must be paid on a salary basis
    - *Salary can be paid either on a weekly, bi-weekly, bi-monthly, or monthly basis*
  - Must be paid the minimum salary established by regulations
  - Must perform certain duties
    - *Job titles alone are not sufficient to determine whether a worker meets an exemption*

New Minimum Salary Rule

- March 2014: President Obama signed an executive order directing the DOL to revise its rules
  - DOL conducted months of extensive consultations with employers, workers, unions and other stakeholders
- July 6, 2015: DOL issued proposed regulations
  - Increase the minimum salary from $455 per week ($23,660 per year) to $970 per week ($50,440 per year)
  - Increase the minimum compensation amount for highly compensated employees from $100,000 to $122,148
- 60-day comment period
- More than 270,000 comments

New Minimum Salary Rule

- Finally issued May 18, 2016
  - Effective December 1, 2016
  - Included hundreds of pages of commentary
- Raised minimum salary for most exemptions
  - EAP exemptions - $913 /week ($47,476 per year)
  - HCE exemption - $2,577/week ($134,000 per year)
- Salary may include up to 10% nondiscretionary bonuses
- Salary threshold automatically increased every 3 years
  - Indexed to 40% of weekly earnings for salaried workers
- To the surprise of many, job duties did not change

New Minimum Salary Rule

- According to the DOL, the rule was designed to:
  - Put more money into the pockets of middleclass workers
  - Increase salary threshold above poverty level
  - Improve work-life balance and workers' health
  - Reduce on-the-job accidents and injuries
  - Help correct current misclassifications
  - Increase employment by spreading work and creating jobs
  - Increase productivity through improved morale
- DOL told Employers that the new rule would help them by eliminating confusion (and litigation)

New Minimum Salary Rule

- According to DOL
  - 4.2 million workers would become eligible for OT
  - Clarifies status of 8.9 million misclassified workers
  - More than 7.4 businesses impacted
  - U.S. employers would spend $592.7 to comply
  - **NET TRANSFER OF $1.48 BILLION FROM EMPLOYERS TO WORKERS**
- According to Employers
  - Reclassification of employees
  - Potential lay-offs
  - Morale issues
  - Budget crises

But Then . . .

United States District Court
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

STATE OF NEVADA, ET AL §
§
v. §
§
UNITED STATES DEPARTMENT OF LABOR, ET AL §
§
§

Civil Action No. 4:16-CV-00731
Judge Mazzant

MEMORANDUM OPINION AND ORDER

Pending before the Court is the Emergency Motion for Preliminary Injunction (Dkt. #10) filed by the State of Nevada and twenty other states (the "State Plaintiffs"). After considering the relevant pleadings, exhibits, and argument at the preliminary injunction hearing, the Court enters the findings of fact and conclusions of law set forth below. Based on these findings and conclusions, the Court grants the State Plaintiffs' motion.

And Then . . .

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

STATE OF NEVADA, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Defendants.

No. 4:16-CV-731-ALM
LEAD

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Defendants, Thomas Perez, in his official capacity as Secretary of the Department of Labor; David Weil, in his official capacity as Administrator of the Wage & Hour Division, United States Department of Labor; Mary Zeigler, in her official capacity as Assistant Administrator for Policy, Wage & Hour Division, United States Department of Labor; the Wage & Hour Division of the United States Department of Labor; and the United States Department of Labor, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Court's November 22, 2016 Memorandum Opinion and Order, ECF No. 60.

But Then . . .

And Then . . .

STATE OF NEVADA, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF LABOR, et al.,

Defendants-Appellants.

No. 16-41606

UNOPPOSED MOTION FOR 60-DAY EXTENSION OF TIME IN WHICH TO FILE REPLY BRIEF

The federal government's reply brief is currently due March 2, 2017, as extended by this Court. To allow incoming leadership personnel adequate time to consider the issues, the federal government respectfully requests an additional 60-day extension of time, to and including May 1, 2017, in which to file the reply brief.

And Finally . . .

United States District Court

EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

STATE OF NEVADA, ET AL.	§	
	§	
v.	§	Civil Action No. 4:16-CV-731
	§	Judge Mazzant
UNITED STATES DEPARTMENT OF LABOR, ET AL.	§	LEAD
	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court is the Motion for Expedited Summary Judgment (Dkt. #35) filed by the Plano Chamber of Commerce and more than fifty-five Texas and national business groups (collectively, "Business Plaintiffs"). After considering the relevant pleadings, the Court grants Business Plaintiffs' motion.

And Finally . . .

CONCLUSION

Accordingly, it is therefore **ORDERED** that Business Plaintiffs' Motion for Expedited Summary Judgment (Dkt. #35) is **GRANTED**. The Court hereby concludes the Department's Final Rule described in 81 Fed. Reg. 32,391 is invalid.

SIGNED this 31st day of August, 2017.

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

The Court's Reasoning

- Congress intended employees who perform "bona fide executive, administrative or professional capacity" duties to be exempt from overtime pay.
- The FLSA itself does not provide for a salary requirement, but the DOL's authority to use a minimum salary level — as part of a broader exemption test — was valid and permissible.
- Even though some salary test is permissible, the updated salary level under the Final Rule did not give effect to Congress' intent. By increasing the minimum salary level from $455 per week ($23,660 annually) to $913 per week ($47,476 annually), the DOL made an employee's duties and functions irrelevant if the employee's salary fell below the minimum salary level (i.e., white collar employees earning less than $913 per week would not qualify for the exemption and would be eligible for overtime irrespective of their job duties and responsibilities).

What's Next?

"I am extremely disappointed in Judge Mazzant's decision today. I certainly plan to appeal."

Photo by Joe Raedle/Getty Images

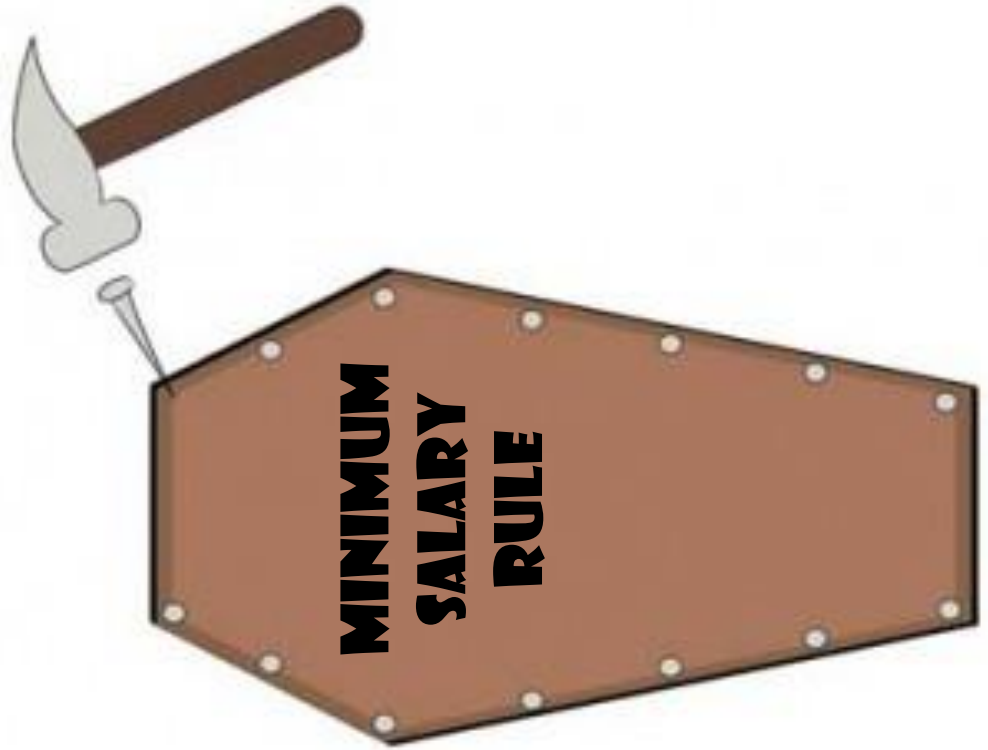
What's Next?

"HA! KIDDING!!!!"

"I totally had you going for a minute!"

Photo by Joe Raedle/Getty Images

New Minimum Salary Rule



Could This Be Next for the FLSA?

- Working Families Flexibility Act of 2017 (H.R. 1180)
  - Amends FLSA to authorize employers to provide compensatory time off in lieu of paying overtime wages
  - Employee earns compensatory time at a rate of at least 1.5 hours for each hour worked over 40 hours
  - Notable requirements:
    - Employee must agree in writing (or in collective bargaining agreement)
    - Worked at least 1,000 hours continuously in the last year
    - Can accrue up to 160 hours of compensatory time
    - Employees must use comp time within a "reasonable period" of request, and comp time must not "unduly disrupt" the employer's operations

Could This Be Next for the FLSA?

- Notable Requirements (cont'd):
  - Employer may reimburse for unused comp time in excess of 80 hours with at least 30 days' notice
  - Employee may request monetary compensation be provided, at any time, for all unused, accrued comp time
    - Employer must pay within 30 days
  - Must pay any unused, accrued comp time at the end of the year
  - Employee must receive pay for unused, accrued comp time upon termination
  - Employee may withdraw his/her agreement at any time
  - Employer can discontinue the compensatory time program with 30 days' notice to employees

How Much Will the FLSA Be Enforced?

- On March 16, 2017, the White House proposed slashing 21% of the DOL's funding
- According to a White House proposal, the budget for fiscal year 2018 calls for $9.6 billion in discretionary spending at the DOL, down from $12.2 billion for the previous year

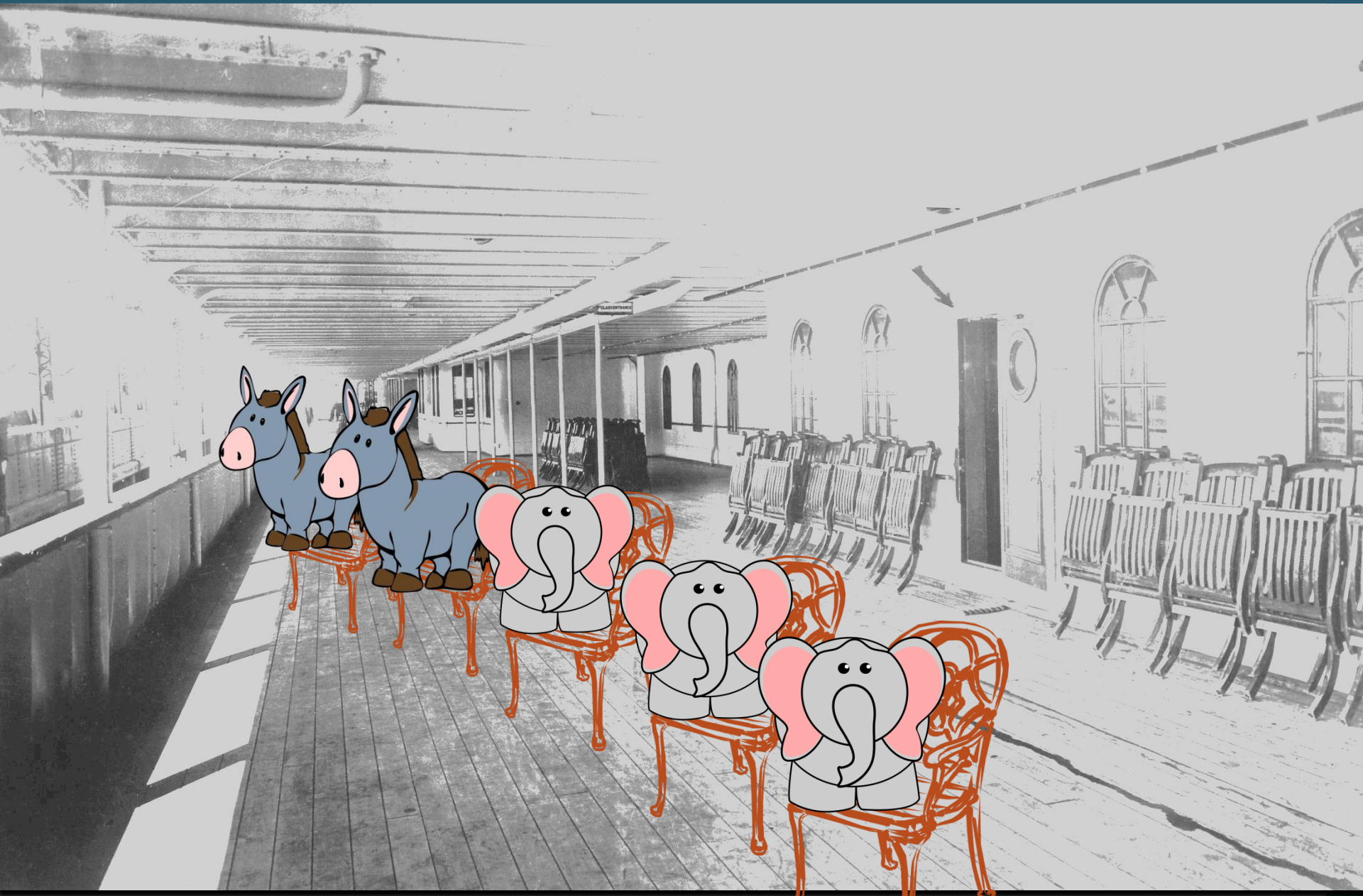
RESHUFFLING THE NLRB DECK

The Five-Member Board

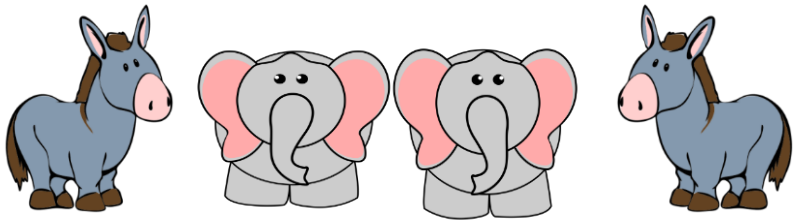
The End of an Era – Obama Board

The End of an Era

The Trump Board (Anticipated)

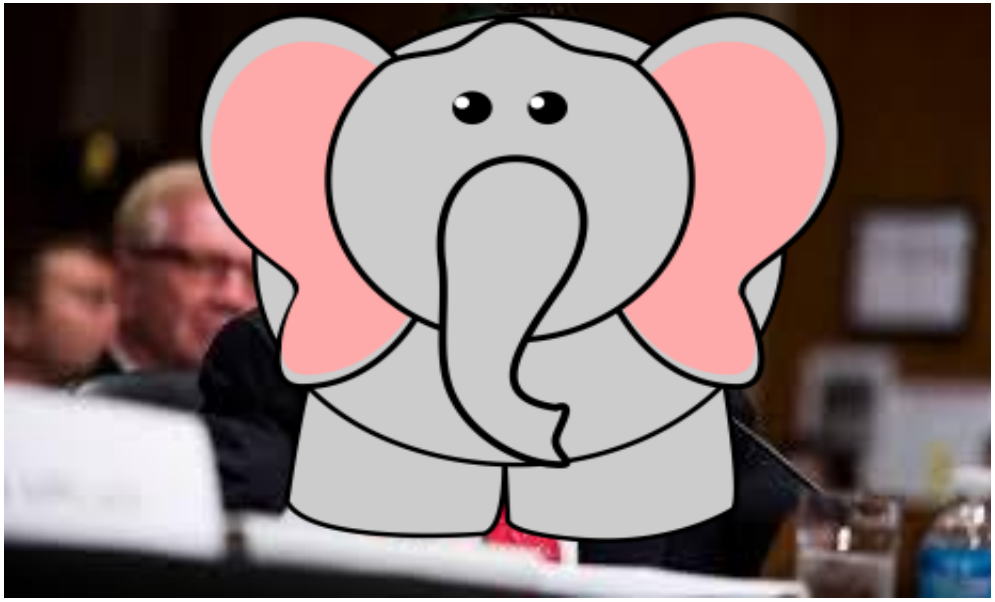


The Trump Board (So Far)



The Trump Board's #5

The Trump Board's #5



What Will the Trump Board Do?

- Discontinue former initiatives?
- Roll back Obama NLRB changes?
- Something entirely different?

Who Will Be the Next NLRB General Counsel?

Nov. 2012 - Nov. 2017
Richard Griffin

2018-2023
Definitely Not Richard Griffin

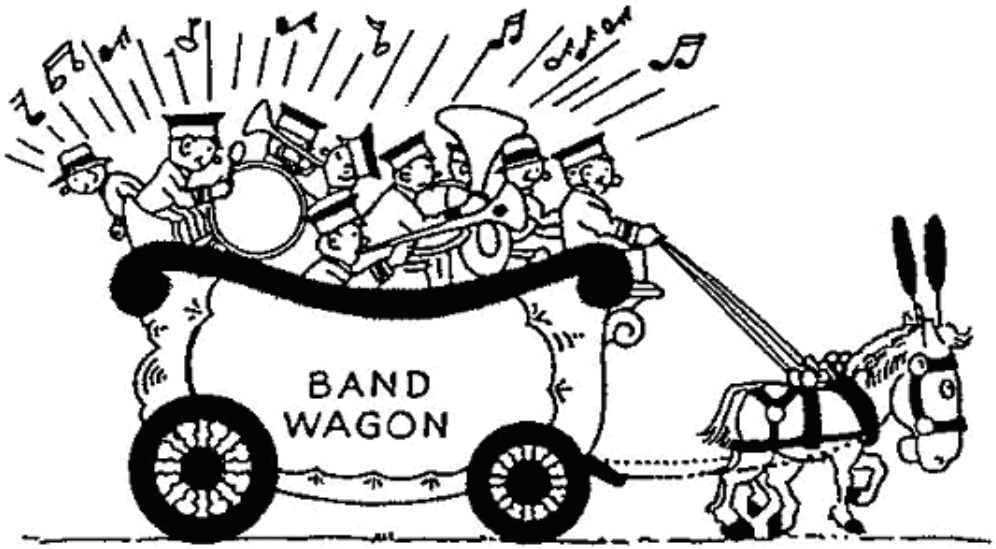
JOINT EMPLOYMENT

NLRB Joint Employer Initiative

- The NLRB's controversial 2015 decision in *Browning-Ferris Industries of California* loosened the standard for finding a joint employer relationship.
  - Now, the NLRB may find a company to be a joint employer even if it does not exercise control in a direct and immediate way.
  - The NLRB may also find a company to be a joint employer if in practice it does not exercise any authority at all, as long as it possesses *the authority* to control employees.

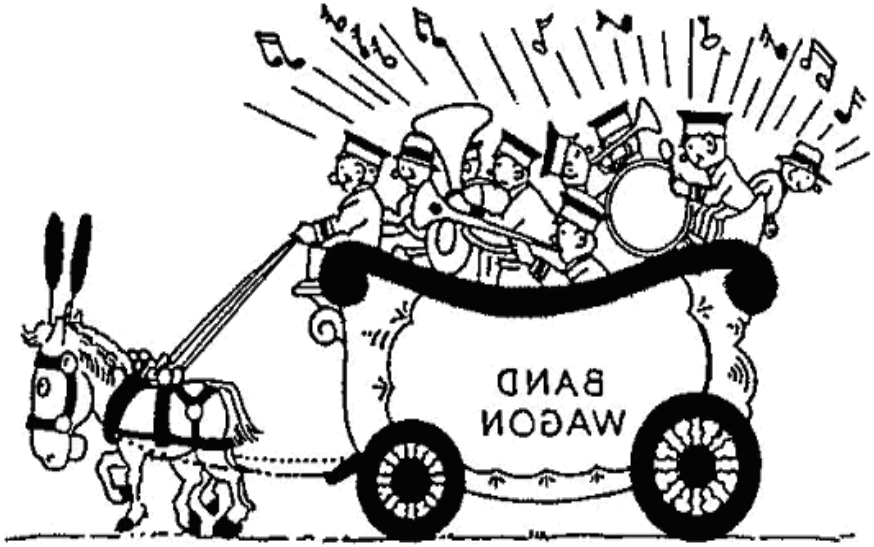
Joint Employment: The DOL Followed Suit

- In January 2016, the U.S. DOL Wage and Hour Division issued a new interpretation of joint employment under its laws.
- Under the new interpretation, joint employers were jointly and severally liable for violations of those laws.
- Additionally, an employee's activities at various joint employers are aggregated. Importantly, this means that the hours an employee works at two or more employers can be added together for purposes of calculating overtime.



Joint Employment: The DOL Reverses

- On June 7, 2017, the U.S. Department of Labor (DOL) announced the withdrawal of its joint employment guidance.
- The DOL noted: "Removal of the administrator interpretations does not change the legal responsibilities of employers." Accordingly, employers must continue to be careful when entering into independent contractor arrangements or employee sharing/staffing arrangements — but the DOL's decision signals that it may take a more pro-employer approach to these issues going forward.



Awaiting NLRB Joint Employment Reversal

- The NLRB has not abandoned the standard in *Browning-Ferris Industries of California* that loosened the standard for finding a joint employer relationship (yet!)
  - However, the U.S. Court of Appels in Washington, D.C. will soon rule on an appeal of *BFI*.
  - On August 4, 2017, a different panel of that same court overruled the NLRB's joint employer holding in a separate case, against CNN. This does not necessarily show how it will decide *BFI*, but employer groups see it as an optimistic sign.

CHANGES FOR FEDERAL CONTRACTORS

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

OFCCP

U.S. DEPARTMENT OF LABOR

Blacklisting

- On August 25, 2016, the government issued the Fair Pay and Safe Workplaces Executive Order, which imposed obligations on companies bidding for future federal contracts, including:
  - Disclosing administrative determinations, civil judgments and arbitration awards where the company was found to have violated any of 14 identified labor laws
  - Providing non-exempt employees with detailed salary and overtime information, and inform workers of their independent contractor status in writing
  - Agreeing not to require workers to enter into to any mandatory pre-dispute arbitration agreements on Title VII discrimination claims or sexual harassment claims

Blacklisting

- On March 27, 2017, President Trump signed legislation and issued an executive order nullifying the Obama administration's Fair Pay and Safe Workplaces executive order and implementing rules and guidance.

Blacklisting

- With the rescission, federal contractors will *not* be required to:
  - Comply with the paycheck transparency rules.
  - Report alleged labor violations to federal agencies as part of the bid process.
- And federal contractors can:
  - Enter into mandatory arbitration agreements concerning employee Title VII claims.

OTHER RANDOM HAPPENINGS

Maternity Leave

- In early March, Trump announced a policy proposal providing six weeks' leave at partial pay for married birth mothers only.
  - Critics argue this insufficiently protects low-income women, it fails to account for medical complications following childbirth, and that it perpetuates sex stereotypes that only women should care for children.

Persuader Rule

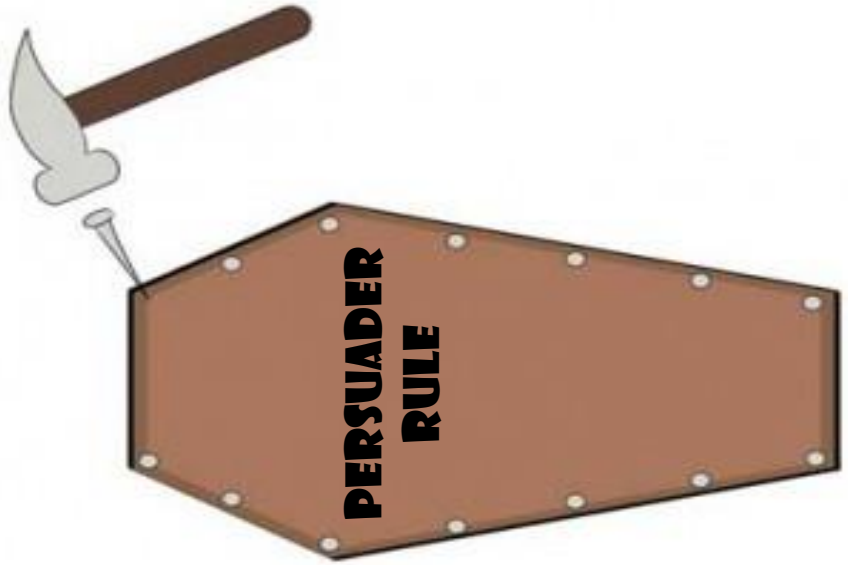
- The Labor Management Reporting and Disclosure Act of 1959 requires employers and their labor relations consultants to report to the federal government any activities undertaken with an object, directly or indirectly, to persuade employees about how to exercise their rights to union representation and collective bargaining
- Many of the required disclosures are financial in nature
- The DOL publishes the information on its website

Persuader Rule

- Historically, “advice” has been exempted from the reporting requirement
- The Obama Administration’s Persuader Rule eliminated this exception, making such activity subject to reporting
- On November 16, 2016, a federal district court in Texas issued a permanent injunction blocking the Persuader Rule nationwide

Persuader Rule

- The case is still alive, and others could intervene to try to keep the Persuader Rule alive through the appeals process, but the Trump Administration is unlikely to make preserving the Persuader Rule a priority.



Class Action Waivers

- Are employers allowed to have individual employees sign arbitration agreements that bar them from pursing work-related claims on a collective or class basis?
- The NLRB has said “no” since 2012.
- On appeal, the federal courts disagreed about whether the NLRB’s position ran afoul of the Federal Arbitration Act.

Class Action Waivers

- In January 2017, the Supreme Court agreed to hear the case, but not until its next session (presumably it is waiting for a full Court).

A Little West of Here . . .

- California employers cannot require their employees to work more than six days in seven, but the clock restarts each workweek, meaning employees can work as many as 12 consecutive days without a day of rest, the California Supreme Court ruled May 8, 2017, in *Christopher Mendoza v. Nordstrom, Inc.*

Maternity Leave

- The Family and Medical Insurance Leave Act ("FAMILY Act") was reintroduced in congress last February (earlier attempts failed), and would provide workers 12 weeks of partially paid leave for those qualifying for FMLA leave; it would be available to spouses, domestic partners, same-sex couples, and adoptive parents.
  - The FAMILY Act must first pass in the House and Senate before it lands on Trump's desk to be signed into law.

Digital OSHA Reporting

- Last year, the Occupational Safety and Health Administration (OSHA) promulgated a regulation that requires, among other things, certain employers to electronically submit occupational injury/illness information to OSHA beginning in July 2017.
- That regulation did not change employers' existing obligations to collect, maintain and certify occupational injury/illness records. But, it does require some employers to electronically submit certain records, and the effective date for electronic reporting for jurisdictions covered by federal OSHA was to be phased in a series of dates, beginning July 1, 2017.

Digital OSHA Reporting

- The anti-retaliation provisions become effective August 10, 2016, but OSHA delayed their enforcement until Dec. 1, 2016.

2017 Labor and Employment Year in Review

Questions?

FAEGRE BAKER DANIELS

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