

2017 in Employment Law: Update and Predictions

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President Donald J. Trump took office on January 20, 2017, and it is safe to say that the Trump administration will take a different approach to labor and employment issues than the Obama administration; however, it is impossible to predict what President Trump (and Congress) will prioritize in the coming months and years. Nevertheless, there is value in reviewing what changes have already occurred and in trying to prepare in advance for anticipated changes.

A. Changes with the Department of Labor (“DOL”)

Wage and Hour. Obama’s new overtime rule was scheduled to take effect on December 1, 2016. Its most significant change would have been requiring employers to pay overtime to employees who make less than \$913 per week whereas the prior salary test for the white collar exemptions was \$455 per week. On November 22, 2016, a federal district court in Texas granted a temporary injunction blocking the new rule from taking effect on December 1, 2016. The case was brought by 21 states and various business groups. *Nevada v. U.S. Department of Labor*, U.S. District Court for the Eastern District of Texas, No. 16-cv-731.

The Government filed a notice of appeal in December 2016 to Fifth Circuit Court of Appeals. In 2017, the Government has filed three unopposed motions to extend time to file their reply brief. In the last motion, the Government requested the additional time “to allow incoming leadership personnel adequate time to consider the issues.” Alexander Acosta was confirmed as Secretary of Labor on April 27, 2017, and, on September 5, 2017, Acosta filed a motion to dismiss appeal which was granted on September 6, 2017. Why?

On July 26, 2017, the DOL published a request for information - the first step in the rulemaking process - asking for input on changes that should be made to the overtime rules. The DOL sought comments on several issues, including:

- Would updating the salary threshold to keep pace with inflation be the appropriate measure?
- Should multiple salary levels be set to account for employer size and geographical regions?
- Should different salary levels be considered for the executive, administrative, and professional exemptions?
- Would it be preferable to base the exemption entirely on the duties test without regard to the salary paid by an employer?
- Should non-discretionary bonuses and incentive payments be counted towards an employee’s salary?

The deadline to submit comments was September 25, 2017; and the DOL received more than 214,000 responses. My prediction is that DOL will issue revised overtime regulations that will increase the salary threshold for the white collar exemptions, but nowhere near the increase provided in the Obama regulations.

Continued on next page

That said, the court case regarding the overtime issues is not complete. As noted above, the Fifth Circuit dismissed the appeal on the temporary injunction. However, while that appeal was pending, on August 31, 2017, the District Court granted summary judgment in favor of the businesses and states and invalidated the rule on the same grounds used to grant the preliminary injunction. On October 30, 2017, the Government filed a notice of appeal to the Fifth Circuit, but asked to stay the appeal pending the outcome of the new rulemaking. The Fifth Circuit has stayed the appeal with a status update due in May 2018.

DOL Independent Contractor Guidance. In July 2015, the DOL issued guidance as to the classification of works as independent contractors versus employees. The guidance tightened regulation and enforcement of employer misclassifications of employees as independent contractors and contained an expansive view of the "employment" relationship, i.e. "most workers are employees under the FLSA," rather than independent contractors. The DOL set forth a multi-factor "economic realities" test with a focus on whether a worker was economically dependent on the employer or was in business for himself or herself.

On June 7, 2017, Secretary Acosta announced the agency's withdrawal of its 2015 independent contractor guidance. I predict the DOL's new independent contractor test will no longer start with the presumption that all workers are employees, and, instead, will consider factors such as the degree of employer's right to control the manner in which work is performed; the degree of skill required to perform the work; the worker's opportunity for profit or loss; and the extent to which the work is an integral part of the business.

DOL Joint Employer Guidance. In January 2016, the DOL issues guidance on joint employer relationships with a broad interpretation of joint employment. Per the guidance, joint employer liability did not require "direct control;" "indirect control" was sufficient because "[t]he concept of joint employment, like employment generally, should be defined expansively under the FLSA."

On June 7, 2017, Secretary Acosta announced the agency's withdrawal of its 2016 guidance on joint employment. I predict the DOL will return to requiring "direct control" (i.e. hiring and firing, scheduling, and determining compensation) over the worker to find a joint employment relationship.

DOL's Persuader Rule Rescission. Pursuant to the DOL's Persuader Rule law firms providing strategic advice to companies facing union organizing drives would be required to disclose their clients and their fees in connection with such activities, far expanding the rule beyond its original coverage. In November 2016, the U.S. District Court for the Northern District of Texas issued a nationwide permanent injunction continuing its preliminary injunction against the enforcement of the rule. In June 2017, the DOL published a Notice of Proposed Rulemaking and proposed to rescind the rule.

B. Changes in Immigration

H-1B Visas. Under the H-1B program, the government admits 85,000 foreign workers annually. In April 2017, President Trump signed executive order regarding H-1B visas requesting a report on the system. In the past, Trump has said H-1B visas "should include only the most skilled and highest-paid applicants and should never, ever be used to replace American workers."

E-Verify. During the campaign, President Trump indicated that he would mandate the use of E-Verify for all workers in the country. This change would have little effect in Mississippi. Pursuant to Mississippi's Employment Protection Act, all Mississippi employers are required to use E-Verify for new hires as of July 1, 2011.

DACA and Dreamers. President Obama signed an executive order establishing the Deferred Action for Childhood Arrivals ("DACA") which protected undocumented workers who were brought to the United States as children. To be eligible, the applicants had to have arrived before age 16 and live here since June 15, 2007. President Trump has signed an executive order ending the program and calling on Congress to take action.

C. Changes in the EEOC

Victoria Lipnic is the Acting Chair of the EEOC. She believes the EEOC serves a limited role as an enforcement agency and opposes EEOC actions which arguably conduct legislative functions. She has dissented against the Commission guidance and opinions that arguably strayed from federal court determinations, legislative history and/or plain statutory text, such as pregnancy discrimination guidance that was rejected by the U.S. Supreme Court. Thus, Lipnic will likely rein back on the commission's more progressive or activist policy

efforts supported by the previous administration.

Additionally, President Trump has nominated Janet Dhillon as the new EEOC Chair and Daniel Gade as the new EEOC Commissioner. Dhillon has served as general counsel of Burlington Stores, Inc., J.C. Penney's, and U.S. Airways. Gade would take over the remaining vacant commissioner spot and solidify a Republican leaning EEOC.

The Trump administration's two nominees to the EEOC told U.S. senators during their confirmation hearings on September 19, 2017 that they were personally opposed to workplace discrimination based on sexual orientation and gender identity, but they could not assure lawmakers that they would support the EEOC's view that adverse actions against gay or transgender workers violates federal civil rights laws. As such, the EEOC might recall its prior guidance, "What You Should Know about EEOC and the Enforcement Protections for LGBT Workers," thus deferring to the courts and congressional action.

D. LGBTQ Rights

Whether Title VII protects against discrimination and harassment based upon sexual orientation and gender identity will remain a hot topic. In March 2017, the Eleventh Circuit Court of Appeals (Florida, Georgia & Alabama) affirmed prior precedent that Title VII does not protect against discrimination based on sexual orientation. In April 2017, the Seventh Circuit Court of Appeals (Illinois, Indiana & Wisconsin) was the first appellate court to hold Title VII prohibits discrimination based on sexual orientation. In June 2017, the EEOC filed an amicus brief in a Second Circuit Court of Appeals (Connecticut, New York and Vermont) case asserting that Title VII includes protection against sexual orientation discrimination. The following month, the Department of Justice filed amicus brief in the same case taking the opposite position, stating "the EEOC is not speaking for the United States and its position about the scope of Title VII is entitled to no deference beyond its power to persuade." Given the split in Circuit Court opinions, the U.S. Supreme Court will eventually decide the issue, absent congressional action.

E. Changes to the NLRB

Under the Obama administration, the National Labor Relations Board was extremely concerned about employers attempting to chill the employees' rights to collectively discuss the terms and conditions of their employment. As such, the NLRB issued guidance regarding employee handbooks and social media policies. The NLRB also adopted accelerated union election rules, known as the "quickie election rules." I would anticipate a rollback in these policies and procedures.

F. Conclusion

Changes in employment law have come and will continue to come under President Trump. It is imperative that employers are staying informed on these changes. Our firm offers a variety of blogs, webinars, and breakfast briefings, and I encourage you to visit www.bakerdonelson.com to learn more.

Jennifer G. Hall is a shareholder in the Jackson office of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. Only representing employers, Jennifer devotes a significant amount of her practice in consulting and advising employers with their human resources issues, including training and handbook review. She also represents employers before the Department of Labor, the Equal Employment Opportunity Commission, the Mississippi Department of Employment Security, and federal and state courts.