

HUSCH BLACKWELL

Rehabilitation and Transition Conference

Changes to Expect in the New Administration

FEDERAL LABOR AND EMPLOYMENT LAW
DEVELOPMENTS & RECENT CASES

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Tom, a member of Husch Blackwell's Healthcare, Life Sciences & Education team, brings a decades-long passion for solving clients' problems to his practice, which spans traditional labor law and all aspects of employment counseling and law.



Tom has experience in nearly all forms of administrative and civil litigation at the federal and state levels. He has also been involved in areas as diverse as sexual harassment avoidance, class action wage and litigation issues, bargaining and union relationships, executive compensation and contracts, and successful discipline of employees.

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FEDERAL BALANCE OF POWER

- Executive Branch
 - Transfer to Republican Control
- Senate – 2016 Election Results
 - 46 Democrats
 - 2 Independents
 - 52 Republicans

FEDERAL BALANCE OF POWER (CONT.)

- House of Representatives – 2016 Election Results
 - 193 Democrats
 - 237 Republicans
 - 5 Vacancies (4 Republicans, 1 Democrat)

TRUMP'S PRIORITIES

- Appoint U.S. Supreme Court Justice – Neil Gorsuch sworn in 4/10/17
- Appoint Other Federal Judges
- Appoint Key Executive Branch Personnel
- Repeal and Replace the ACA
- Immigration Reform

TRUMP'S PRIORITIES (CONT.)

- Repeal/Block Obama's Executive Orders
 - Overtime rules
 - Paid sick leave
 - Pay data disclosures
 - Persuader rule
 - Fair pay & safe workplace
 - Joint employer initiatives

FEDERAL AGENCIES

- NLRB, DOL and EEOC
 - Considerable rule making authority
 - Robust investigative powers
 - Administrative decisions
 - January 2014, President Obama’s State of Union Address declared 2014 “a year of action... So wherever and whenever I can take steps without legislation... that’s what I’ll do.”
 - Impact of a Trump Presidency

NATIONAL LABOR RELATIONS BOARD

- Current status of the NLRB – members
 - Mark Gaston Pearce (D)
 - Philip A. Miscimarra, Chairman (R) – appointed in April
 - Laura McFerran (D)

UNION ORGANIZING

- Ambush Elections
 - Effective April 14, 2015
- Micro-Units
- “Joint Employer” definition broadened
- Fewer NLRB elections
- Unions’ win rate increase to 72%
- Smaller units

WISCONSIN RIGHT TO WORK LAW

- Union Security Provisions Unlawful
- Payment of Dues
- Impact on Bargaining
 - Dues check-off survives contract expiration
 - Vague union authorization forms

NLRB AND THE NON-UNION WORKPLACE

- At-Will Employment
- Off-Duty Workplace Access
- Job Abandonment Rules
- Confidentiality During Internal Investigations
- Confidentiality and Non-Disparagement Policies
- Social Media Policies/Terminations

DEPARTMENT OF LABOR FLSA OVERTIME REGULATIONS

- Enjoined 11/22/16
- Salary Level \$913/week (\$47,476 annualized)
 - Automatic increases every three years
 - Option to reclassify employees to non-exempt or increase salary level
 - Up to 10% of minimum may come from non-discretionary bonuses and incentives if paid at least quarterly

DEPARTMENT OF LABOR

- Use of Opinion Letters
- Executive Orders – Federal Contractors
 - Paid Sick Leave E.O.
 - Fair Pay and Safe Workplace E.O. permanently blocked 3/27/17
 - Pay Transparency – non-retaliation rules also blocked

EEOC STRATEGIC ENFORCEMENT PLAN 2017-2021

- Eliminate Barriers in Recruiting and Hiring
- Protect Vulnerable Workers
- Select Emerging and Developing Issues
- Equal Pay Protection
- Protecting Access to the Legal System
- Preventing Systemic Harassment

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

- EEO-1 Pay Data Collection – March 2018
- New Enforcement Guidance on Retaliation
- Updated Guidance on Pregnancy Discrimination
- Transgender Bias Suits/Sexual Orientation Claims
- Americans with Disabilities Act Cases

FEDERAL DEFEND TRADE SECRETS ACT

- Enacted May 11, 2016
- Federal Claim for Trade Secrets Misappropriation
- Possibility of Double Damages and Attorney's Fees
- Possible Ex Parte Seizure of Misappropriated Trade Secrets and Related Materials
- Whistleblower Protection
 - Notice of immunity provisions

WISCONSIN UPDATES

- LIRC may be eliminated
- WFEA Statutory Offers of Settlement
- WFEA Limitations on Remedies

AVOIDING LIABILITY

- Make sure current policies and documents are compliant
- Assign a point person to monitor expected changes
- Be prepared to modify policies and practices
- Management and supervisory training on expected changes and solid “blocking and tackling” human resources skills
- Assign a “gatekeeper” to carefully review all adverse employment actions

SUPREME COURT DECISIONS

Agency Regulation

- Encino Motorcars, LLC v. Navarro
- **Decided:** June 20, 2016
- **Issue:** Whether the DOL, in promulgating a 2011 regulation that changed its long-standing interpretation regarding overtime laws as it pertains to “service advisors” at car dealerships, followed the proper procedures as outlined in the Administrative Procedures Act.
- **Holding:** The DOL did not provide sufficient explanation behind its decision, so the 2011 regulation should not be given deference.
- **Significance:** While this particular holding is fairly narrow in scope, it is an example of how regulations can be challenged via the judicial system, and, given the impending change in Administration and judicial appointments, this may be the vehicle of choice for industry and trade associations to do so in the future.

SUPREME COURT DECISIONS

Attorney's Fees and Title VII

- CRST Van Expedited, Inc. v. EEOC
- **Decided:** May 19, 2016
- **Issue:** Whether a favorable judgment on the merits is necessary in order to be considered the “prevailing party” such that attorney’s fees can be recovered in a Title VII case.
- **Holding:** A party can be a “prevailing party,” even absent a ruling on the merits.
- **Significance:** Employers can recover attorney’s fees when they “prevail” in a Title VII case—which can occur if the court decides the case on procedural, rather than factual, grounds—if an employee’s claim is frivolous, unreasonable, or groundless.

SUPREME COURT DECISIONS: PENDING

Collective Action Arbitration Agreements

- Epic Systems Corporation v. Lewis
- **Oral Argument:** TBD
- **Issue:** Whether an employment contract that requires employees to individually arbitrate wage and hour claims is enforceable.
- **Significance:** The Seventh Circuit held that contractually prohibiting employees from participating in collective action violates their right to engage in protected concerted activity under the NLRA, and the FAA does not mandate enforcement of such arbitration provisions. Unless this decision is overturned, class action waivers will not be enforced.

SEVENTH CIRCUIT DECISIONS

Disability Discrimination

- Dunderdale v. United Airlines
- **Decided:** December 3, 2015
- **Issue:** Whether the employer's revised seniority and job-bidding system, which removed certain exceptions for employees who required accommodations for a disability, violates the ADA.
- **Holding:** There were no no-bid positions open at the time the employee needed to be moved to a different position due to his lack of seniority and he did not make sufficient efforts to obtain another reasonable accommodation or another position; as such, he could not establish a viable claim for disability discrimination.
- **Significance:** A reasonable accommodation, absent special circumstances, cannot override a bona fide seniority system, and employers are not required, as a reasonable accommodation, to remove employees from their current position to allow disabled employees to assume those jobs.

SEVENTH CIRCUIT DECISIONS

Title VII Discrimination

- Hively v. Ivy Tech Community College
- **Decided:** April 4, 2017
- **Issue:** Whether employees can maintain a discrimination claim under federal law for sexual orientation discrimination.
- **Holding:** Sexual orientation discrimination is a type of discrimination on the basis of sex, and is therefore prohibited under Title VII.
- **Significance:** While the court acknowledged that it could not effectively add another protected category into Title VII, it concluded, based on Supreme Court precedent, that discrimination on the basis of sexual orientation amounts to discrimination on the basis of sex. It became the highest court to make this determination, which could set this issue up for Supreme Court review in the near future.

WISCONSIN COURT OF APPEALS DECISION

Non-Solicitation Agreements

- Manitowoc Company v. Lanning
- **Decided:** August 17, 2016
- **Issue:** Whether the employer can enforce a provision in an employment contract that prohibits an employee from inducing other employees to resign or to work for a competitor, customer, or supplier.
- **Holding:** The non-solicitation provision is not enforceable because it is not sufficiently narrowly tailored.
- **Significance:** Much like other aspects of restrictive covenants in employment agreements, a non-solicitation prohibition can only be as broad as is necessary to protect legitimate business interests.

TEXAS DISTRICT COURTS DECISIONS

Workplace Safety and Reporting

- Texo ABC/AGC, Inc. v. Perez
- **Injunction Denied:** November 28, 2016
- **Issue:** Whether OSHA's recent Improve Tracking Workplace Injuries and Illnesses Rule unlawfully limits employer post-accident drug testing and safety incentive programs.
- **Holding:** The trade groups and independent companies that filed the lawsuit did not adequately support their argument that the Rule is likely to cause irreparable harm; their arguments were too speculative in nature.
- **Significance:** The Rule, which went into effect December 1, 2016, may require employers to more narrowly tailor post-incident drug testing and safety incentive policies so as to not dissuade employees from reporting a post-accident injury.

TEXAS DISTRICT COURTS DECISIONS: PENDING

Overtime Pay

- State of Nevada v. US Department Of Labor
- **Injunction Issued:** November 22, 2016
- **Issue:** Whether the DOL's proposed overtime Rule, which increases the minimum salary level of certain employees who are exempt from overtime pay regulations, should be allowed to take effect on December 1, 2016.
- **Holding:** The DOL exceeded its authority under FLSA in effectively supplanting the "duties test" outline in the exemptions.
- **Significance:** For now, this proposed Rule will not go into effect. The DOL filed an appeal to the Fifth Circuit in December, though the court denied its motion to stay pending that appeal. Given the change in administration since that time, along with a motion filed by the Texas AFL-CIO to intervene in this lawsuit, the ultimate outcome if this appeal is unclear.

MASSACHUSETTS DISTRICT COURT DECISION

Age Discrimination

- EEOC v. Texas Roadhouse, Inc.
- **Consent Decree Entered (settled):** March 31, 2017
- **Issue:** Whether Texas Roadhouse engaged in a “pattern or practice” of age discrimination in violation of the Age Discrimination in Employment Act (“ADEA”).
- **Holding:** The company engaged in a pattern of denying individuals age 40 and older positions in the front-of-the-house (hosts, bartender, servers) where they would be seen by and interact with customers.
- **Significance:** The EEOC filed this lawsuit, which covered nearly 500 stores and thousands of individuals, in 2011; it is the largest age discrimination suit that the EEOC has brought to court in decades. The parties agreed to settle this case, which will require Texas Roadhouse to pay \$12 million and change its hiring practices.

QUESTIONS?

Thank You!

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