Labor and Employment Law Special Briefing

2016
Looking Back on the Labor and Employment Roller-Coaster Ride

SESCO is pleased to provide a detailed white paper summarizing the significant challenges employers of all sizes, in all industries and in all states faced in 2016. This white paper summarizes the most significant decisions. Of course if you have any questions how these may impact your organization, we're as close as your telephone.

The year 2016 will undoubtedly be remembered as an unpredictable roller coaster for the labor and employment scene, with controversial regulations both issued by federal agencies and rolled back by the courts. And the unpredictability was seen in the courts, too, prompted by the unforeseen death of Supreme Court Justice Antonin Scalia in February and the vacancy left on the High Court for the rest of the year. The national election year also sparked heated battles over issues underscoring deep national divides, such as antidiscrimination protections for lesbian, gay, bisexual, transgender, and queer individuals, and fixing our complex immigration problem.

SESCO took a look back on 2016 with the aim of highlighting the most important labor and employment developments of the year. Here are the ones that our internal team of experts found most noteworthy.

AT THE HIGHEST COURT

Perhaps nothing marked the year at the Supreme Court more than the passing of Justice Antonin Scalia in February. The sad news sparked a standoff with Republicans refusing to even take up consideration of President Obama's March 16 nomination of Merrick Garland – a move that left a vacancy on the Court for the rest of the year resulting in 4-4 decisions in several important cases. In other rulings impacting employment law, the Court addressed statistical evidence in class certification, Fair Credit Reporting Act standing, the Department of Labor's automobile service advisors exemption, and class action waivers.

Empty chair left important questions unanswered. On March 29, the Court's 4-4 tie in *Friedrichs v. California Teachers Association* summarily upheld a Ninth Circuit opinion that allows public-sector unions to collect agency fees. Conventional wisdom was that Justice Scalia would have provided the deciding vote in the case, which was expected to overturn the Court's 1977 precedent in *Abood v. Detroit Board of Education.* The closely watched case had critical implications for public-sector unions and their ability to remain viable. The increasing number of right-to-work laws in many states now bar requirements that employees either join a union or pay a fair-share service fee – an "agency fee" – which is generally the same amount as union dues. The petition for certiorari in the *Friedrichs* case had questioned whether public-sector employees could be forced to pay agency fees, which is currently permitted under California law. The teacher challenging the lawfulness of agency fees sought rehearing, but the Court declined the request in a June 28 order.

Immigration Reform. On June 23, in *U.S. v. Texas*, the Court's 4-4 action let stand a decision in which the Fifth Circuit upheld a district court injunction that stands in the way of an executive enforcement guidance that would implement the Department of Homeland Security's Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program. The DAPA program would have allowed DHS to halt deportation proceedings and issue work permits and other benefits to a specific class of undocumented immigrants. The program sought to implement immigration reform measures proposed by President Obama in November 2014 after immigration reform had stalled in Congress. The preliminary injunction also blocked a proposed expansion of a similar program, Deferred Action for Childhood Arrivals (DACA), initially implemented in 2012.

FCRA standing. In a Fair Credit Reporting Act case with clear implications for employers that rely on consumer reporting agencies to run background checks (and so must follow the Act's notice requirements), the Court held, in *Spokeo, Inc. v. Robins*, the Ninth Circuit erred in its analysis of whether a plaintiff suing over inaccuracies in his credit report had Article III standing. Specifically, the appeals court analyzed whether the alleged injury (a statutory violation) was particularized, but it failed to also consider if the injury was "concrete" – both are required. Remanding for further analysis, the Court noted in its May 16 ruling that "bare" procedural statutory violations will not automatically confer standing, but they may be enough in certain circumstances where there is a risk of real harm.

DOL's exemption flip-flop. On June 20, in *Encino Motorcars, LLC v. Navarro*, the Court dealt a blow to the Department of Labor, finding that it had failed to give a reasoned explanation for the change in policy in its 2011 regulations that automobile service advisors are entitled to Fair Labor Standards Act overtime compensation. The 6-2 decision concluded that the regulation was not entitled to *Chevron* deference and vacated the Ninth Circuit's contrary ruling. Because the 2011 regulation is inconsistent with the DOL's longstanding earlier position, the industry had significantly relied on the interpretation since 1978 that service advisors are exempt from the overtime provisions of the FLSA. Considering also the fact the service advisors had negotiated and structured compensation plans based on this understanding, the Court determined that the rule cannot carry the force of law.

Affirmative action. Addressing the case for a second time, the Court held on June 23, in a 4-3 decision, in *Fisher v. University of Texas at Austin*, that the university's consideration of race in a portion of its admissions decisions was lawful under the Equal Protection Clause of the Fourteenth Amendment. Of note, the Court advised that the university does have a continuing obligation to satisfy the strict scrutiny burden by periodically reassessing its admission program's constitutionality and efficacy in light of the school's experience and the data it has gathered since adopting its admissions plan, and by tailoring its approach to ensure that race plays no greater role than necessary in meeting its compelling interests.

(Justice Kagan took no part in the consideration or decision of either the most recent petition or the Court's June 2013 decision in this case due to her involvement with it when she was the U.S. Solicitor General.)

TBD: NLRB's Take on Class Action Waivers

Looking ahead just for a moment, it may be that the petition for certiorari most watched right now is the National Labor Relations Board's bid for the Court to issue a definitive ruling on class action waivers. Below, the Fifth Circuit rejected the NLRB's finding that 24 Hour Fitness USA's mandatory arbitration policy ran afoul of the National Labor Relations Act, *summarily disposing* of the Board's request for enforcement of an order that had flown in the face of the circuit's prior holdings on the matter.

Circuit split. In *NLRB v. 24 Hour Fitness USA, Inc.*, the Board is asking the Justices to resolve a clear circuit split on the question of whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice under the NLRA because they limit the employees' NLRA rights to engage in "concerted activities" in pursuit of their "mutual aid or protection," under the Act, and are thus unenforceable under the savings clause of the Federal Arbitration Act. However, the Board has suggested that the Court resolve the three other currently pending petitions for certiorari that raise similar questions before resolving its petition.

Other petitions pending. Petitions for certiorari are already pending to review the Fifth Circuit's earlier ruling on the question *(NLRB v. Murphy Oil)*, and the Seventh *(Epic Systems Corporation v. Lewis)* and Ninth *(Ernst & Young, LLP v. Morris)* Circuits' explicit rejection of the Fifth Circuit's analysis.

REGULATION FRONT AND CENTER

Much of the action in 2016 was at the center of the continuing battle between the Obama Administration and its federal agencies and state and federal legislators, who fought hard to roll back what executive branch players saw as necessary regulatory action to address 21st Century concerns. The feds won some and lost some, while other skirmishes are still ongoing.

Epic Overtime Battle

In 2014, President Obama urged the DOL to review severely outdated regulations related to exempt employees. In response, on May 18, 2016, the DOL released its final rule updating overtime eligibility that would automatically extend protection to over four million workers. Passed in 1938, the Fair Labor Standards Act has engendered minimum wage and overtime regulations applicable to many employees. However, the FLSA also provides an exemption from these regulations for executive, administrative, and professional employees, commonly referred to as white-collar workers, who are not entitled to overtime wages. To qualify as exempt, employees must meet certain tests regarding their job duties (duties test) and must be paid on a salary basis at not less than a "minimum specified amount" (salary level test).

The white-collar exemption was originally intended to apply to highly compensated individuals. But due to inflation, the salary threshold failed to provide protection to an increasing number of workers over the years. In 2004, the weekly salary amount was raised for the first time since the 1970s, when it was set at $455 ($23,660 annually). The duties test for exemption was also modified. As a result, the final rule released by the DOL would update the executive, administrative, and professional worker's salary and compensation levels as follows:

- The standard salary level is set at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, currently the south ($913 per week; $47,476 annually for a full-time worker).

- The total annual compensation requirement for highly compensated employees subject to the minimal duties test is set to the annual equivalent of the 90th percentile of full-time salaried workers nationally ($134,004); and

- In order to ensure useful and effective tests for exemption and continued worker protection, the salary and compensation levels will be updated every three years at the above percentile levels.

The final rule also amends the salary basis test to allow employers to satisfy up to 10 percent of the standard salary level with nondiscretionary bonuses and incentive payments such as commissions. Additionally, the DOL included an automatic updating mechanism, which would adjust the salary floor every three years. Notably, the DOL made no changes to the duties tests. The new salary and compensation levels were to take effect December 1, 2016.

Overtime rule blocked. However, on November 22, in *State of Nevada v. U.S. Department of Labor*, a federal district court in Texas preliminarily enjoined the DOL from enforcing its revised overtime rule. A coalition of more than 50 business groups and a separate combined effort by 21 states had sued to invalidate the regulation, seeking expedited consideration and emergency injunctive relief. Ruling on the state plaintiffs' injunction request, the court found they demonstrated a substantial likelihood of success on the merits, as well as the prospect of irreparable harm. A nationwide preliminary injunction preserved the status quo while the court ponders whether the DOL had authority to promulgate the final rule and whether the rule itself was legally viable.

Bona fide executive, administrative, or professional. The court rejected the DOL's contention that Congress did not define the terms "bona fide executive, administrative, or professional capacity" as set forth in the FLSA. While the terms are laden now with legal meaning, the court looked to their plain meaning at the time Congress first enacted the statute and concluded they simply referred to employees who performed actual executive, administrative, and professional duties – *without regard* to their salary level. For good measure, the court noted, Congress had thrown in the phrase "bona fide," which it construed as another telltale sign that Congress meant for the exemption to turn on the specific duties one actually performs.

Duties control. Further, according to the court, those plain meanings suggested "that Congress intended the EAP exemption to depend on an employee's duties rather than an employee's salary." While Congress gave the DOL considerable leeway to "define and delimit" the *types* of duties that would qualify as executive, administrative, or professional, nothing in the statutory language endowed the agency with authority "to define and delimit with respect to a minimum salary level."

Expedited review. Not surprisingly, because the regulations had contained a salary level test for more than 70 years, the Labor Department filed a notice of appeal regarding the district court's order to enjoin implementation and enforcement of the rule on December 1. The Fifth Circuit issued an order December 8 granting the Labor Department's opposed motion for an expedited appeal with some modifications. The appeals court will hear arguments on the first available sitting after all briefing is completed. Notably, based on the schedule, the court will not hear the case prior to the inauguration of President-elect Donald Trump. Meanwhile, the Texas AFL-CIO has moved to intervene in the case, which could keep the case alive – should intervention be granted – even if the Trump administration chooses not to move forward with the appeal.

New sheriff in town. Perhaps the largest looming question with the upcoming transition at the White House has been whether the Labor Department's new overtime regulation will survive. Many predict it will not, citing the position on wages that has been taken by Andrew Puzder, President Trump's nominee for Secretary of Labor. Others have expressed concerns about Puzder's views on the minimum wage and other worker protections. As the CEO of CKE Restaurants, Mr. Puzder has opposed raising the minimum wage or strengthening overtime protections.

Regulatory Rollback

Contractor blacklisting rule enjoined. The Obama Administration published its much-anticipated final Federal Acquisition Rule (FAR) and DOL guidance implementing the President's Fair Pay and Safe Workplaces Executive Order on August 25. Executive Order 13673, signed in July 2014, was designed to ensure that government contracts don't go to companies that violate federal labor laws by requiring potential contractors to disclose labor law violations from the past three years before they can receive a contract. The DOL said the final rule and guidance were "designed to increase efficiency and cost savings by ensuring that federal contractors are responsible and provide basic workplace protections." Opponents quickly dubbed the EO the 'blacklisting' rule, decried its burden on employers, and questioned whether the directive would produce its intended results.

If the new rules had been fully phased in, prospective contractors would have had to disclose violations of 14 basic workplace protections from the prior three years, including those addressing wage and hour, safety and health, collective bargaining, family and medical leave, and civil rights protections. The EO itself also requires that contractors' employees get the necessary information each pay period to verify the accuracy of their paycheck. And it bars federal contractors from enforcing mandatory pre-dispute arbitration agreements with respect to workers' claims alleging sexual assault or civil rights violations – ensuring these plaintiffs get their day in court.

Contractors are already required to disclose findings of fault and liability made in administrative or civil proceedings, but the DOL was of the opinion that current disclosures did not give the whole picture of the contractor's labor compliance track record, additionally requiring the disclosure of *preliminary* findings of violations by federal agency officials as well. Management-side attorneys pointed out the added requirement is a boon for labor unions and plaintiffs' attorneys: Because settlements (before any finding of a violation) are not reportable, federal contractors would now have more incentive to resolve even the most threadbare of claims rather than report allegations without an actual finding of a violation.

Preliminary injunction. But on October 24, in *Associated Builders and Contractors of Southeast Texas v. Rung*, the Eastern District of Texas entered a nationwide preliminary injunction barring the administration from implementing the final rules to effectuate Executive Order 13673. The preliminary injunction came just hours before the final FAR rule and DOL guidance were to be implemented and enjoined those portions of the EO that would impose new reporting requirements on contractors and subcontractors concerning labor law violations and restrict the availability of pre-dispute arbitration agreements regarding matters arising under Title VII and torts based on sexual assault or harassment.

Statutory authority lacking. The enjoining court found that the public disclosure and disqualification requirements being imposed on federal contractors and subcontractors were nowhere found in or authorized by the Federal Property and Administrative Services Act, the statute on which the executive order, FAR rule, and DOL guidance relied. Where Congress has decided to permit the suspension or debarment of government contractors, it has done so expressly in labor laws that apply directly to government contracts, and even then only after final adjudications of alleged violations by the DOL, subject to judicial review. The executive order, FAR rule, and DOL guidance explicitly conflicted with those labor laws that already specify debarment procedures after full hearings and final adjudications for contractors who violate the requirements specifically directed at government contracting, concluded the court. As for the arbitration provision, the court found it was not authorized by the Federal Arbitration Act.

First Amendment. The court also found merit to the plaintiffs' contention that any bidder on a solicitation occurring after the new FAR rule goes into effect will suffer an infringement of their First Amendment rights in the form of "compelled speech" – forcing contractors to engage in public speech on matters of considerable controversy adversely affecting their public reputations, thereby infringing on the contractors' rights under the First Amendment.

Nationwide injunction. Accordingly, the court issued a nationwide injunction barring the implementation of any portion of the FAR rule or DOL guidance relating to the new reporting and disclosure requirements regarding labor law violations. It also enjoined the enforcement of the restriction on arbitration agreements. However the paycheck transparency requirement was not enjoined.

"Persuader" rule too. On March 24, the Labor Department released its long-awaited "persuader rule" expanding the reporting requirements when employers hire third-party consultants (including attorneys) to help craft and deliver messages to workers about unionization. The final rule revises the two public disclosure reporting forms, Form LM-10 (employer report) and Form LM-20 (agreement and activities report), that must be filed, pursuant to the Labor-Management Reporting and Disclosure Act (LMRDA), when an employer engages an external labor relations consultant to undertake efforts to persuade the employer's workers to reject a union organizing campaign. The DOL also provided a summary of the final rule. The proposed reporting changes would have applied to arrangements, agreements, and payments made on or after July 1.

Previously, the employer and labor relations consultant had to file a report when the consultant communicated *directly* with the employer's workers. Under the new rule, both *direct* and *indirect* activities undertaken by a consultant must be reported. Examples of *indirect* consultant activity that must now be reported include conducting a union avoidance seminar for supervisors – provided it is undertaken with an object to persuade employees. At least three lawsuits were filed by trade groups contending that the rule infringes on employer free-speech rights and treads on attorney-client relationships.

Also preliminarily enjoined. Deeming the DOL's controversial persuader rule "defective to its core," a federal court in Texas enjoined the agency on June 27 from implementing the provisions nationwide *(National Federation of Independent Business v. Perez,).* In a lengthy opinion, the district court parted ways with a federal court in Minnesota which, less than a week earlier, had refused to stop the DOL from forging ahead with its "re-interpreted" advice exemption rule and its revised Forms LM-10 and LM-20. Instead, the Texas court saw a clear threat of irreparable harm and a balancing of hardships in the plaintiffs' favor, noting free-speech implications and that, as a practical matter, once employers are compelled to disclose the information, there's no taking it back.

Injunction made permanent. The court converted its preliminary injunction into a permanent one on November 16, thus blocking implementation of the regulation *(National Federation of Independent Business v. Perez).* The rule is facially invalid, the court said: It conflicts with the LMRDA, the rulemaking is arbitrary and capricious in violation of the Administrative Procedure Act, and the DOL exceeded its authority in promulgating it. It is also unconstitutionally vague and violates due process (as well as employers' First Amendment rights). Finally, it runs afoul of the Regulatory Flexibility Act. "DOL's New Rule is not merely fuzzy around the edges," the court wrote. "Rather, the New Rule is defective to its core because it entirely eliminates the LMRDA's Advice Exemption."

DACA/DAPA injunction upheld after Supreme Court rehearing denial. The Supreme Court denied the Obama Administration's bid for rehearing of the case that in June resulted in a 4-4 tie among the Justices and left standing a nationwide injunction barring implementation of the president's executive immigration action, one of a long list of certiorari denials in the Court's October 3 order.

Rehearing denied. In July, the administration filed a petition asking the Supreme Court to grant rehearing of the case; it would have tested the president's immigration reform policy had there been a full panel of nine Justices. In *U.S. v. Texas*, the administration filed a petition for certiorari (No. 15-674) after late in 2015 the Fifth Circuit upheld a district court injunction that stands in the way of an executive enforcement guidance to implement the DAPA program referenced earlier.

Another bite at the apple? Meanwhile, a New York "Dreamer" is challenging the nationwide injunction. The first-of-its kind lawsuit, filed in the Eastern District of New York by a DACA recipient, challenges the reach of what it asserts is the unlawfully broad injunction in *United States v. Texas.* If successful, the new suit would fix a wrongdoing suffered by thousands of DACA recipients who are not party to the Texas case and could reinstate both initiatives in some parts of the country, according to the National Immigration Law Center. An Illinois Dreamer now has filed a similar suit challenging the reach of the purportedly unlawfully broad injunction, hoping to open a new pathway for the implementation of DAPA and expanded DACA outside of Texas, potentially providing relief for millions of families. The plaintiffs in both lawsuits assert that the federal government relied on that injunction to wrongfully revoke three-year work permits that had been issued to them as well as thousands of DACA recipients across the country.

But the Feds Win a Few

NLRB's 'quickie' election rule upheld. The NLRB's revised rule modifying the procedures for union representation elections did not violate the NLRA or the APA, the Fifth Circuit ruled on June 10, affirming a lower court's decision refusing to enjoin its enforcement. The controversial rule amended the procedures for determining whether a majority of employees wish to be represented by a union for purposes of collective bargaining.

Trade groups representing employers had argued that the rule exceeded the Board's statutory authority under the NLRA and violated the APA. Reiterating the high burden faced by the employer groups, the appeals court held, in *Associated Builders and Contractors of Texas, Inc. v. NLRB*, that the challenged provisions neither exceeded the scope of the Board's authority nor violated the APA's arbitrary and capricious standard.

DOL fiduciary rule withstands challenge. On November 4, the D.C. District Court refused to enjoin the DOL's fiduciary rule or otherwise sustain a challenge by the National Association for Fixed Annuities. NAFA had argued that the agency exceeded its statutory authority and improperly categorized insurance agents as fiduciaries. But the new fiduciary rule was, if anything, more compliant with the statute than the five-part test under the 1975 fiduciary regulation, and the fact that commission-based compensation is standard practice among sellers of fixed annuities does not impermissibly convert the best interest contract exemption into a mandate, the court ruled in *The National Association for Fixed Annuities v. Perez.*

Although NAFA, among other things, had challenged the DOL's authority to redefine "investment advice" and "fiduciary" under the Employee Retirement Income Security Act and the Internal Revenue Code, arguing that the rule creates a private right of action which only Congress can do, the court repeatedly returned to a particular theme: the agency's 2010 attempt to redo the 1975 fiduciary framework, which it scrapped the following year.

In proposing the amendments in 2010, the Department explained that the extant five-part test, among other things, no longer reflected the state of the financial industry. The 1975 framework permitted insurance companies to pay commissions on sales of variable and fixed annuities held in ERISA plans and IRAs where the relevant investment advice was not provided "on a regular basis." But a shift over the decades from defined benefit to defined contribution plans meant more and more investors sought advice on one-off, but significant, transactions such as 401(k) rollovers. The decision on how to invest these rollovers "will be the most important financial decision that many consumers make in their lifetime," the agency noted in the 2015 re-proposal.

Federal court refuses to enjoin revised OSHA retaliation rule. Denying a motion filed by various trade associations to enjoin the Occupational Safety and Health Administration from implementing its new anti-retaliation rule, a federal court in Texas November 28 found the plaintiffs failed to show they would be irreparably harmed absent a nationwide injunction. Assertions that post-accident drug testing and safety incentive programs dramatically reduce workplace injuries (and that the rule would unduly curtail these initiatives) or that implementing OSHA's new rule would increase injuries, were unsupported and speculative, said the court in *Texo ABC/AGC, Inc. v. Perez.* With the request for injunctive relief denied, the new rule took effect December 1.

The "Improve Tracking Workplace Injuries and Illnesses" rule requires employers to inform workers of their right to report work-related injuries and illnesses without fear of retaliation, and to implement procedures for reporting injuries and illnesses that are reasonable and do not deter workers from reporting. The rule itself also incorporates the existing statutory prohibition on retaliating against workers for reporting injuries and illnesses. Many practitioners have pointed out that this new rule will allow OSHA to issue citations for practices that it believes are retaliatory even in the absence of any employee complaint.

Other Regulatory Action

EEOC regs on ADA, GINA compliance for employer wellness progranis. The Equal Employment Opportunity Commission released a pair of final rules that map out the extent to which employers may offer inducements and incentives for participation in wellness programs without running afoul of the Americans with Disabilities Act and Genetic Information Nondiscrimination Act. Both final rules, which would apply beginning on January 1, 2017, provide guidance to employers and employees about how workplace wellness programs can comply with the ADA and GINA consistent with provisions governing wellness programs in the Health Insurance Portability and Accountability Act, as amended by the Patient Protection and Affordable Care Act.

AARP, however, filed a lawsuit against the EEOC asking a federal court in the District of Columbia to issue an injunction staying the application date of the rules and to declare that the rules violate both statutes as well as the APA. AARP takes issue in particular with the 30-percent incentive that the EEOC says employers may offer for wellness program participation without rendering the provision of otherwise protected confidential medical or genetic information involuntary. The U.S. Chamber of Commerce has filed an *amicus* brief with the court, asking it to reject AARP's attempt to enjoin the rules.

2017 EE0-1 Report. Beginning in March 2018, the EEO-1 Report will include the collection of summary pay data from employers with more than 100 employees. The first deadline for the new 2017 EEO-1 report will be March 31, 2018, which gives employers 18 months to prepare. On its website, the EEOC has a landing page with a sample of the new form and instruction booklet, as well as a Q&A and other information. For the most part, employers expressed concern about the burden and expense of complying. Management attorneys questioned how the aggregate compensation data and aggregate hours worked data collected on the new form can be relevant to an individual charge of discrimination; they worried the data would create "false positives" for systemic compensation discrimination and put the burden on employers to defend their pay practices.

Paid leave for federal contractors' employees. The DOL released its final rule implementing Executive Order 13706, "Establishing Paid Sick Leave for Federal Contractors," signed by President Barack Obama on September 7, 2015. The final rule implements the requirement in EO 13706 that certain parties contracting with the federal government provide employees up to seven days of paid sick leave annually. Employees will earn one hour of paid sick leave for every 30 hours worked, which may be taken if they are sick, need to care for a sick family member, or must see a doctor or take a family member to a medical appointment. Paid sick leave also may be taken for reasons related to domestic violence, sexual assault, or stalking.

The White House estimates that the final rule will extend paid sick leave to 1.15 million people working on federal contracts, including nearly 600,000 employees who currently lack even one day of paid sick leave. The new regulation applies to all covered contracts solicited and awarded on or after January 1, 2017.

On December 15, the Department of Defense, General Services Administration, and National Aeronautics and Space Administration released an interim rule amending the Federal Acquisition Regulation to implement EO 13706 and the related final rule issued by the Department of Labor. This interim rule is effective January 1, 2017.

DOL had authority to promulgate tip-pool rule change. And, in a win for the DOL, a divided Ninth Circuit held in February that the agency acted within its authority when it promulgated revisions to its tip-pool regulation, reversing a federal district court's order invalidating the 2011 rule change. As revised, the tip-pool regulation prohibits an employer from including non-tipped staff in tip pools *even* when it does not take the tip credit but instead pays the full statutory minimum wage. The FLSA's "clear silence as to employers who do not take a tip credit has left room for the DOL to promulgate the 2011 rule," the majority concluded in *Oregon Restaurant and Lodging Association v. Perez.*

TRENDS THAT GAINED MORE TRACTION

2016 also witnessed two trends that continue to spark controversy yet at the same time gain more traction. The so-call 'gig economy' and the 'fissured workplace' as the Labor Department describes it, are rapidly expanding features of the 21st Century workplace that have spawned significant controversy. The other trend is the sputtering inroads made in antidiscrimination protections for lesbian, gay, bisexual, transgender, and queer individuals.

"Employment" Redefined

The steady pace of economic change continued unabated in 2016, and with it, the rapid reordering of traditional notions of 'employment' and 'work'. Organizations of all stripes continued to shed full-time employees, turning increasingly to part-time workers, long-term temps, outside labor suppliers, independent contractors, and 'gig' arrangements to staff their operations. While the seemingly more nimble 'contingent' workforce model suits the needs of an evolving economy, its growth upends traditional employment protections and security for broader swaths of workers; it has left legislatures, government agencies, and plaintiffs' lawyers struggling to keep up in an effort to ensure the workforce doesn't get left behind economically. These efforts are pushing the bounds of employment law, and presenting considerable challenges for employers, too.

Joint employment. The Department of Labor started the year with a bang when it issued Administrator's Interpretation No. 2016-1 outlining a new test for joint employment and making it clear that the term "employee" under the FLSA (and Migrant and Seasonal Agricultural Worker Protection Act, and Family and Medical Leave Act) was to be construed "as broad as possible." The 15-page guidance, issued January 20 and released together with a Q&A on joint employment, explained that "employee" under these statutes would read more broadly than the common law test, than the National Labor Relations Board's recently announced test under *Browning-Ferris Industries*, and than the OSHA test. The DOL's Wage and Hour Division would use the same expansive "suffer or permit to work" language as does the FLSA's definition of employment.

Browning-Ferris? That was the 2015 NLRB decision that riled the business community – particularly those entities that utilize contingent workforce arrangements. *Browning-Ferris* altered the standard for determining when an entity is a "joint employer" of employees under the NLRA and thus is obligated to engage in collective bargaining with its union. The controversial decision held that to be a joint employer, it was enough that an entity retain the *right* to control employees' terms and conditions of employment (in its contract with a staffing agency, perhaps), regardless of whether it actually *exercised* that right.

The decision drew quick fire and a sustained burn continuing into 2016, which saw Congressional hearings decrying the decision and legislative efforts by Republicans to block the Board's application of the new standard. The employer filed an appeal, which is pending in the D.C. Circuit. Notably, the EEOC has filed an *amicus* brief in support of the NLRB's position, telling the court of appeals that the Board's newly articulated standard is right in sync with the EEOC's own test. (The definition of "employer" in Title VII and the NLRA is virtually identical.)

Making matters worse, in July 2016, the NLRB followed up with Miller & Anderson, Inc., which held that contingent workers can be combined into a single bargaining unit with a joint employer's own, directly employed workers. A bargaining unit that combines workers solely employed by the client or "user" employer with employees jointly employed by that same "user" employer *and* a supplier employer (such as a staffing agency) is appropriate, a divided Board held, because both groups of workers are performing work for the "user" employer, working side by side as part of a common enterprise.

Franchises under attack. It wasn't just staffing agencies and their 'user' employer clients that have felt the heat in recent years. The franchise industry has been fending off challenges on numerous fronts. And, in 2016, two of its standard-bearers succumbed to the pressure. Amidst the ongoing battle between federal agencies and franchisors over potential franchisor liability for franchisee employment law violations, the Subway sandwich chain in August entered into a ‘creative partnership’ with the DOL’s Wage and Hour Division (WHD) under which the agency will provide data about its concluded investigations with Subway franchises, and Subway will in turn share its own data with the WHD. The stated goal: to help Subway understand and use this publicly available data so that Subway can make informed business decisions that reflect existing and potential franchisees’ history of FLSA violations. The parties also said they would explore prospects for using technology to further franchisee compliance, such as building alerts into the payroll and scheduling platform that Subway offers as a service to its franchisees. Under the agreement, Subway will require franchisees to comply with all laws, including the FLSA, and may terminate an existing franchise, refuse to give a franchisee any additional franchise opportunities, or impose other discipline based on the franchisee’s history of FLSA compliance.

Does the franchisor get a break? Probably not. The agreement made clear that it was not meant to waive any of Subway’s liability if found in violation of the FLSA or other statutes. The WHD retains its prosecutorial discretion to investigate and seek remedies for any violations of the FLSA or other relevant laws. And the International Franchise Association (IFA), the industry’s trade group, issued a statement warning of the “catch 22” that the agreement could represent for the industry, particularly in light of the NLRB’s latest doings. The IFA commended franchisor efforts to help guide their franchisees in complying with applicable labor laws. However, these initiatives have been dramatically complicated by the expanded National Labor Relations Board issuance of a new, vague joint employer standard.

McDonald’s settles class action. Then in October came news that McDonald’s Corp. had agreed to put up $3.75 million to settle a class action wage suit brought by crew members at franchisee-owned California Bay-area restaurants – the first class action settlement between McDonald’s and a certified class of crew members working at franchise-operated restaurants. The corporate entity defendants would pay $1.75 million to class members for unpaid wages, as well as all the costs of class notification and administration, and court-awarded statutory attorneys’ fees and costs to plaintiffs’ counsel of up to $2 million – purportedly half of the actual fees and costs plaintiffs’ counsel have incurred. The plaintiffs had maintained that McDonald’s was jointly and severally liable for the California Labor Code violations alleged and raised the overarching issue of whether McDonald’s is a joint employer of the crew members. The court had previously concluded that McDonald’s was not liable as a joint employer, but it permitted the plaintiffs to proceed against McDonald’s under an ostensible agency theory.

NLRB also took on McDonald’s. Meanwhile, the NLRB continued to investigate McDonald’s Corp. alongside its franchisees in an ongoing unfair labor practice case under a theory that McDonald’s may be a joint employer and thus liable for its franchisees’ allegedly unlawful conduct. Currently, the company is involved in discovery skirmishes with the Board, and most recently, lost a special appeal challenging the General Counsel’s request for production pursuant to a court-enforced Board subpoena.

The “gig” economy. The NLRB has since set its sights on the “gig” economy. In October, a Board regional office brought an unfair labor practice case against Postmates, a delivery app, contending that its delivery workers are employees and not independent contractors – and thereby signaling that the Board would be operating under the presumption that gig economy participants are indeed covered employees under the NLRA.

The big story. The biggest story of 2016 on the “gig” front, though, was the $100 million settlement that a federal court in California rejected in a suit brought by Uber drivers who claimed they were misclassified – a bellwether case in a growth industry for plaintiffs firms. (The case at hand is one of a growing number of suits against Uber and other app-based services such as Lyft; even Yelp writers and Mary Kay distributors have tried their luck at litigation.) Here, though, the parties had to go back to the drawing board. Even if it were to approve a likely $84 million in relief – a 90 percent discount from the estimated verdict amount of $854.4 million for non-Private Attorney General Act (PAGA) claims against the rideshare company – the court said it would not sign off on a waiver of an additional $1 billion in potential PAGA recovery in exchange for a comparatively paltry $1 million additional payout.

The trend is local, too. This past year, progressive states and localities have gotten into the act, too, seeking ways to protect this new, untethered breed of worker-entrepreneurs. New York City is at the forefront in this regard, enacting the ‘Freelance Isn’t Free Act’ in November, a first-of-its-kind measure that extends wage theft protection to independent contractors in the city, including gig workers. The ordinance penalizes employers that don’t pay contractors within a designated period of time and, in certain cases, requires written contracts for services worth $800 or more. Statewide, the N.Y. Department of Labor awarded unemployment insurance benefits to two Uber drivers, meaning that in the eyes of the state agency, the drivers were employees of the rideshare app, not mere platform users.

LGBTQ COMMUNITY MAKES GREAT STRIDES

The lesbian, gay, bisexual, transgender, and queer community made great strides in 2016 toward workplace equality, but at times it seemed to be two steps forward, one step back. On one hand the EEOC filed its first lawsuits alleging that sexual orientation discrimination violates Title VII, and federal courts appeared to be shifting to a similar view, with the Seventh Circuit poised to be a groundbreaker. On the other hand, there has been legislative activity at both federal and state levels that appeared to encourage discrimination against LGBTQ individuals, such as North Carolina's controversial law limiting restroom use by transgender individuals.

EEOC enforcement actions. Coverage of discrimination against LGBTQ individuals as sex discrimination under Title VII is one of the priority issues identified in the EEOC's Strategic Enforcement Plan. This year, the agency filed its first lawsuits on this basis. In a federal court in Pennsylvania, the agency sued Scott Medical Health Center, alleging that a telemarketing manager unlawfully harassed a gay male employee, including by regularly calling him "f'**ing faggot," among other derogatory names. In a November 4 ruling, the court adopted the EEOC's view on sexual orientation discrimination and refused to dismiss the claim.

In a federal court in Maryland, the EEOC sued Pallet Companies, *dba* IFCO Systems, alleging that a supervisor discriminated by, among other things, telling a lesbian employee: "I want to turn you back into a woman," and "You would look good in a dress." The company fired her days after she complained. The suit has since settled, with Pallet agreeing to pay $202,200.

Since filing those two suits, the agency has continued advocating its interpretation of Title VII, including by filing suit against Rent-A-Center in Illinois for discriminating against a transgender employee. The EEOC's ongoing efforts also are readily apparent on its website, which, among other resources, provides a list of cases and *amicus* briefs filed by the agency and other court decisions supporting Title VII coverage of LGBTQ discrimination.

***Hively:* Does Title VII cover sexual orientation?** When it comes to the debate on whether LGBTQ discrimination is 'because of' sex, the most significant ongoing Title VII case is *Hively v. Ivy Tech Community College*, in which a part-time professor claimed she was blocked from full-time employment because of her sexual orientation. In a now-vacated July decision, a Seventh Circuit panel felt bound by precedent to rule that sexual orientation is not protected. However, it also indicated that change may be coming: "It seems unlikely that our society can continue to condone a legal structure in which employees can be fired, harassed, demeaned…and otherwise discriminated against solely based on who they date, love, or marry."

On October 11, the panel's ruling was vacated to permit *en banc* consideration of the question – a move largely taken as tipping in favor of the plaintiff and some likelihood that the Seventh Circuit would reverse course. In oral arguments on November 30, the appeals court and the parties were confronted by the legal and practical contradictions surrounding the question.

District courts took on LGBTQ issues too. The Seventh Circuit is not the only court tackling Title VII claims based on discrimination against LGBTQ individuals. Some district courts, while expressing disgust with allegations of workplace harassment, stuck to precedent and tossed the claims. Others did not. For example, in *Boutillier v. Hartford Public Schools,* a federal court in Connecticut denied summary judgment on a sexual orientation discrimination claim by a gay teacher who claimed she was berated in front of peers, assigned less desirable jobs, accused of misconduct, and eventually constructively discharged. The court analyzed judicial handling of interracial association discrimination claims, which it found analogous to claims based on sexual orientation ("intrasexual" association). It noted, as have other courts, the inconsistency in finding that sex stereotyping constitutes discrimination based on sex, but sexual orientation does not.

In *Fabian v. Hospital of Central Connecticut,* another federal judge in Connecticut held that failing to hire an individual due to her transgender status was "because of sex" under Title VII and denied an employer's motion for summary judgment. And a federal court in New York refused to dismiss a failure-to-hire claim by a transgender extern who was denied the use of the women's restroom and restricted from participating in an examination of a female patient by a supervisor who said “only females are allowed beyond this point" and "he-shes…and gays will need to answer to Jesus" (*Carr v. North Shore – Long Island Jewish Health Systems, Inc.*).

Fears that NDAA will rollback LGBTQ protections. On the legislative side, the House passed the National Defense Authorization Act (NDAA) for Fiscal Year 2017, along with its Section 1094, which opponents fear would negate President Obama's 2014 executive order protecting LGBT workers on government contracts. Forty-two senators, including Bernie Sanders (I-Vt.), raised concerns that the provisions would enable “taxpayer-funded discrimination." On October 25, as negotiations on the conference report of the NDAA reached their final stage, the senators sent a letter to the Chairmen and Ranking Members of the House and Senate Armed Services Committees urging them to do away with an amendment (232r2) offered by Rep. Steve Russell (R-Okla.). In a press release, Senator Ben Cardin (D-Md.) warned that under the amendment, religiously affiliated organizations could claim a right to use federal funds to: fire employees who use birth control, or who are pregnant and unmarried; fire employees who marry same-sex partners; and refuse to interview applicants who follow a different religious tradition. However, on November 30, Republicans pulled the controversial amendment from the NDAA, and both chambers agreed to the language on December 8.

Bathroom restrictions for transgender individuals. Speaking of rolling back protections for LGBTQ individuals, many believe that North Carolina provided a textbook example in responding to a *Charlotte anti-discrimination ordinance* by enacting a law (H.B. 2) in March that mandated local boards of education and public agencies to require single-sex, multiple-occupancy bathrooms or changing facilities to be designated for use only by persons based on their 'biological sex,' defined as the gender stated on a person's birth certificate.

The new law set off a maelstrom of legal actions. A transgender employee of the University of North Carolina filed suit challenging H.B. 2 and New York Governor Cuomo signed an executive order banning non-essential state travel to North Carolina. In May, the U.S. Justice Department sent a letter to Governor McCrory warning that he and the state were violating Title VII by engaging in a pattern or practice of discriminating against transgender employees. The DOJ also sent letters to the North Carolina Department of Public Safety and the University of North Carolina leveling charges that those state entities were also violating Title VII, as well as Title IX and the Violence Against Women Reorganization Act of 2013.

Governor McCrory responded by filing an action seeking a declaration that North Carolina is not discriminating against transgender individuals. The federal government then filed a complaint seeking a declaration that North Carolina was violating federal law. In July, a coalition of 10 states and the District of Columbia filed a brief in support of the federal government's suit, arguing that the experience of the states has shown that North Carolina's law was not needed to protect safety and privacy. Instead, it would just cause unjustified harm to transgender people. (The coalition, along with two other states, also filed a court brief opposing the State of Texas's challenge to federal guidance permitting transgender students to use facilities consistent with their gender identity.) Despite this firestorm, Governor McCrory signed legislation (H.B. 169) that restores a tort claim for wrongful discharge subject to a one-year statute of limitations but goes no further – meaning it extends no express protection to the LGBTQ community.

In a special legislative session held in December, the North Carolina Legislature failed to pass compromise legislation under which, in light of the Charlotte City Council's revocation of its antidiscrimination ordinance, H.B. 2 would be repealed and a six-month moratorium on local ordinances guaranteeing restroom access would be enacted.

Religious freedom and "Do No Harm Act." In May, Congressmen Bobby Scott (D-Va.) and Joe Kennedy III (D-Mass.) proposed to amend the Religious Freedom Restoration Act to "restore the original intent" of the Act. The "Do No Harm Act" would clarify that no one can seek religious exemption from laws guaranteeing fundamental civil rights.

At the state level, Georgia Governor Deal vetoed a bill (HB 757) purporting to protect religious freedoms (though the Governor could find no examples of what it is aimed to protect against) and which could have legalized discrimination against same-sex couples. Meanwhile, the ACLU filed suit challenging a Mississippi "religious freedom" bill (HB 1523) protecting religious organizations and individuals who refuse to recognize, accommodate, or provide goods or services for a same-sex couple due to a religious belief or moral conviction that sexual relations and marriage should be limited to man-woman couples. Also, Pennsylvania Governor Wolf signed two executive orders aimed at blunting "a startling trend" evidenced by North Carolina and Mississippi laws. One of the executive orders pertains to Commonwealth employees; the other is aimed at Commonwealth grants and procurement processes. Both bar discrimination based on sexual orientation, gender expression, and identity, among other areas. Meanwhile, on December 14, a state court in Louisiana has come down against Governor John Bel Edwards, ruling that he unconstitutionally side-stepped the state legislature, creating law, when he took action to protect state employees from sexual orientation and gender identity discrimination by issuing Executive Order No. JBE 2016-11. The court concluded that the EO is unconstitutional and cannot be enforced.

Other LGBTQ Developments

- *Coalition of Mayors.* A group of mayors around the country formed "Mayors Against Discrimination," coalescing to bar official travel to states with discriminatory laws, to examine prohibitions on contracting and purchasing from companies in those states, and to develop model resolutions that could be adopted by legislative bodies.

- *Government contractors.* In June, the OFCCP issued a final rule on sex discrimination regulations that for the first time include discrimination based on gender identity.

- *Members of the military.* Also in June, the Secretary of Defense announced that transgender individuals can openly serve in the U.S. armed forces.

- *HHS reduces healthcare disparities.* The Department of Health and Human Services issued a final rule implementing Affordable Care Act Section 1557, which not only prohibits discrimination in health care based on race, color, national origin, age, disability, and sex, but also extends protections based on pregnancy, gender identity, and sex stereotyping. The rule would likely apply to employee benefits programs of an employer principally engaged in providing or administering health services or health insurance coverage, or employers who receive federal financial assistance to fund an employee health benefit program or health services.

- Speaking of health benefits. The ACLU filed suit on behalf of a transgender male nurse, claiming his employer violated Title VII and the ACA by denying transgender employees health insurance coverage for medically necessary gender transition-related health care. The employee claimed his employer denied him insurance coverage for gender dysphoria treatment, and as a result, he was forced to pay thousands of dollars out of pocket.

2016 TICKERTAPE

There are several other notable trends that characterized 2016, particularly among the states, at the National Labor Board, and with regard to immigration. Passage of the federal Defend Trade Secrets Act was also an important development.

States Take the Lead

It's no surprise that states continue to take the lead on worker protections such as increasing the minimum wage, paid leave, and fair scheduling laws. They also moved ahead on medical and recreational marijuana laws.

At the ballot box. During the national elections in November, voters approved minimum wage hikes in Arizona, Colorado, Maine, and Washington, but voted against a lower rate for youth in South Dakota. They also approved paid sick leave measures in Arizona and Washington. And voters in Arkansas, Florida, Montana, and North Dakota approved medical marijuana initiatives, while voters in California, Maine, Massachusetts, and Nevada approved recreational use proposals.

Arizona: Voters approved Proposition 206, which will increase the state minimum wage to $10 per hour in 2017, to reach $12 per hour by 2020, and establishes a right to earn up to 40 hours annual paid sick leave at the rate of 1 hour of paid sick time for every 30 hours worked but with limits based on the size of the employer.

Arizona voters *did not* approve Proposition 205, which would have allowed recreational marijuana use.

Arkansas: Issue 6, passed by voters, permits medical marijuana use.

California: Voters approved Proposition 64, "The Adult Use of Marijuana Act," under which revised marijuana penalties will go into effect and retail sales of marijuana by state-licensed establishments are scheduled to begin under the law on January 1, 2018. Proposition 64 specifically permits public and private employers to enact and enforce workplace policies pertaining to marijuana.

Colorado: Voters approved Amendment 70 increasing the minimum wage from the current rate of $8.31 per hour to reach $12 an hour by 2020.

Florida: Amendment 2, "Use of Marijuana for Debilitating Conditions," passed and will permit qualified patients to possess and obtain cannabis from state-licensed facilities. The amendment would not require any accommodation of any on-site medical use of marijuana in any place of employment.

Maine: Voters approved Citizen Initiative Question 4 to raise the minimum wage to $9 per hour January 1, 2017) with $1 annual increases to reach $12 an hour by 2020, and then annual cost-of-living increases after that. In addition, the minimum wage for direct service workers who receive tips will increase from half the minimum at $5 in 2017 by $1 annual increases until it is equal to the overall minimum wage. The minimum wage would also be indexed to the cost of living start 2021.

Voters also gave a thumbs-up to the "Marijuana Legalization Act," which permits adults to legally possess and cultivate small amounts of marijuana for their own personal use. The act will not require an employer to permit or accommodate the use, consumption, possession, trade, display, transportation, sale, or growing of cannabis in the workplace, nor will it affect the ability of employers to enact and enforce workplace policies restricting the use of marijuana by employees or to discipline employees who are under the influence of marijuana in the workplace.

Massachusetts: Question 4, the "Regulation and Taxation of Marijuana Act," was approved by voters and will allow recreational marijuana use. Employers will be able to maintain all current employment drug use policies.

Montana: Montana voters approved the "Medical Marijuana Act" in 2004 and have approved its expansion via "The Montana Medical Marijuana Initiative," I-182, which includes PTSD as a debilitating medical condition.

Nevada: The "Nevada Marijuana Legalization Initiative," Question 2, passed and will allow personal use of marijuana. Proponents state that the initiative will NOT affect employers' current marijuana policies or their ability to establish workplace restrictions on marijuana consumption by employees, nor does it change existing medical marijuana laws or affect patients' rights.

North Dakota: Voters approved Measure 5, the "North Dakota Compassionate Care Act of 2016," which permits patients with an eligible debilitating condition to possess and obtain marijuana.

South Dakota: Voters in South Dakota said "no" to Referred Law 20, which created a separate youth minimum wage of $7.50 per hour with no yearly cost-of-living wage adjustment. These workers must continue to be paid the full minimum wage.

Washington: In Washington, which already has one of the highest minimum wages nationwide, the current minimum wage of $9.47 will reach $13.50 an hour by 2020 as voters approved Initiative Measure No. 1433. Beginning in 2021 the minimum wage will be adjusted for inflation. The initiative also guarantees paid sick time to workers, allowing workers to accrue 1 hour of paid sick leave for every 40 hours worked.

More about minimum-wage hikes…The federal minimum wage has been stuck at $7.25 since 2009 for lack of legislative action. During 2016, however, state lawmakers enacted minimum wage increases in California, the District of Columbia, and Oregon. In New York, the minimum wage was boosted through a budget deal between Governor Andrew Cuomo and legislative leaders. Notably, New Jersey Governor Chris Christie, citing the economy, vetoed legislation that would have raised the minimum wage in that state. County and municipal lawmakers also passed minimum wage measures boosting the minimum wage either in the absence of state action or beyond what state legislators approved.

California: On March 31, the California Legislature finalized, S.B. 3, reportedly the first statewide $15 an hour minimum wage requirement in the nation, set for implementation in 2022 for larger employers, and in 2023 for smaller employers. For employers with 26 or more employees, the minimum wage increases would be phased in, starting with January 1, 2017, to $10.50. After January 1, 2023, the minimum wage would be increased annually. The measure includes certain safety valves that would pause the wage increases should negative economic or budgetary conditions arise.

District of Columbia: On June 27, Mayor Muriel Bowser signed into law Act 429, which increases the minimum wage in the District to reach $15 per hour by 2020, including a $5 per hour tipped minimum wage. Both wages would be indexed to inflation.

Oregon: In Oregon, the minimum wage increased on July 1, from $9.25 per hour to $9.75 per hour ($9.50 per hour in nonurban counties). The July 1 increases are the first in a series of increases put in place by S.B. 1532, which calls for gradual increases over 6 years, with increases based on geographical boundaries – to reach $13.50 per hour statewide by July 1, 2022, $14.75 in the metro Portland area, and $12.50 in rural areas. Beginning in 2023, the minimum wage would then be determined based on inflation, with the larger cities being $1.25 more than the state minimum wage and the rural areas being $1 less.

New Jersey: Governor Chris Christie on August 30 vetoed Assembly Bill 15 that proposed to raise the state minimum wage to reach $15 per hour by the year 2021, stating that by doing so he was protecting the state's economic future.

New York: Governor Andrew M. Cuomo and legislative leaders, through an agreement on the 2016-17 state budget, raised the minimum wage. For workers in New York City employed by large businesses with at least 11 employees, the minimum wage would rise to $11 at the end of 2016, then another $2 each year after, reaching $15 on December 31, 2018. Different schedules are set for small NYC employer, for workers in Nassau, Suffolk and Westchester Counties, and for workers in the rest of the state. Notably, there is a safety valve for the increases.

Paid leave laws advanced, too. 2016 also saw some expansion of state and local paid leave laws. Existing paid sick leave guarantees were expanded in Illinois and mandated for the first time in Vermont. Some localities enacted similar measures, including Los Angeles, and Santa Monica, California, and Cook County and Chicago, Illinois.

Illinois: Illinois Governor Bruce Rauner signed the "Employee Sick Leave Act." Effective January 1, 2017, H.B. 6162 provides that an employee may use personal sick leave benefits provided by the employer for absences due to an illness, injury, or medical appointment of the employee's child, spouse, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, or stepparent, for reasonable periods of time as the employee's attendance may be necessary, on the same terms upon which the employee is able to use sick leave benefits for the employee's own illness or injury.

New York: Through the 2016-17 state budget agreement reached by Governor Cuomo and legislative leaders, New Yorkers will enjoy a new family leave program. When fully phased-in, employees will be eligible for 12 weeks of paid family leave when caring for an infant, a family member with a serious health condition, or to relieve family pressures when someone is called to active military service. Benefits will be phased-in beginning in 2018. This program will be funded entirely through a nominal payroll deduction on employees so it costs businesses – both big and small – nothing. Employees are eligible to participate after having worked for their employer for six months.

Vermont: Governor Peter Shumlin signed H. 187, which requires that employers provide earned sick time at the rate of at least one hour for every 52 hours worked. The law will have a phase-in period and has differing provisions for small employers, as well as delayed compliance for new employers. The earned sick time requirements do not apply to federal employees, or employees that are under 18 years of age, have been employed for 20 weeks or fewer, or are employed on jobs that last 20 weeks or fewer, among other types of employees.

Predictable scheduling. A movement pushing for predictable scheduling, particularly for low-wage workers is beginning to manifest. In September, Seattle enacted a predictable scheduling ordinance, following San Francisco's lead the year before. Seattle's "secure scheduling" ordinance aims to provide some stability in scheduling and predictability in income for service economy workers whose work hours vary every week and are routinely cut when staffing demands are lower than anticipated in the ebb and flow of the retail and restaurant industries.

In September, New York City Mayor Bill de Blasio announced legislation aimed at ensuring hourly fast food workers in the city receive fair notification of their work hours. These and similar legislative efforts are aimed at curbing on-call scheduling that hits low wage workers especially hard, since they can't work elsewhere during those hours hoping to string part-time jobs together to make enough wages to make ends meet.

In late December, six more major retailers agreed to stop using on-call shift scheduling following an inquiry by a multi-state coalition of attorneys general. An estimated 50,000 workers nationwide will benefit from the agreements to end the practice of requiring employees to call their employer, typically an hour or two before a scheduled shift, to find out if they will be assigned to work that day, according to New York Attorney General Eric T. Schneiderman. The agreements with these six companies are the latest in a series of groundbreaking national agreements secured by the NY attorney general's office to end on-call scheduling at a number of major retailers.

In April, nine attorneys general sent 15 large retailers a joint inquiry letter seeking information and documents related to their use of on-call shifts. Six of those companies reported that they were using on-call shifts, but after discussions with the AGs' offices, agreed to stop doing so; none are currently using on-call shifts. Four of the companies, also committed to providing employees with work schedules at least one week in advance of the start of the workweek. This advance notice will permit employees to plan ahead to cover child care and other obligations.

A number of these companies found alternative staffing methods for addressing unanticipated employee absences or fluctuations in business volume; typically, some kind of pool arrangement has been implemented in lieu of on-call shifts.

Salary history inquiries. As federal legislative efforts to narrow the gender pay gap have lagged, states have also begun to move the dial on that front. In August, Massachusetts Governor Charlie Baker signed S. 2119, "An Act to Establish Pay Equity," which bars employers from requiring applicants to provide their salary history before receiving a formal job offer and permits employees to freely discuss their salaries with coworkers.

In December, the Philadelphia City Council approved File #160840, a measure that would ban salary history inquiries or disclosure of salary history requirements as a condition of employment or an interview for employment. If signed by Mayor Jim Kenney, the ordinance would also bar employers from relying on the wage paid by a current or former employer in setting an employee's wages at any point in the employment process, unless the employee knowingly and willingly discloses his or her wage history.

Trade Secrets Act Makes it Through

It's no secret that we've lived through years of gridlock in the Capitol – 2016 was no different. One piece of legislation with a notable impact on the labor and employment landscape did, however, make it into law. President Obama May 11 signed S.B. 1890, the "Defend Trade Secrets Act of 2016" (DTSA). The bipartisan measure amends the Economic Espionage Act of 1996 to create a federal civil remedy for trade secrets theft. The legislation will, according to its sponsors, help American innovators protect their intellectual property. The law took effect immediately and applies to any acts of trade secrets misappropriation taking place after the date of enactment.

Uniform standard. The DTSA creates a uniform federal standard for trade secret misappropriation. The DTSA defines a "trade secret" as "all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible." To obtain protection, the owner must take reasonable measures to keep the information secret. Additionally, trade secrets are covered by the DTSA only if they derive independent economic value, actual or potential, from not being generally known or ascertainable. The DTSA's definition of "misappropriation" resembles that of the Uniform Trade Secrets Act, but it does not prohibit "reverse engineering, independent derivation, or any other lawful means of acquisition." The DTSA does not preempt state law.

The statute will allow companies to craft one set of nondisclosure policies, rather than the piecemeal approach required previously, when civil remedies for trade secret misappropriation were available only under state laws, with varying standards and requirements. The DTSA provides for injunctions and damages, including *ex parte* seizure authority when it is needed to prevent the disclosure or further dissemination of a stolen trade secret. The statute authorizes monetary and injunctive relief, while safeguarding the freedom of employees to move from one job to another and providing limited immunity to whistleblowers. The DTSA also amends the RICO Act to add violation of the Economic Espionage Act as a predicate act of racketeering.

On the Immigration Front

In 2016, we saw a new Form I-9 and a final rule that eased the way for certain immigrant and nonimmigrant workers and their employers.

Form I-9. The U.S. Citizenship and Immigration Services (USCIS) published a revised version of Form 1-9, Employment Eligibility Verification. The new version (dated 11/14/16) must be used by employers beginning January 22, 2017. Until then, employers may continue to use either the version dated 03/08/2013 N or the new version. In a news release, USCIS pointed to several changes made in the new version. Section 1 now asks for "other last names used" rather than "other names used" and streamlines certification for certain foreign nationals. Other changes include the addition of prompts to ensure information is entered correctly; the ability to enter multiple preparers and translators; a dedicated area for including additional information rather than having to add it in the margins; and a supplemental page for the preparer/translator.

The instructions, which have been separated from the form in keeping with other USCIS forms, also include specific instructions for completing each field. The revised Form I-9 is also easier to complete on a computer, according to USCIS. Enhancements include drop-down lists and calendars for filling in dates, on-screen instructions for each field, easy access to the full instructions, and an option to clear the form and start over. When the employer prints the completed form, a quick response (QR) code is automatically generated, which can be read by most QR readers.

Final rule. A final rule, Retention of EB-I, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, amended Department of Homeland Security regulations on certain employment-based immigrant and nonimmigrant visa programs. The final rule provides various benefits to program participants, including improved processes and increased certainty for U.S. employers seeking to sponsor and retain immigrant and nonimmigrant workers; greater stability and job flexibility for those workers; and increased transparency and consistency in the application of DHS policy related to affected classifications.

DHS said that many of the changes made by the final, which is effective January 17, 2017, are primarily aimed at improving the ability of U.S. employers to hire and retain high-skilled workers who are beneficiaries of approved employment-based immigrant visa petitions and are waiting to become lawful permanent residents. At the same time, changes to the final rule increase the ability of those workers to seek promotions, accept lateral positions with current employers, change employers, or pursue other employment options.

NLRB's Elastic Specialty Healthcare

In 2016, federal courts of appeals continued to scrutinize the National Labor Relations Board's 2011 decision in *Specialty Healthcare and Rehabilitation Center of Mobile,* in which the Board adopted a new approach for determining what constitutes an appropriate bargaining unit in non-acute health care facilities and also clarified the criteria for analyzing a party's claim that a proposed bargaining unit was inappropriate because it excluded certain employees. The new criteria do not apply to bargaining unit determinations outside of health care facilities, the Board stated, or to acute care hospitals, which are covered by the NLRB's "health care rule." However, the landmark decision has proved much more elastic, as the following cases show.

Second Circuit. In *Constellation Brands, U.S. Operations, Inc. dba Woodbridge Winery v. NLRB,* the Second Circuit on November 21 ruled that the framework outlined by the NLRB in

Specialty Healthcare to determine whether a union's proposed bargaining unit consisted of employees who share a "community of interests" was valid. However, the Board did not properly apply the *Specialty Healthcare* framework in the case because the Board failed to require the union to meet its prima facie burden of showing why excluded employees had distinct interests from employees in the petitioned-for unit that outweighed similarities with unit members.

Third Circuit. The Third Circuit, in *NLRB v. FedEx Freight, Inc.*, held on August 9 that because the NLRB's interpretation of the legal standard to apply in unit-determination cases in *Specialty Healthcare* was reasonable, the Board properly applied that two-step framework here, and the court refused to grant FedEx's petition for review based on its claim that dockworkers should have been included in the bargaining unit.

Fourth Circuit. On April 26, in *Nestle-Dreyer's Grand Ice Cream, Inc.*, the Fourth Circuit held that the Board did not violate the NLRA or abuse its discretion when it certified a bargaining unit comprised solely of maintenance employees at an ice-cream production facility. In so ruling, the appeals court rejected the employer's challenge to the NLRB's *Specialty Healthcare* decision (despite being backed up by a flurry of *amicus* briefs from business groups) as well as its contention that, even under that decision's "overwhelming community-of-interest" standard, a maintenance-employee-only unit was improper.

Fifth Circuit. The Fifth Circuit in *Macy's, Inc. v. NLRB*, reviewed a NLRB order finding that a bargaining unit consisting solely of cosmetics and fragrances employees at a Macy's department store was appropriate and that the employer unlawfully refused to bargain. After first concluding that the standard articulated by the Board in *Specialty Healthcare* did not violate the NLRA, the appeals court concluded that Macy's failed to establish that the unit was clearly not appropriate.

Eighth Circuit. On March 7, in *FedEx Freight, Inc. v. NLRB*, the Eighth Circuit ruled that the overwhelming community of interest standard articulated by the NLRB in *Specialty Healthcare* is not a material departure from past precedent and is consistent with the requirements of NLRA Section 9(b). After approving the standard, the court found that FedEx did not meet its burden to show that dockworkers at two of its terminals shared an overwhelming community of interest with city and road drivers so as to require their inclusion in the same unit.

A New Year and A New Administration

Donald Trump is the President of the United States. According to the President's website, Trump's regulatory reforms will include a "temporary moratorium on all new regulation, canceling overarching executive orders," and eliminating "unnecessary regulations that kill jobs and bloat government." While most observers expect many of the more onerous developments for employers to face hostility under a Trump administration, the President doesn't readily fit the standard pro-business Republican mold. What we do know: He has stated opposition to immigration, has given a nod to equal pay, has conveyed mixed messages about the minimum wage, and has fought unions as a business owner. What lies in store for 2017 under the new administration?

Secretary of Labor. For his opening salvo, President Donald Trump has picked Andrew Puzder for the job of Secretary of Labor. Those who thought the President would show some measure of balance and restraint with respect to federal labor policy have viewed the appointment of Mr. Puzder to head the DOL as a setback. Puzder is the CEO of CKE Restaurants, which operates Hardee's and Carl's Jr. Should he be confirmed, Puzder's selection as Secretary of Labor portends a near about-face in policy at the agency.

Course correction at the NLRB. The NLRB has consistently rankled employers during President Obama's eight years at the helm, proving a stalwart supporter of organized labor and ushering in change, in degrees both incremental and sweeping, to that end. Much to the chagrin of employers, the Obama Board has chipped away at once-reliable Board precedents on important and previously settled issues. The NLRB boldly expanded its reach into nonunion terrain, policing employee handbooks and policies, of both union and nonunion employers alike, and brazenly took on the Federal Arbitration Act.

Much of this will be undone under Donald Trump's administration, most labor practitioners confidently predict. The President has had his own run-ins with the NLRB and will surely view such matters through an employer's lens. As naturally occurs when an administration turns from Democratic to Republican (and vice versa), the Board's makeup turns with it, with the majority of its Members adhering to the party in power. Such is the case with the incoming administration. But expect a more dramatic pendulum swing than usual – in part because the Board under President Obama had veered so sharply left that a more assertive course correction will be expected. A Trump Board will surely be comprised of majority Members with similar pro-business bents and his sense of mandate.

Supreme Court nominees. Among the new President's first orders of business will be to nominate a Supreme Court Justice. President Trump would need to make two selections to the Court to change the current balance and give the Court a decidedly more conservative bend. In addition to the vacancy on the Court caused by the death of Justice Antonin Scalia, there are currently two Justices over 80 years of age, Ruth Bader Ginsburg and Anthony Kennedy. Those appointments are likely to have an impact on the legal landscape of the country for 25 years or more, depending on whether the new president serves four or eight years.

ABOUT SESCO

SESCO Management Consultants is a full-service human resource and employee relations consulting firm. We have an extensive history working with entrepreneurs, CEO's, HR directors, and presidents of small to medium size organizations to develop systems that enhance profitability and productivity. We provide extensive employee-related solutions specializing in compliance issues, retention, and overall workforce improvement.

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