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Turbulence Ahead in 2016: Annual Employment Law Update



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Wage and Hour Issues

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DOL Guidance on Independent Contractors

- ✦ Will continue to be a major focus
- ✦ Uber case, for example
- ✦ Misclassification deprives employees of workplace protections
 - ▶ Minimum wage, overtime compensation, unemployment insurance, workers compensation and employer-sponsored health insurance coverage.
 - ▶ Also, lower tax revenue for government.
 - ▶ Uneven playing field for employers who properly classify their workers
- ✦ Can arise in, and impact, many areas, including I-9 compliance

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Factors

- ✦ Is the work an Integral Part of the Employer's Business?
- ✦ Does the Worker's Managerial Skill Affect the Worker's Opportunity for Profit or Loss?
- ✦ How Does the Worker's Investment Compare to the Employer's Investment?

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Factors (cont.)

- ✦ Does the Work Performed Require Special Skill and Initiative?
- ✦ Is the Relationship Between the Worker and the Employer Permanent or Indefinite?
- ✦ What is the Nature and Degree of the Employer's Control?

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Economic Realities Test

- ✦ The ultimate determination is always whether the worker is economically dependent on the employer or truly an independent businessperson
- ✦ "In sum, most workers are employees under the FLSA's broad definitions."

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Wage/Hour (cont'd)

White Collar Exemptions

Overtime Pay and More

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White Collar Exemptions

✦ Includes:

- ▶ Executive
- ▶ Administrative
- ▶ Professional
- ▶ Outside Sales
- ▶ Computer Employees

✦ Requires:

- ▶ Paid on a salary basis (with some exceptions for outside sales and computer employees)
- ▶ Not less than \$455/week
- ▶ Certain job duties

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Salary Level Test

✦ Proposed increase to 40th percentile of weekly earnings for FT salaried workers

- ▶ \$970/week
- ▶ \$50,440 annually

✦ Automatic increases to keep pace with inflation without requiring additional action by the DOL

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Job Duties Test

- ✦ No proposed change at this time
- ✦ Considering an exempt-duties threshold
 - ▶ e.g., must spend at least 50% of work time engaged in primary duty, not including time spent concurrently performing nonexempt work
 - ▶ Solicited comments on whether current tests are functioning effectively

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Wage/Hour (cont'd)

Minimum Wage and Miscellaneous

Overtime Pay and More

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Minimum Wage

- ✦ Legislative initiatives
 - ▶ Will continue in Congress but unlikely to gain traction
 - ▶ So, see initiatives at state and local level
- ✦ Executive Order for federal contractors
- ✦ Be aware of local jurisdictions and paid sick leave requirements

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FLSA Retaliation

- ✦ Divided 9th Circuit decides that HR director can sue for FLSA retaliation
- ✦ Did not follow “manager rule”
 - ▶ That rule requires manager to “step out” of business role and take some action adverse to employer
 - ▶ To give “fair notice” that raising an FLSA complaint and not just performing job
 - ▶ Splits with other circuits (keep eye on case)

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Class Actions Continue To Increase

- ✦ Hours Worked disputes
 - ▶ Checking emails
 - ▶ Answering calls
 - ▶ Meal breaks
- ✦ Misclassification Cases
 - ▶ Contractors
 - ▶ White Collar employees
- ✦ Arbitration Agreements
 - ▶ Attempts to waive collective/class action
 - ▶ NLRB still overturning despite Supreme Court rulings and 5th Circuit overturning *Horton*

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SUPREME COURT 2015: EMPLOYMENT-RELATED CASES

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Current and Last Term

- + **Tyson Foods, Inc. v. Bouaphakeo et al.** (test of “trial by formula”; debate over statistical sampling for damages; can include those not truly injured, argue employers; impact on other employment claims)
- + **Obergefell v. Hodges** (same sex ruling; impacts on FMLA and benefit policies)
- + **Integrity Staffing Solutions v. Busk et al.** (waiting in security screening lines not compensable work time)
- + **EEOC v. Abercrombie & Fitch Stores, Inc.** (religious discrimination)
- + **Mach Mining LLC v. EEOC** (courts may review EEOC’s duty to conciliate a case before filing a lawsuit)
- + **Perez et al v. Mortgage Bankers Association** (DOL rulemaking was upheld)
- + **Young v. UPS** (pregnancy discrimination)

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NATIONAL LABOR RELATIONS BOARD

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NLRB Active in Reviewing Handbooks/Codes of Conduct

- + Confidentiality provisions under scrutiny
- + Non-disparagement provisions
- + Employee conduct policies
- + Social Media policies
- + Investigative procedures
- + Policy prohibiting recordings ruled unlawful (*Whole Foods Market, Inc.*)

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E-Mail Usage

- ✦ ***Purple Communications, Inc.***
- ✦ Overturned *Register Guard*
- ✦ Employees have right to use email for Section 7 purposes

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Joint Employer

- ✦ ***Browning-Farris Industries of California, Inc.***
- ✦ NLRB adopted a controversial “joint employer” standard
- ✦ Overturns precedent in place since 1980s
- ✦ Trying to reach “ultimate employer” using 3rd party contractors or using the franchise model
- ✦ McDonald’s in legal battle challenging new standard

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Arbitration

- ✦ NLRB continuing to enforce *Horton* ruling
- ✦ Employer violates Section 8 by requiring employee to sign an arbitration agreement that includes a class/collective action waiver
- ✦ 5th Circuit reversed *D.R. Horton* and *Murphy Oil USA* – Board did NOT appeal
- ✦ ***Philmar Care LLC (and Amex Card Services Co. and United Express Enterprises, Inc.)***

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“Micro-Units”

- ✦ Volkswagen Plant in Chattanooga
- ✦ Election among only maintenance employees at the plant
- ✦ “Local” union won the election
- ✦ Gov. Haslam – called election a “cherry-picked” win by union
- ✦ VW appealing and apparently refusing to bargain

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Facebook

- ✦ “Likes” can signal “concerted” activity
- ✦ Arises in key element of a Section 7 case
 - ▶ Need both protected activity and concerted activity
 - ▶ Law not designed to remedy individual gripe or grievance generally

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Sexual Orientation and The Workplace

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Discrimination on the Basis of Sex

- ✦ Two modes of analysis under Title VII:
 - ▶ Discrimination because of sex (treating men and women differently because of their sex)
 - ▶ Discrimination based on sexual stereotyping
 - *Price Waterhouse* case
 - Not promoted because did not act and appear "feminine" enough

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Sexual Orientation

- ✦ Courts have largely agreed: sexual orientation is NOT a protected category under Title VII
- ✦ But *Price Waterhouse* opened the door for expansion of protection to:
 - ▶ Transgender persons
 - ▶ LGB persons discriminated against because they were not conforming to sex-based stereotypes
 - Employer could legally discriminate against gay employees for being gay but not because they were acting insufficiently masculine or feminine

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EEOC Decision

- ✦ July 15, 2015 EEOC decision
 - ▶ "We conclude that sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."
 - ▶ "Sexual orientation is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex."

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Does the Decision Have Legs?

- ✦ Arose in the context of a federal employee
- ✦ But, position taken by EEOC
 - ▶ Likely to apply in public and private sectors
 - ▶ Likely to process charges raising this theory
- ✦ Ultimately, courts will determine
- ✦ *Isaacs v. Felder*, M.D. Ala. (Oct. 29, 2015)
 - summary judgment for employer, but reversed Magistrate Judge on Title VII protection

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OSHA Guidance

- ✦ Employees entitled to have access to restrooms based on their gender identity
- ✦ EEOC agrees

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EEOC

- ✦ Recently issued Technical Assistance guidance on anti-Muslim discrimination
- ✦ Anticipate this will be a growing emphasis in the coming year

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Local Initiatives

- ✦ “Ban the box” legislation
- ✦ Minimum wage
- ✦ Sick pay
- ✦ Paid family leave

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Questions?

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