

# NEW CHALLENGES FOR HR

CFMA HEARTLAND REGIONAL CONFERENCE  
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# AGENDA

- Updates and Trend:
  - Discrimination Claims
  - FMLA & ADA
  - Retaliation Claims
  - Wage & Hour Update
  - NLRB & OSHA

# DISCRIMINATION UPDATE AND TRENDS

# EEOC ENFORCEMENT UNDER TRUMP?

- Stated Priority of Deregulation
  - Floated proposal to merge EEOC and OFCCP
- Acting Chair Victoria Lipnic
- Janet Dhillon nominated to be Chair (not confirmed yet)
- General counsel position vacant
  - Potential budget cuts



# EEOC 2017-2021 STRATEGIC ENFORCEMENT PLAN

## Substantive Areas of Priority

- (1) Eliminating barriers in recruitment & hiring
- (2) Protecting vulnerable workers
- (3) Addressing 5 emerging issues:
  - a. Discriminatory leave policies under ADA
  - b. Accommodations under ADA and PDA for pregnancy-related leave
  - c. Protecting LGBTQ Workers
  - d. Clarifying employment relationships
  - e. Discrimination against certain racial & ethnic groups

# EEPC 2017-2021 STRATEGIC ENFORCEMENT PLAN

## Substantive Areas of Priority

- (4) Equal pay
- (5) Access to the legal system
  - a. Overbroad waivers that limit or deter substantive rights
  - b. Retention of applicant and employee data and records
  - c. Retaliatory practices that dissuade others from reporting violations
- (6) Preventing systematic harassment

# EEO-1 EXPANSION RULE DELAYED BY OMB

- EEOC issued rule last year
  - Would have required employers to report W2 wage data and hours worked by 12 specified pay bands
- OMB has delayed the rule
- But EEOC says still committed to fighting wage inequality
  - Not just gender, but also race
- Still have OFCCP requirement for federal contractors

# FAIR PAY AND SAFE WORKPLACES EO REVISED

- EO applied to federal contractors
- Main provisions:
  - \$500,000+ contractors req'd to disclose "violations" of labor laws
  - Mandatory arbitration agreements prohibited
  - Disclosures of employee pay
- First two requirements previously enjoined
- Entire EO eliminated in March 2017



# PAY DISPARITY

- Equal Pay Act refresher
  - No discrim. in comp. because of sex
- Defenses:
  - Seniority system
  - Merit system
  - System where earnings measured by quantity/quality of production
  - Factors other than sex
    - ◆ Courts divided on whether salary history is a factor other than sex
    - ◆ Yes: 8<sup>th</sup> and 9<sup>th</sup> Circuits
    - ◆ No: 10<sup>th</sup> and 11<sup>th</sup> Circuits

# “DON’T ASK” COMPENSATION LAWS

- Currently prohibited in:
  - DE, MA, OR
  - SF, NYC, Philly, PR
- Considering:
  - ID, MD, NY, RI, TX, VA
- Requires training of interviewing managers

# FMLA AND ADA UPDATE

# FAMILY AND MEDICAL LEAVE ACT

- Reminders
  - DOL updated the definition of "spouse" -- now includes same-sex common law marriages entered into in state that recognizes such marriages
  - To request a fitness-for-duty certification upon returning from leave, must have given when the leave is initiated
  - After FMLA leave exhausted, consider ADA accommodation requirements

# MEDICAL MARIJUANA

- General understanding that employers could enforce drug policies because marijuana not legal under federal law
- Employees have been raising disability claims
- Massachusetts first state court to find that medical marijuana use might be a required accommodation of disability under state law

# RETALIATION CLAIMS

# NEW RETALIATION GUIDANCE

In August 2016, EEOC issued new retaliation guidance for the first time since 1988

- Identifies less obvious forms of retaliation
- ADA: Interference provision broader than anti-retaliation provision
- Filing a charge or providing a statement to the EEOC is protected activity “regardless of whether an individual has a reasonable, good faith belief that the underlying allegations are, or could become, unlawful conduct.”
- An employee’s claim, even if frivolous, is protected under EEOC guidelines

# NEW RETALIATION GUIDANCE

## New Guidance “Promising Practices”

### (1) Write anti-retaliation policies

- Include examples of retaliation, reporting procedures, and statement that retaliation is subject to discipline

### (2) Train managers and supervisors

### (3) Proactive follow-up

### (4) Review of employment action

- Proposed employment action should be reviewed by qualified person, e.g., HR personnel or legal counsel





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# WAGE & HOUR UPDATE

# FLSA WHITE COLLAR EXEMPTIONS RULE

- Rule would have doubled salary level required for executive & administrative exemptions
- Court issued temporary injunction day before effective
- Permanently enjoined on Aug 31
- DOL likely to propose new rule
  - Announced RFI in July

# OBAMA ADMINISTRATION RULE ENJOINED

- Opinion seemed to question validity of salary level test
- Appealed by DOL
- Trump administration sought to drop appeal
- District Court issued permanent injunction
- Clarified validity of salary level test

# DOL'S RFI

- Different salary levels
- Different salary levels for regions
- Different salary levels for exemption, position
- Reinstate long and short tests
- Relative importance of salary vs. duties tests
- Should salary level(s) automatically update

# CLASS ACTIONS



- Class action litigation continues to be one of the hottest areas of litigation for businesses
  - Misclassification cases (exempt/non-exempt) on the rise
    - ◆ Watch for industry trends/targets
    - ◆ In Missouri, cases being filed in state court under MMWL
  - Travel time continues to be a risk area, particularly for DOL-initiated litigation

# MISCLASSIFICATION LAWSUITS (INDEPENDENT CONTRACTORS)

- Misclassification of employees as independent contractors continues to be a key risk area
- DOL: majority of independent contractors are misclassified
- States are informing workers as to difference between employee and independent contractor status (e.g., Pennsylvania)

# MISCLASSIFICATION LAWSUITS (INDEPENDENT CONTRACTORS)

- Lawsuits illustrate risks:
  - Uber lawsuits continue to provide examples where classifications do not fit the actual work situations of the gig economy
  - Delivery/courier companies that use independent contractors continue to be primary targets. FedEx settled a class action for \$15.4 million, which included attorneys' fees of \$4.6 million
  - Pacific Gas and & Electric workers filed a lawsuit on November 1, 2016 alleging that they were denied pension benefits because they were incorrectly classified as independent contractors

# ARBITRATION AGREEMENTS

## Class Action Waivers

- 7<sup>th</sup> and 9<sup>th</sup> Circuits side with the NLRB in holding that federal labor and employment law (specifically, Section 7 of the National Labor Relations Act) gives employees the right to engage in collective litigation and this right cannot be waived in arbitration clauses
- 5<sup>th</sup> Circuit disagrees (upholding class action waivers)
- 8<sup>th</sup> Circuit (includes MO, MN, IA, NE, AR, SD, ND) also disagrees, holding that class-action waivers are legal and must be upheld

Supreme Court will need to resolve circuit split



# ARBITRATION AGREEMENTS

## Class Action Waivers

- United States Supreme Court will review the enforceability of class action waivers for employees
  - 5<sup>th</sup> Circuit (*Murphy Oil v. NLRB*)
  - 7<sup>th</sup> Circuit (*Lewis v. Epic Sys. Corp.*)
  - 9<sup>th</sup> Circuit (*Morris v. Ernst & Young*)
- Expectations of Justice Gorsuch

# ARBITRATION AGREEMENTS

## Drafting Tips

- Be aware that enforcement of class action waivers, at least in the short-term, may be more difficult in some jurisdictions.
- Avoid one-sided provisions that tend to render agreements “unconscionable.”
- Make sure there is consideration for the employee’s agreement to arbitrate.
- Consider including an opt-out provision (9th Circuit suggested in a footnote in *Morris* that class action waivers may be permissible when employees are not required to sign such waivers as a condition of employment or when they are given an opportunity to “opt out” of the arbitration agreement).

# NLRB AND OSHA UPDATE



# NLRB UPDATE



- Trump has made two appointments to board positions
  - One has been confirmed
  - Another position will be up at the end of 2017
- General Counsel nominated
- Expectation of roll backs on some opinions

# NLRB 2017

- Potential contraction of Section 7 interpretation regarding concerted activity
- Social media and other policies
- Micro-units
- Joint employer status and the effect on temporary employees

# SOCIAL MEDIA ISSUES

- Challenges of social media
  - Protecting business assets and confidential information from disclosure
    - ◆ Litigation holds
  - Effect on productivity
  - Use in hiring/promoting decisions
  - Protecting business reputation while complying with NLRA
  - Preventing harassment and bullying
  - Separating the workplace from personal relationships

# OSHA ELECTRONIC REPORT RULE

- Would have used same forms currently used
- But electronic submission would have made some data available to public on OSHA's website
- Has been postponed and is being re-considered
- Anti-retaliation rules not affected (eff. 12/2016)
  - Limitations on post-accident drug-testing policies

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