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LAW FIRM

LABOR & EMPLOYMENT UPDATE

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LEGISLATIVE AND ADMINISTRATION ACTION

With a new President, a greater Republican activist Congressional majority, and the fuel of the recent election rhetoric, there is a rush to introduce new and dramatic legislation. The number of proposals are overwhelming; too numerous to begin to describe in a few Update pages. One cannot predict which will or will not become law, or when, and in what final form. Here are a couple of interesting proposals:

REINS. The "Regulations from the Executive in Need of Scrutiny Act of 2017" (REINS) (H.R. 26), was introduced by Rep. Doug Collins (R-Ga.). H.R. 26 would require congressional approval of major rules - defined as regulations having an annual economic cost of $100 million or more. Among its other provisions, the bill would: (1) require congressional review of all agency regulations; (2) set requirements for agency submission of related information when creating regulations; (3) provide an option for congressional disapproval of non-major rules; and (4) require GAO analysis of existing rules. The bill passed the House on January 5 and was sent to the Senate on January 6, where it was referred to the Committees on Homeland Security and Governmental Affairs. If passed, this law would have a good chance at being challenged as unconstitutional since it seems to be a congressional effort to have more power in the Congress-Executive-Judicial "Balance of Powers" and would impact the independent rights of the Executive branch of our government.

No Tax Delinquencies In Government. Rep. Jason Chaffetz (R.-Utah) has introduced the Tax Accountability Acts (HR 396 and 397) which would forbid anyone with unpaid taxes to work in Federal employment. It would also focus on the estimated 63,000 private sector Federal Contractors who are delinquent on tax payments and eliminate them from government contracts, and require applicants for Federal contracts to disclose tax payment and any tax delinquency information. However, it seems that an original part of the bill requiring members of Congress and appointed administration members (or the President) to also disclose tax payment liabilities and delinquency information and having an ethics review will not survive the committee's consideration process. So, be aware if you are a Federal employee, or a government contractor. But don't worry if you are a politician.

LITIGATION
Personal Liability – Arbitration

Company Owner Can Still Be Sued In Court Because Arbitration Agreements Were Signed In His Corporate Capacity. A company required employees to sign binding arbitration agreements forbidding employment actions from being filed in court. These agreements were signed by the owner, in his official capacity, on behalf of the company. So employees filed claims against the company in the arbitration process. One employee then sued the owner personally

in court. The employee alleged that after he won the arbitration, the owner then proceeded to disparage and defame him, his fiancée and attorney. The owner argued that the arbitration agreement prevented a court suit. The court ruled that this was a separate cause of action, and that the arbitration agreement only applied to the company. It was not signed in the owner's personal capacity, and did not prevent personal suits against him, or other individual managers for personal liability. *Zweizig v. Northwest Direct Teleservices* (D. Ore., 2017).

Fair Labor Standards Act

Don't Try To Retroactively Claw Back Payments To Salaried Employees. Companies which decide to undo salaried-basis increases after the court halted implementation of the DOL rules should do so only going forward. They should avoid attempts at recovery of already paid salary increases. Taking back the already paid "overage" could violate the salaried basis test and result in FLSA suits and liability. It would also violate the "wage claims" provisions of many states' laws. Once a wage has been set and paid, a "contract" is created which would prevent a retroactive recoupment. State wage and contract claims can be even more costly than an FLSA action.

Benefit Op-Out Pay Is "Wages" To Be Included In Overtime Pay. "Extra pay" must be added to wages. Then the regular hourly rate must be re-calculated, and wages and overtime hours must be paid on that rate (often creating an extra, after-the-fact paycheck for the enhanced hourly and OT pay). Extra pay can include production bonuses, commissions, incentives, and other non-exempt extra compensation. In *Flores v. City of San Gabriel* (9th Cir. 2016), the court found that cash-in-lieu of benefits; i.e., payment for not being on the health insurance plan, should be included in regular wages. In this case the op-out payment was $1,305 per month. So this had to be added to each month's wages and the regular hourly rate and OT recalculated and paid for all those who were not on the health insurance, for a two-year back pay period.

Service Advisors Are Not Exempt From Overtime Pay. There has been a continuing argument, with contradictory rulings by different circuit courts, over whether auto service advisors are hourly employees, or covered by the special auto industry exemption from overtime. The 9th Circuit Court has ruled again that they are not exempt and must be paid OT. This is a significant decision, since this case went to the U.S. Supreme Court and was remanded to the 9th Circuit for a clear decision. This ruling could now be adopted by the other circuit courts (or it could also be appealed to the Supreme Court again). *Navarro v. Encino Motor Cars* (9th Cir., 2017).

Privacy

Taking Pictures Of Drunken CEO Is Not A Protected Activity. There are many laws protecting an employee's right to raise concerns. However, we can override those protections by our own outrageous or dumb behaviors. A female employee had raised concerns about a male manager's inappropriate sexual comments toward female employees; an activity protected from retaliation. Then the company discovered other activity. The employee and others attended a large convention. The company CEO became very intoxicated at an evening event. The employee helped the CEO to her (the CEO's) hotel room, and made sure she was safe. Then the employee took photos of the CEO in her drunken state, and shared them with other employees of the company. The employee was fired. She sued the company claiming the discharge was in retaliation for her sexual harassment complaint. The court disagreed. Engaging in protected acts does not immunize one from discipline for poor performance or all other improper actions. The company had valid non-retaliatory reasons to fire the employee for advertising the personal distress of the CEO, and especially the nonconsensual violation of the CEO's privacy in her own hotel bedroom. *Donley v. Stryker Corp.* (N.D. Ill., 2017).

Posting Nude Photos Of Co-Worker. A similar situation, not yet a case, involved a Georgia police officer who apparently had animosity toward another female officer. She allegedly hacked into that officer's personal computer system, found private nude photos, and publicly posted them for others to view. She then sent taunting, threatening messages to the other female officer. The officer who did the hacking/posting was arrested and jailed for violating the state's "revenge porn" law. She has been suspended pending decision on her employment. A privacy suit by the other officer could be anticipated.

Family and Medical Leave Act

Routine Care For Autistic Child Qualifies For FMLA. Autism is a serious health condition under the FMLA. An employee requested two days a week FMLA to care for her autistic child due to a lack of other routine care at home for him on those days (a local day care provider could not meet the child's very serious needs – so at home was the only realistic placement). Originally the company granted the request, but then decided it could not, and ordered the employee to be present at work or be fired. She was then fired. In the FMLA case the court found that the FMLA covered the need to regularly be home to care for the serious ongoing medical condition specific to this child's autism. Doctor's appointments or direct involvement of a medical professional were not necessary to qualify as FMLA leave. The discharge violated the law. *Wink v. Miller Compressing Co.* (7th Cir., 2017).

Discrimination

Sanctions

Bribing Witness Results In Dismissal Of Case. A suit for national origin harassment and retaliation was dismissed due to "witness tampering." The plaintiff offered to pay a witness to provide false testimony in his favor. The interesting factor in this case is that the tampering was reported by the plaintiff's own attorney, when he discovered a revealing text by the bribed witness. The attorney had an Ethics Code duty to report such fraudulent conduct to the court. The court's sanction was to dismiss the case, without possibility to refile. The court stated that the plaintiff may have had a meritorious complaint, but is barred from pursuing it due to his behavior. *Ramirez v. T&H Lemount, Inc.* (7th Cir., 2016).

Age

The R-Word – Again. An older teacher sued for age discrimination following being discharged. *Skaggs v. Van Alstyne Indep. School Dist.* (E.D. Tx., 2017). The principal's repeated question of "are you retiring anytime soon?" in relationship to his expression of dissatisfaction with the teacher's old fashioned-outdated techniques was sufficient to create a jury question of age discrimination. Though the district had presented a good deal of seemingly valid, non-discriminatory evidence of poor performance, the principal's use of the "R-word" and seemingly age-related comments was sufficient to tip the balance enough to send the case to a jury for decision. [See also the "R-word" case warning in the January, 2017 Update.]

Sexual Harassment

Family Business Entanglements Have Perils. In *Salea v. Blackburn Building Services* (D. Conn., 2017), the court found that too much family involvement in a harassment situation could create liability. A male employee complained that a top manager of a family business, a son of the owners, had sexually harassed him, including touching of private areas. This was reported to another manager, also a family member. The top executive, the alleged harasser's mother, assigned an "outside investigator," the harasser's brother, to look into the matter. Though an "apology" was recommended, nothing happened. The complaining employee was disciplined for having raised the issue and telling other co-workers about the incident. The court found that the company's process was defective. It was tainted by conflict of interest. It failed to provide employees any meaningful avenue to raise complaints or receive real action. There was no effective alternative which would provide a fair and objective process, in compliance with the law.

Race-National Origin

Placement Agency Sued For Avoidance Of African-Americans In Recruiting. A staffing agency and seven of its clients were sued for deliberate actions to avoid hiring African-Americans for low-end factory and warehouse jobs. The seven client companies allegedly wanted only Hispanic workers in these jobs, because they believed Hispanics were more willing to perform and remain in dirty, strenuous jobs. The clients and staffing agency used coded language to indicate that only Hispanics and no African-Americans would be recruited, including a preference for sending "the dirty ones" – meaning Hispanic applicants. Job advertising was placed only in Spanish language publications and recruiting was done in predominantly Hispanic neighborhoods. When African-Americans did happen to stumble upon the ads and applied, the staffing agency allegedly sent them for interviews or try-outs on only the worst of the worst positions in order to be a discouragement. The evidence for the case was based in part on testimony of internal "whistleblowers" who worked for the staffing agency and client companies. *Hunt v. Pers Staffing Group* (N.D. Ill, 2016).

Contractor Charged For Favoring Asians. In *OFCCP v. JBS US Lux* (Swift Beef Co.) (DOL Admin Case., 2016), the OFCCP has charged that a government contractor food company's Texas plant discriminated against White, Black, Hispanic and Native American applicants in favor of Asians in factory production jobs. The action seeks lost wages and cancellation of Federal contracts and a ban from future contracts.