



Playing the Trump Card: *What's New in Employment Law in 2017*



THE
PEOPLE'S
COURT

TOPICS

- Neil Gorsuch
- Filing Trends
- LBGT Claims
- Wage and Hour Issues
- Executive Orders
- DOL
- NLRB
- Osha
- Wellness Programs

The Supreme Court Is Back in Business!

- **Neil Gorsuch**

- Similar legal philosophy to late Justice Anton Scalia
- Columbia University; Harvard Law School (classmate of President Obama); doctorate in legal philosophy from Oxford University.
- He clerked for two Supreme Court justice: Byron White and Anthony Kennedy
- Unanimously confirmed to Tenth Circuit bench in 2006.
 - “feeder judge” — 11 former law clerks have gone on to clerk for Supreme Court justices
- Opinions suggest he believes in limited Executive Branch power



GORSUCH; VACANCY NO MORE

- CONFIRMED APRIL 7.
- HEARD FIRST THREE CASES APRIL 17.
- FIRST CASE WAS A DISCRIMINATION CASE—ASKED MANY Q'S.
- 113TH SUPREME COURT JUSTICE.

GORSUCH; “NUCLEAR CONFIRM”

- **PRE-2013:** FILIBUSTERS ALLOWED; FORCED SOME CONSENSUS PICKS (KENNEDY INSTEAD OF BORK);
- **NOV. 2013:** HISTORY: DEMOCRATS ELIMINATED IT FOR CABINET POSTS/NON-SUPREME COURT PICKS.
- **APRIL 6, 2017:** REPUBLICANS END IT FOR SUP. CT.
- **TODAY:** ONLY 50 VOTES NEEDED TO CALL FOR VOTE ON A PICK, AND IN FUTURE.

GORSUCH; “NUCLEAR CONFIRM”

- **CONSEQUENCES FOR FUTURE?**
 - JUSTICE GINSBURG—84; LEFT LEADER;
 - JUSTICE BREYER---ALSO IN LEFT MIDDLE, 78;
 - JUSTICE KENNEDY, THE SWING VOTE, 81;
 - JUSTICE SOTOMAYOR---63;
 - JUSTICE KAGAN—57
- Approximately 1300 days left in Trump’s first term
- Death of Ginsberg, Breyer or Kennedy would likely result in **DRAMATIC SHIFT.**

SAMPLE 5-4 VOTES OF NOTE

- AFFIRMATIVE ACTION;
- FREE SPEECH;
- ABORTION;
- RIGHT TO DIE;
- GAY MARRIAGE;
- RACIAL PREFERENCES IN ADMISSIONS;
- RELIGIOUS DISPLAYS;
- BUSH vs. GORE;
- HANDGUN CARRY;
- CAMPAIGN SPENDING LIMITS;
- EXECUTION OF PRISONERS FOR CRIMES DONE AS MINORS;

Gorsuch Decisions As A Circuit Court Judge

- Strict constructionist
- *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016) – (expresses doubts about the *Chevron* deference)
- *NLRB v. Cmty. Health Servs.*, 812 F.3d 768 (10th Cir. 2016) (dissenting) (majority upheld NLRB order the disregarded interim earnings in calculating award of back pay)
- *TransAm Trucking, Inc. v. Admin. Review Bd., United States Dep't of Labor*, 833 F.3d 1206 (10th Cir. 2016) (dissenting) (“It might be fair to ask whether TransAm’s decision was or kind one. But it’s not our job to answer questions like that. Our only taks is to decide whether the decision was an illegal one.”)

Gorsuch Decisions

As A Circuit Court Judge

- *Johnson v. Weld Cty. Colo.*, 595 F.3d 1202 (10th Cir. 2010) (“District court did not abuse its discretion in ruling that the employee’s direct evidence of sex discrimination failed to create reliable question of fact because it was inadmissible hearsay”)
- *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 F. App’x 492 (9th Cir. 2009) (joined opinion/citing by designation) (Transgender employee challenged employer’s refusal to allow her to use the women’s bathroom until gender reassignment surgery was completed. Panel held that she had established prima facie case of gender discrimination, but failed in her ultimate burden because she did not establish that her gender was the motivating factor when the employer claimed as its justification.)

TRUMP vs. SUPREME COURT?

- WILL TRUMP RESPECT THE RULE OF LAW IF COURT GOES AGAINST HIM?
 - Critical of Federal Judge Curiel, born in Indiana, who ruled against him in Trump University case , saying not impartial because of “Mexican” heritage;
 - Would Trump Move To Recuse Judge Ginsberg?
 - Ginsberg was critical of Trump in public comments both before and after the election; calling him a “faker” along with other things
 - Trump called on her to resign
 - Potentially ugly for Court

EEOC

- Commission's current composition
 - Victoria Lipnic (R)
 - Chai Feldblum (D)
 - Jenny Yang (D)
 - Charlotte Burrows (D)
 - Vacancy!
- General Counsel is vacant!



NEW EEOC CHAIR

- Victoria Lipnic
- Appointed by President Obama in 2010
 - Named acting chair by President Trump in late January
 - History of regulation in compensation discrimination
 - Previous position – Assistant Secretary of Labor for Employment Standards at DOL
 - Oversaw Wage and Hour, OFCCP from 2002 – 2009
 - Private practice with Seyfarth Shaw in Washington
- Has indicated that she supports EEOC's systemic case approach and LGBT push
- Skeptical about the new EEO-1 requirements



FILING TRENDS



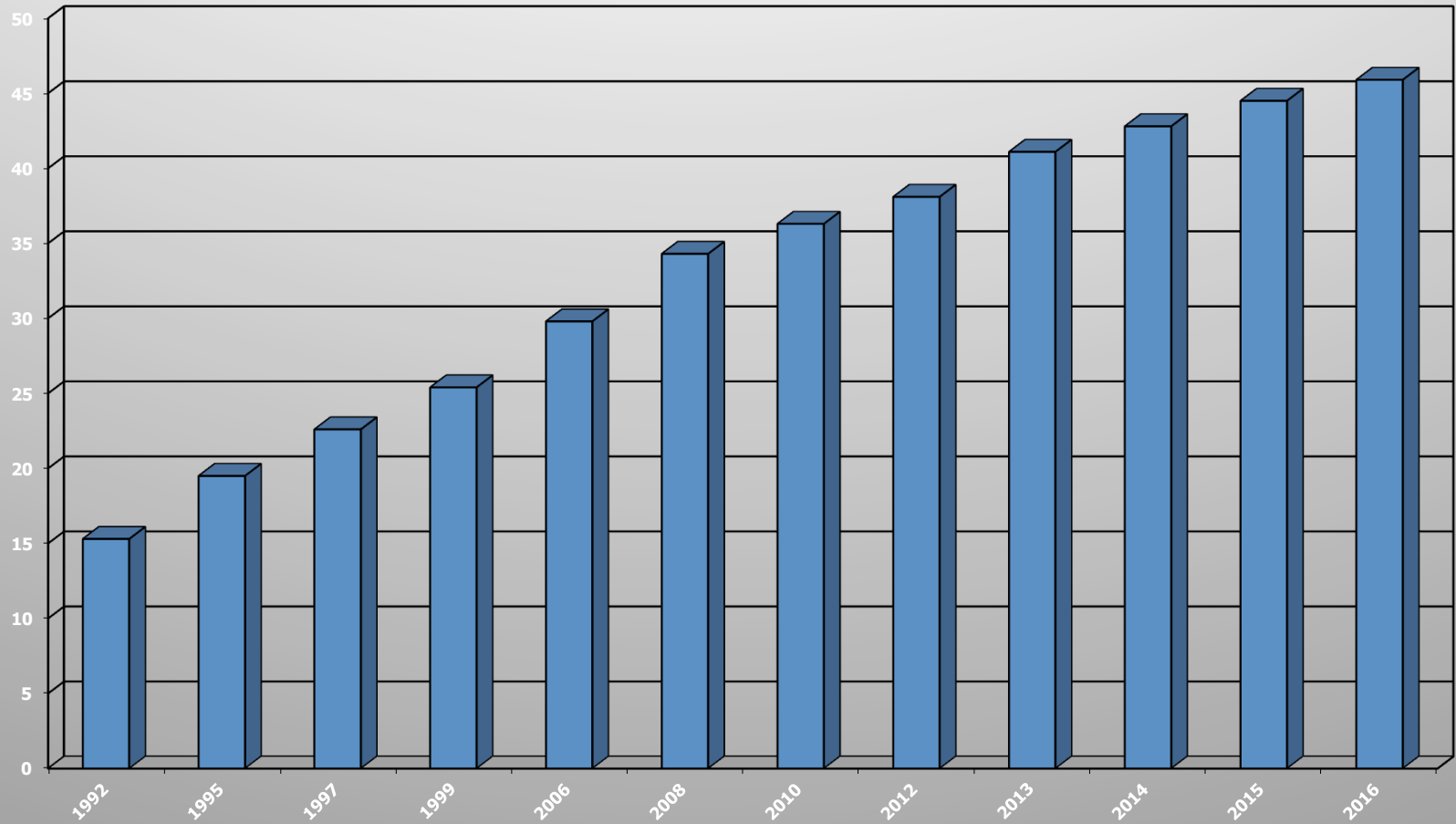
Trends in Charge Filings

YEAR	EEOC CHARGES
2006	75,768
2007	82,792
2008	95,402
2009	93,277
2010	99,922
2011	99,947
2012	99,412
2013	93,727
2014	88,778
2015	89,385
2016	91,503

2016 EEOC Charges by Type

Type	Percentage
Retaliation	45.9%
Race	35.3%
Disability	30.7%
Sex	29.4%
Age	22.8%
National Origin	10.8%
Religion	4.2%
Color	3.4%
Equal Pay Act	1.2%
GINA	0.3%

Rise of Retaliation



EEOC Strategic Enforcement Plan

- Prioritizes the following areas:
 - Targeted approach focusing on where government efforts can have strategic impact
 - Integrated approach: collaboration, coordination and consistency
 - Accountability: taking ownership to achieve results given existing resources



EEOC Strategic Enforcement Plan



- Stated goals:
 - Eliminating barriers in recruitment and hiring
 - Protecting immigrant workers, migrant workers, and underserved communities
 - Ensuring equal pay protections
 - Preserving access to the legal system
 - Preventing systemic harassment

EEOC Strategic Enforcement Plan

- Addition of two areas to the emerging issues priority:
 - Complex employment relationships in the 21st century workplace; and
 - Discrimination against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups



EEOC Strategic Enforcement Plan

- Other focus areas:
 - Lack of diversity in technology
 - Increasing use of data driven screening tools
- Reinforces efforts to address pay discrimination based on sex, as well as on race, ethnicity, age, and for individuals with disabilities.



EEO-1 Pay Data Reporting

- Effective March 2018
 - Summary pay reporting to be included on EEO-1 reports
 - Separates employees into job categories and identifies workers by race, gender, etc.
 - Includes W-2 wages for each position to separate them by “pay bands”
 - May be asked for and used against employers in pay discrimination claims
- Hours worked data
 - Summary of all hours worked by employees in each salary band – includes salaried workers



LBGT CLAIMS



Protections for LGBT Employees

- Courts have adopted the view that employment actions motivated by gender stereotyping are unlawful sex discrimination
- EEOC has set forth position that LGBT rights are protected by “sex” discrimination
 - Discrimination is based upon sex of those individual chooses to associate with
- View has been adopted by other agencies, such as the Department of Labor and the Department of Education
- Possible that Trump’s appointees will not keep to the same course.
- Circuit Courts and Supreme Court coming

Christiansen v. Omnicom Group

- Creative director of Omnicom alleged discrimination due to failure to conform to gender stereotypes.
- “Stereotypically feminine” gay men (or “stereotypically masculine” lesbian women) can pursue a gender stereotyping claim under Title VII.
- Gay, lesbian, and bisexuals do not have less protection from traditional gender stereotype discrimination, but sexual orientation alone will not show non-conformity with a gender stereotype.
- Concurrence: Legal landscape has changed and “because of...sex” discrimination should encompass sexual orientation discrimination.



Evans v. Georgia Regional Hospital

- Hospital security officer alleged discrimination based on sex. She did not carry herself in the “traditional woman[ly] manner.”

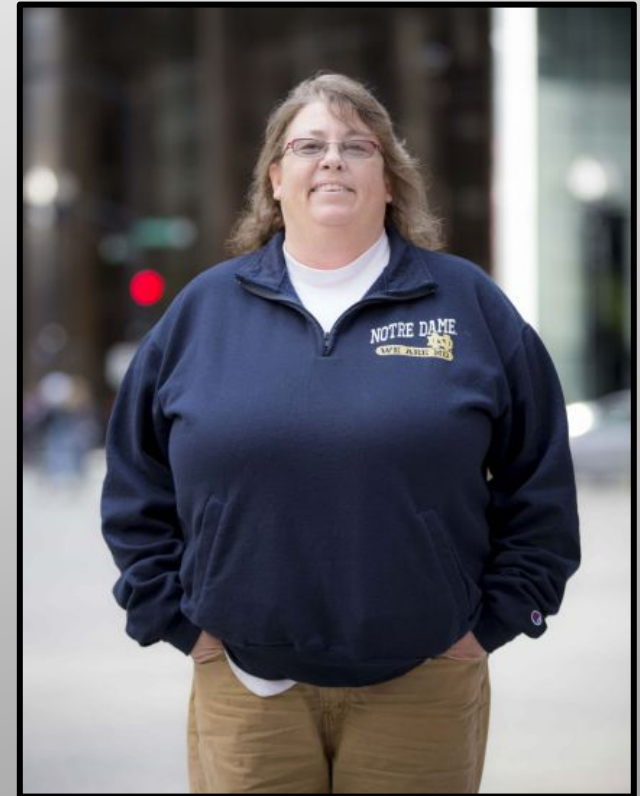


Evans v. Georgia Regional Hospital

- Sexual orientation is not actionable under Title VII.
- Discrimination based on gender non-conformity is actionable and not just another way to claim sexual orientation discrimination.
 - Evans failed to show that she was discriminated because of her masculine manners. Just being lesbian did not support her claim of gender non-conformity.
- Dissent argued Title VII should prohibit discrimination based on an employee's sexual orientation because it is discrimination "because of ...sex."

Hivley v. Ivy Tech

- Adjunct professor at Ivy Tech was denied several full-time positions.
- She identified as a lesbian.
- Claimed discriminated on because of sexual orientation.
- Court: Employment discrimination based on sexual orientation is a form of sex discrimination under Title VII.

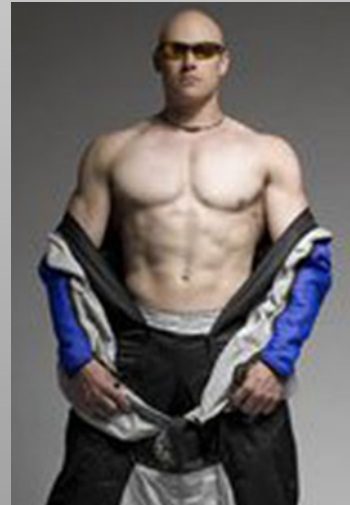


Hivley v. Ivy Tech

- Majority: The fact that the enacting Congress may not have anticipated a particular application of law can't stand in the way of the provisions of the law on the books. Supreme Court precedent shows additions to statutes regarding "sex" when Congress is silent.
- Judge Posner: The meaning of "sex" has changed and is much broader than when Title VII was enacted.
- Judge Flaum: Causation under Title VII is a motivating factor and discriminating because a person is attracted to the same sex is motivated in part because of the employee's sex.
- Dissent: Limiting "sex" to men-and-women is consistent with: previous interpretations; the "ordinary" meaning of the word; the absence of the word "orientation" in the statute; and the term has had the same use since it's enactment in discrimination statutes.

Zarda v. Altitude Express

- Gay skydiver
- Fired for allegedly touching a female tandem student
- Died base jumping, but estate continued suit
- “[W]e decline Zarda’s invitation to revisit our precedent. A separate panel of this Court recently held that Simonton can only be overturned by the entire Court sitting in banc.”



Zarda v. Altitude Express

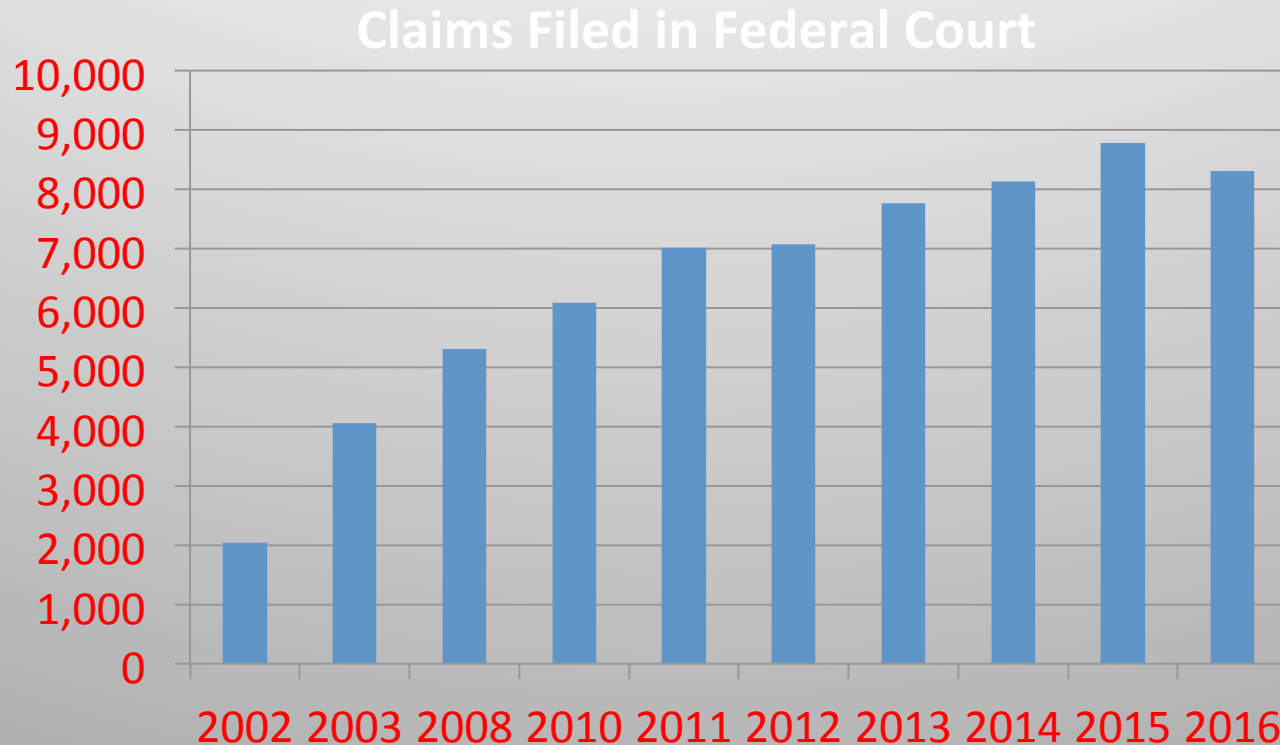
- Rehearing *en banc* granted
- EEOC has been invited to submit an amicus brief
- Question parties are to brief: “Does Title VII of the Civil Rights Act of 1964 prohibit discrimination on the basis of sexual discrimination ‘because of . . . sex’?”



WAGE HOUR ISSUES



FLSA LAWSUITS REACH HIGH POINT?



What to Expect – FLSA

- Overtime Rule
 - Enjoined by Texas Judge in November
 - AFL-CIO motion to intervene
 - Plaintiff has pending motion for summary judgment
 - DOL appealed to Fifth Circuit
 - Requested expedited briefing and hearing
 - New administration sought and received extension of time to brief issues
 - Practical reality – no rule...for now



Pay Equity

- New laws in California, Maryland and Virginia
- 2013 Median Annual Earnings of Year-Round, Full-Time Workers
 - All Men \$50,033 100%
 - All Women \$39,157 78%
 - African American women \$34,089, 68.1% (was 68.6%)
 - Latina women \$30,209, 60.4% (was 92%)
 - Asian \$42,335, 84.6% (was 57.5%)
- Have to anticipate increase in litigation



FLSA Retaliation Claims

- Pineda v. JTCH Apartments, L.L.C., 843 F.3d 1062 (5th Cir. 2016)
 - Fair Labor Standards Act's (FLSA) broad authorization of “legal and equitable relief” encompasses compensation for emotional injuries suffered by an employee on account of employer retaliation.



EXECUTIVE ORDERS



The Early Results Are In

- Trump has announced intention to undo Obama's Executive Orders, which may include
 - Fair Pay and Safe Workplace Rule – Contractor blacklisting
 - Required government contractors to disclose violation of 14 federal laws including ULP charges
 - March 17, Trump signed bill blocking enforcement
 - Announced not rescinding EO 13672 that amends EO 11478 (EEO in federal government) and provides LGBT protection
 - Paid Sick Leave
 - Minimum Wage for Federal Contractors

What Is Happening Now

- Executive Orders Entered Presently
 - Financial professional fiduciary rule
 - Hiring freeze for some federal jobs
 - ACA burdens
 - Immigration



Department of Labor



New Secretary of Labor

- Alexander Acosta
 - Confirmed April 27
 - Son of Cuban immigrants
 - Harvard undergrad and law school
 - Clerked for Samuel Alito on Third Circuit
 - Practiced ELL for Kirkland & Ellis in Washington
 - Former NLRB member, Assistant AG for DOJ's Civil Rights Division and U.S. attorney for S.D. Florida



DOL Administrative Interpretations

- Two significant interpretations concerning “independent contractor” (No. 2015-1) and “joint employment” (No. 2016-1) status under the FLSA
- Viewed as efforts to place additional burdens on employers
- **Withdrawn on June 6, 2017**
- **BUT SEE** *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017) (context of an FLSA case)
 - Judge must determine based whether alleged joint employers are “completely disassociated” with respect to employment of employee
 - Six factors to consider in assessing whether employers are “completely dissociated”

Potential DOL Issues

- Return of the Wage & Hour Opinion letter?
- Comp time for private employers (passed House on May 3, 2017)
 - Permit nonunionized private employers offer option for employees to accrue up to 160 hours of comp time

NLRB



Changes to the NLRB Composition

- Currently, NLRB has 2-1 Democratic majority, with two vacant seats that will likely be filled with Trump appointees
 - Philip Miscimarra (R) (Chairman)
 - Mark Pearce (D) (Term expires 2018)
 - Lauren McFerran (Term expires 2019)
 - Marvin Kaplan (nominated May 10)
 - William Emanuel (nominated May 10)
- General Counsel (Richard F. Griffin, Jr.) term expires November 4, 2017



Chair Philip Miscimarra

- Term expires December 16, 2017
- Appointed Chair on April 24, 2017
- Joint JD/MBA from University of Pennsylvania
- ELL lawyer for Morgan Lewis (Chicago); Seyfarth Shaw (Chicago) among firms
- Co-author of three books on labor law



Potential Changes That Could Affect the NLRB

- Board composition
- Fate of Obama-era decisions
- Scrutiny of Employee Handbooks
- Expansive interpretation of Joint Employer Doctrine
- Supreme Court to review class action waiver issue
- Potential federal right-to-work law?

Fate of Obama Era Decisions

- A new board with a Republican majority is likely to revisit recent NLRB rules and decisions, including
 - (1) inclusion of temporary workers in bargaining units with an employer's regular workers,
 - (2) quickie elections,
 - (3) expansion of protected concerted activity (e.g., its impact on workplace policies),
 - (4) definition of appropriate bargaining units, and
 - (5) status of college/university adjunct faculty, graduate students, and student athletes.



Fate of Obama Era Decisions

- The new Board also may not make additional changes the current Board would make, such as extending *Weingarten* rights to non-union workplaces and making misclassification of employees as independent contractors a separate violation of the National Labor Relations Act (NLRA).
- In addition, the Labor-Management Reporting and Disclosure Act (LMRDA) “persuader” regulations, which are currently enjoined, may be revisited.

Handbook Interpretations Likely to Change

- Strong dissent in *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38 (Feb. 24, 2017) on “reasonably construe” standard when being applied to handbook polices and wants it scrapped
- Requirement that employees keep investigations regarding employee misconduct confidential
- Prohibition against “harassment” could be reversed
- Social media policies



Joint Employer Determinations

Old Test for 30 years:

- Joint employer status only existed where “two separate entities share or codetermine those matters governing the essential terms and conditions of employment.”
- The level of control asserted by the potential joint employer needed to be “direct and immediate” as to employment actions such as hiring, firing, discipline, supervision, and direction.



Joint Employer Determinations

Broader new test announced in 2015:

- (1) whether a common law employment relationship exists; and
- (2) whether the potential joint employer “possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful bargaining.”
- The critical distinction is that “control” can now be direct, indirect (through an intermediary) or even a reserved right to control, whether or not that right is ever exercised.
- **BUT SEE** *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017) (context of an FLSA case)



Class Action Waiver

- In 2012, NLRB held that individual contract provisions between an employee and an employer requiring an employee to resolve disputes through arbitration and prohibiting employees from joining class actions filed in courts are unlawful.
- Although NLRB might reverse position, Supreme Court agreed to take up circuit split
- Argument moved to next term of court (2017-18)
 - Probably moved to avoid a 4-4 tie

Federal Right to Work Law?

- Right-to-work laws
 - Typically prohibit requiring nonmember employees at unionized workplaces to pay union dues or fees
 - Was key issue in 2017 IAM campaign to unionize Boeing's Charleston plant
 - Twenty-seven states are now right-to-work
 - Missouri and New Hampshire could soon follow
 - But federal law could be coming with Republican controlled Senate and House
 - Bill introduced by Joe "You Lie" Wilson, (R- SC 2nd District) on February 2, 2017



OSHA



OSHA Leadership Vacancies

- Anybody need a job
- Assistant Secretary
 - Chief of Staff,
 - Senior Advisors
 - Deputy Assistant over Standards and Guidance, Administrative Programs, Cooperative and State Programs, Whistleblower Protection Programs and Technical Support and Emergency Management



OSHA

- Work related injuries and substance abuse testing





- Budget cuts – 83 million cut from DOL budget
- Joint Employment (haven't we discussed this enough?)
- Revocation on April 3 of the Volks rule enacted in December 2016 that established employer has a continuing duty to create accurate work-related injury records- rule had practical effect of extending SOL by five years
- No more right to union representative at OSHA inspections in non-union facility
- No more treating restroom access for transgender employees as a safety issue?

Whistleblower Investigations

- OSHA issued its revised Whistleblower Investigations Manual in January 2016
- Chapter 3 of the Manual states that the burden of proof to be applied by investigators is “**whether there is a reasonable cause to believe that a violation occurred.**”
- Prior standard - “establish the elements of a prima facie allegation”
- New standard - after weighing all the evidence, a reasonable judge could rule in the whistleblower’s favor.

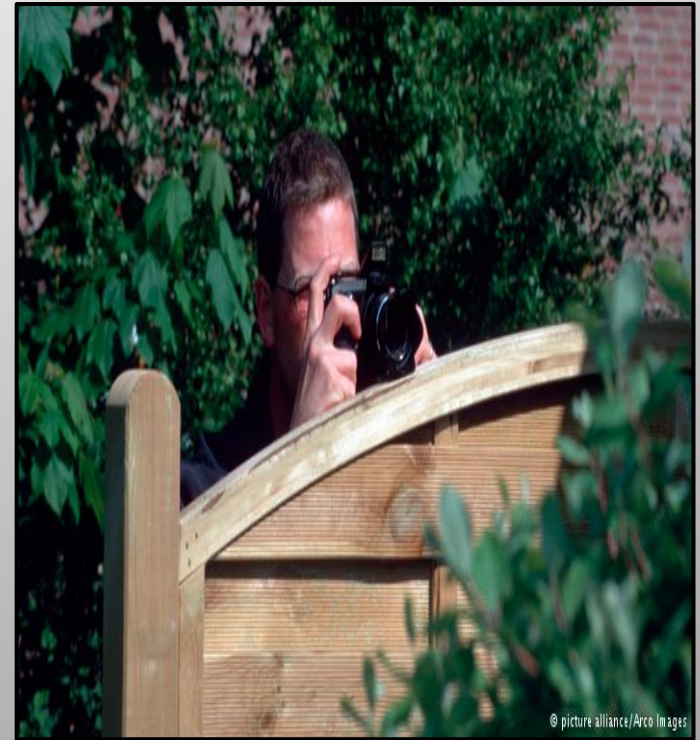


EEOC AND WELLNESS PROGRAMS

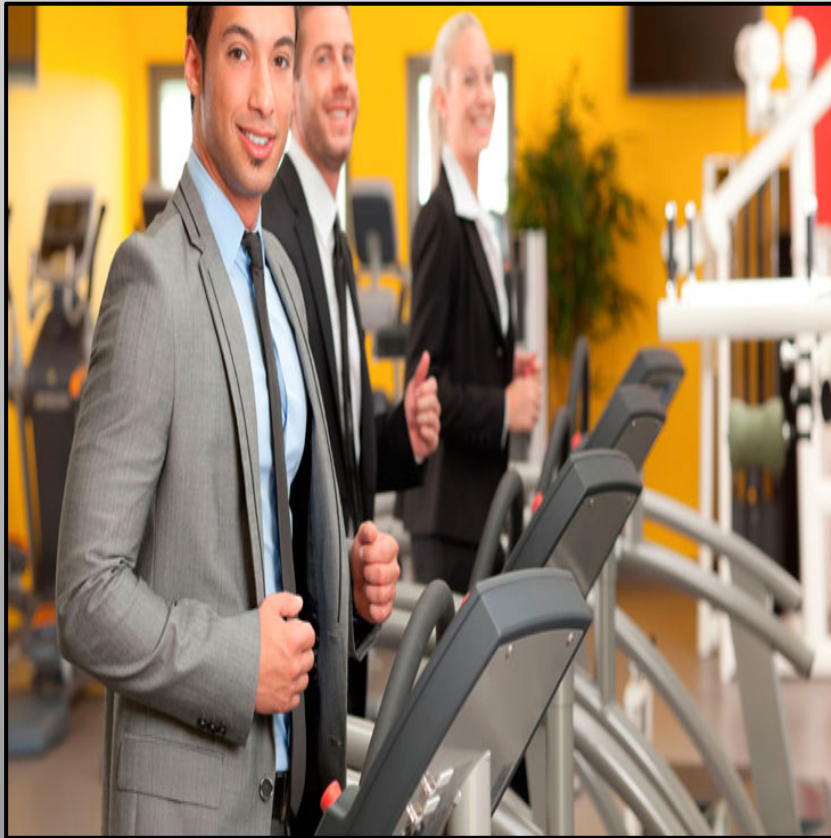


EEOC Guidance on Wellness Programs

The ADA and GINA generally prohibit employers from obtaining and using information about employees' own health conditions or about the health conditions of their family members, including spouses.



EEOC Guidance on Wellness Programs



Both laws, however, allow employers to ask health-related questions and conduct medical examinations, such as biometric screenings to determine risk factors, if the employer is providing health or genetic services as part of a voluntary wellness program.

EEOC Guidance on Wellness Programs

- Final ADA rule: wellness programs that are part of a group health plan and that ask questions about employees' health or include medical examinations may offer incentives of up to 30 percent of the total cost of self-only coverage.
- Final GINA rule: value of the maximum incentive attributable to a spouse's participation may not exceed 30 percent of the total cost of self-only coverage, the same incentive allowed for the employee.



EEOC Guidance on Wellness Programs

- No incentives allowed in exchange for the current or past health status information of employees' children or in exchange for specified genetic information of an employee, an employee's spouse, and an employee's children.
- Apply to all workplace wellness programs, including those in which employees or their family members may participate without also enrolling in a particular health plan.

HOW WILL THIS LIKELY EFFECT EPL CLAIMS IN THE COMING YEAR



