



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

TOPICS

- Neil Gorsuch
- Filing Trends
- LBGT Claims
- Wage and Hour Issues
- Executive Orders
- DOL Opinion Letters
- The ACA
- Wellness Programs
- NLRB
- Bermuda Triangle of FMLA, ADA, and Worker's Compensation
- Regulations in the coming year

The Supreme Court Vacancy!

- **Neil Gorsuch**

- Subscribes to the same legal philosophy as the 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



FILING TRENDS



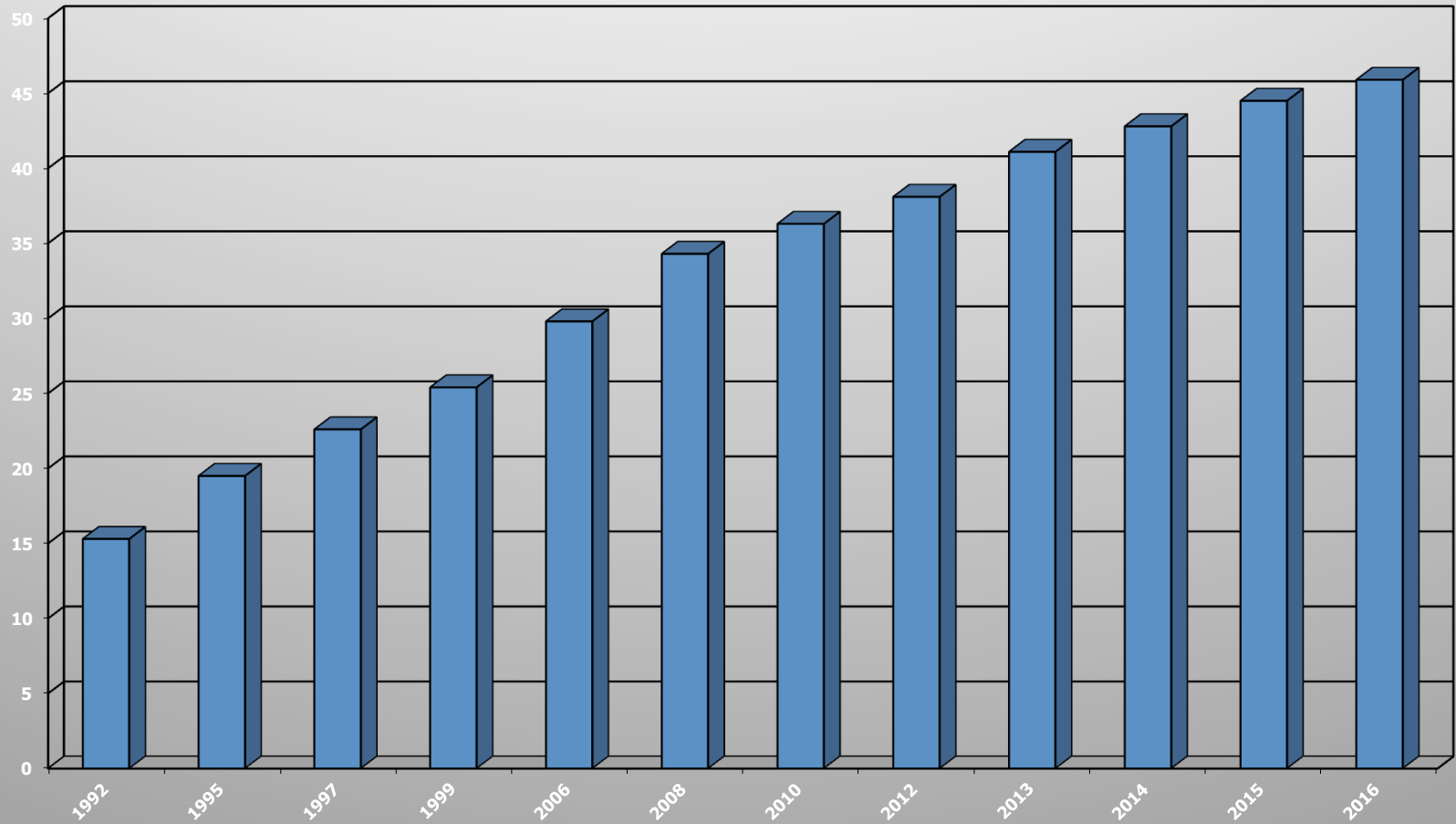
Trends in Charge Filings

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.



NEW EEOC CHAIR

- Victoria Lipnic appointed to serve as Chair
 - 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
 - Potential impact – EEO – 1 Compensation Reporting



LBGT CLAIMS



Baldwin v. Foxx



- FAA supervisory air traffic control employee claimed not selected for front line manager position because homosexual
- Prior decisions recognize gender stereotyping Plaintiff's sex, but not sexual orientation
- Based upon precedent federal agency denied sexual orientation claim

Baldwin v. Foxx

- Commission decision on appeal:
“Complainant’s allegations of discrimination on the basis of his sexual orientation state a claim of discrimination on the basis of sex within the meaning of Title VII.”
 - Contrary to all established case law
 - Found that sexual orientation is a “concept that cannot be defined or understood without reference to sex.”
 - Look for court decisions in 2017

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
 - Gloucester County School Board v. G.G.

WAGE HOUR ISSUES

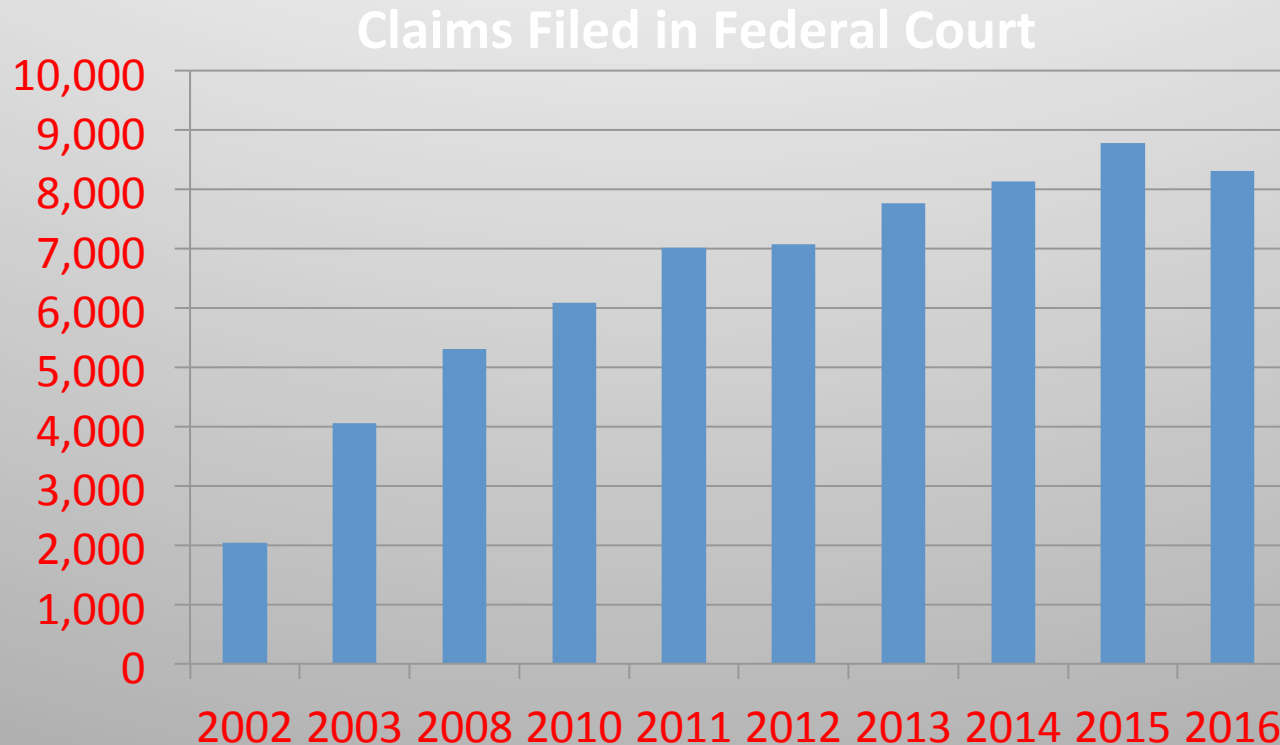


EEO-1 Pay Data Reporting

- 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



FLSA LAWSUITS REACH HIGH POINT?



What to Expect – FLSA

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



State Minimum Wage Laws

- Federal minimum wage remains at \$7.25,
- But many state and local jurisdictions have passed legislation that will increase their respective minimum wage in 2017.
 - Alaska - Hawaii - Montana
 - Arizona - Maine - New Jersey
 - Arkansas - Maryland - New York
 - California - Massachusetts - Ohio
 - Colorado - Michigan - Oregon
 - Florida - Missouri - South Dakota
 - Vermont - Washington - Washington D.C.

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



What to Expect

- Trump has announced intention to undo Obama's Executive Orders, which may include
 - Paid Sick Leave
 - Minimum Wage for Federal Contractors
 - Fiduciary Rule (already delayed)
 - Fair Pay and Safe Workplace Rule – Contractor blacklisting
 - House passed resolution to block rule on Feb. 2
 - Unlikely to affect LGBT protection EO – per Trump

What Is Happening Now

- Executive Orders Entered Presently
 - 2 for 1 executive order
 - Delay financial professional fiduciary rule
 - Hiring freeze for some federal jobs
 - ACA burdens
 - Immigration



DOL OPINION LETTERS



DOL Opinion Letters

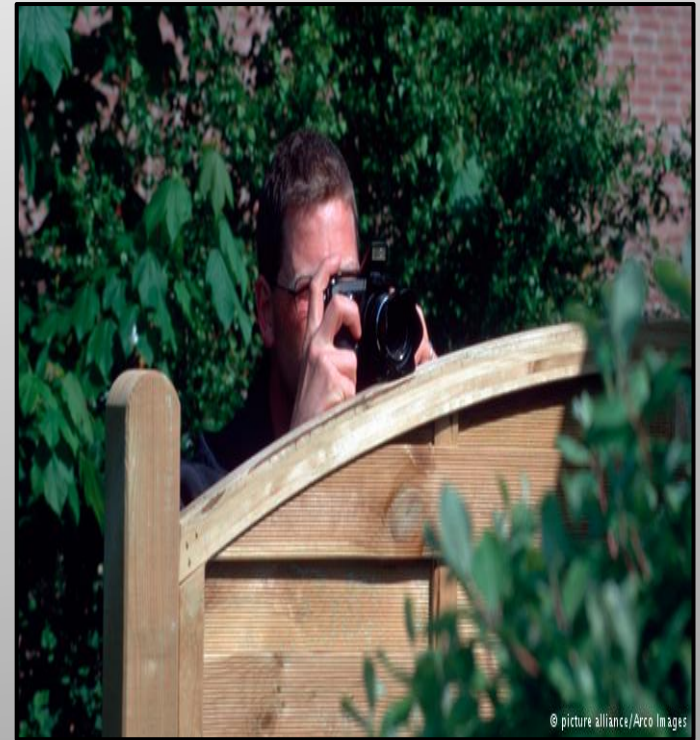
- Two significant interpretations concerning “joint employment” and “independent contractor” status under the FLSA
- Viewed as efforts to place additional burdens on employers
- New opinion letters could scale-back or withdraw the Obama Administrator Interpretations, permitting employers greater flexibility in using independent contractors and giving business more certainty in expanding through use of **franchises**.

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.

NLRB



Potential Changes Affecting NLRB

- Effect of Trump on NLRB's 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?

Changes to the NLRB Composition

- Currently, NLRB has 2-1 Democratic majority, with two vacant seats that will likely be filled with Trump appointees
 - Mark Pearce (D) (Term expires 2018)
 - Philip Miscimarra (R) (Acting Chairman)
 - Lauren McFerran (Term expires 2019)
- General counsel term expires in 2018



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

- Prohibition against “harassment” could be reversed
- Requirement that employees keep investigations regarding employee misconduct confidential
- Social media policies



Joint Employer Determinations

Broader New Test as of July 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.



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.



Under Trump, the standard could revert back

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 will not be until next term of court
 - 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
 - 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



WORK RELATED INJURIES



ADA, FMLA & Worker's Compensation

- It is not going away



OSHA

- Worker's compensation and substance abuse testing



IMPACTS IN THE COMING YEAR



New I-9 Form



- New form effective January 22, 2017
- Failure to use new form will expose organizations to penalties, which were recently nearly doubled
- Has been dubbed a "smart I-9" because of the fillable, interactive PDF option that enables users to fill in the fields of the form online before printing and signing a hard copy

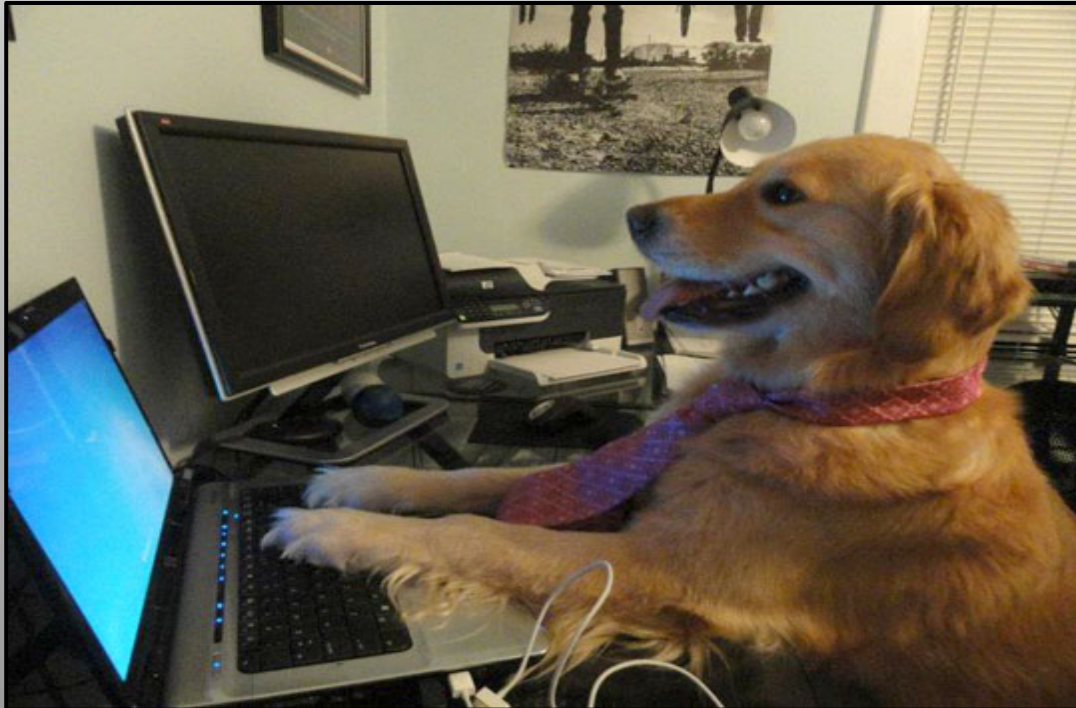
New I-9 Form

- Section 1
 - Can only be completed by the employee
 - One key change is that users must enter N/A in any fields that they previously would have left blank.
 - The employee now needs to affirmatively check a box indicating that he or she did not use a preparer or translator if that's in fact the case



New I-9 Form

- Section 2
 - Completed by employer
 - Drop-down menus are now available



Use of E-Verify

- The new administration may focus on expanding enforcement of existing immigration laws in the workplace, which may include encouraging more employers to use E-Verify under existing law, as well as working with Congress to expand mandatory use.
- Under current federal law, E-Verify is voluntary for employers, except as mandated by executive order for federal government contractors



SUMMARIES OF EPL CLAIMS IN THE COMING YEAR

