What to Expect in 2018

Legal Changes to Affect Employers

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In 2017, the Trump administration set a course to dismantle former President Barack Obama's labor and employment regulatory legacy.

The Department of Labor (DOL) rescinded its "persuader rule" that would have required employers to disclose who advises them on how to discourage union organizing activity. The Equal Employment Opportunity Commission (EEOC) suspended its implementation of a revised EEO-1 report that would have placed onerous salary reporting requirements on employers. And the DOL has reversed course on an overtime rule that would have doubled the salary requirement to exempt employees from overtime.

More upheaval is on the horizon in 2018, with the judiciary taking center stage. Below is a preview of two significant changes anticipated in 2018.

Class action waivers

On October 2, the Supreme Court of the United States heard oral arguments in three consolidated cases that will decide the future of class action waivers in the employment context. The high court will resolve a dispute that has grown since the National Labor Relations Board (NLRB) issued its controversial 2012 decision in *D.R. Horton*. In that case, the NLRB held for the first time that the National Labor Relations Act (NLRA) bans class action waivers in employment arbitration agreements.

The overwhelming majority of federal and state courts, including the Second, Fifth and Eighth Circuit Courts, have disagreed with the NLRB's *D.R. Horton* decision and refused to enforce it. Undeterred, the NLRB continues to adhere to its position. In 2016, the Seventh and the Ninth Circuit Courts of Appeals became the first federal appellate courts to side with the NLRB, followed by the Sixth Circuit in 2017.

In recent years, the Supreme Court has issued a number of decisions regarding the enforceability of action waivers in arbitration agreements under the Federal Arbitration Act (FAA). Many of the justices' views on arbitration and class action waivers are fairly well known and split along ideological lines. With the passing of Justice Scalia, who was frequently in the majority of 5-4 decisions, all eyes have turned to the Court's newest appointee, Justice Gorsuch.

During oral arguments on the first day of the new term, Justices Breyer, Kagan, Sotomayor and Ginsburg asked passionate questions indicating support of the NLRB and employees' position, leaving observers with little doubt of their impressions.

Chief Justice Roberts and Justice Alito, on the other hand, posed more subtle questions that appeared to support the employers' arguments. Justice Thomas was predictably silent. To the surprise of many observers, Justice Gorsuch did not say a word, in contrast to his noted style of active questioning during oral arguments. At this point, the only thing certain is a divided opinion.

The Supreme Court's decision, expected in January or February 2018, is highly anticipated because of the uncertainty created by some courts enforcing arbitration agreements while the NLRB files unfair labor practice charges against employers that maintain those agreements. The Supreme Court's forthcoming decision promises to bring much-needed clarity for employers in crafting and enforcing arbitration agreements.

Sexual orientation discrimination

Until 2017, the United States Circuit Courts of Appeal had long held that sexual orientation is not a protected class under Title VII. On April 4, 2017, the Seventh Circuit Court of Appeals issued its decision in *Hively v. Ivy Tech Community College of Indiana*, departing from its own legal precedent and becoming the first federal appellate court to find that sexual orientation is encompassed in Title VII of the Civil Rights Act of 1964's definition of sex.

Following the Seventh Circuit's lead, the Second Circuit granted rehearing in *Zarda v. Altitude Express*, in which a skydiving instructor claimed a violation of Title VII, alleging he was terminated after telling a customer he was homosexual. In a curious twist, two federal government divisions, the EEOC and the Department of Justice (DOJ), each filed amicus briefs on opposite sides of the Zarda case.

The EEOC maintained its position, held since 2013, that Title VII prohibits sexual orientation discrimination. DOJ took the opposite position, noting that "the EEOC is not speaking for the United States and its position about the scope of Title VII is entitled to no deference beyond its power to persuade."

With splits in the Circuit Courts and among different federal agencies, it seems inevitable that this issue will find its way to the Supreme Court, perhaps in 2018. Until then, Indiana employers are advised to treat sexual orientation as a protected class under Title VII.

Employers with operations outside of the Seventh Circuit's jurisdiction (Illinois, Indiana and Wisconsin) are advised to take seriously any claim of discrimination or harassment based on sexual orientation as those may be subject to a patchwork of state or local regulations and/or an EEOC investigation.

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