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2018 Labor & Employment Law Update:

What Employers Need to Know

(November 2, 2018)

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Where Are We Headed?

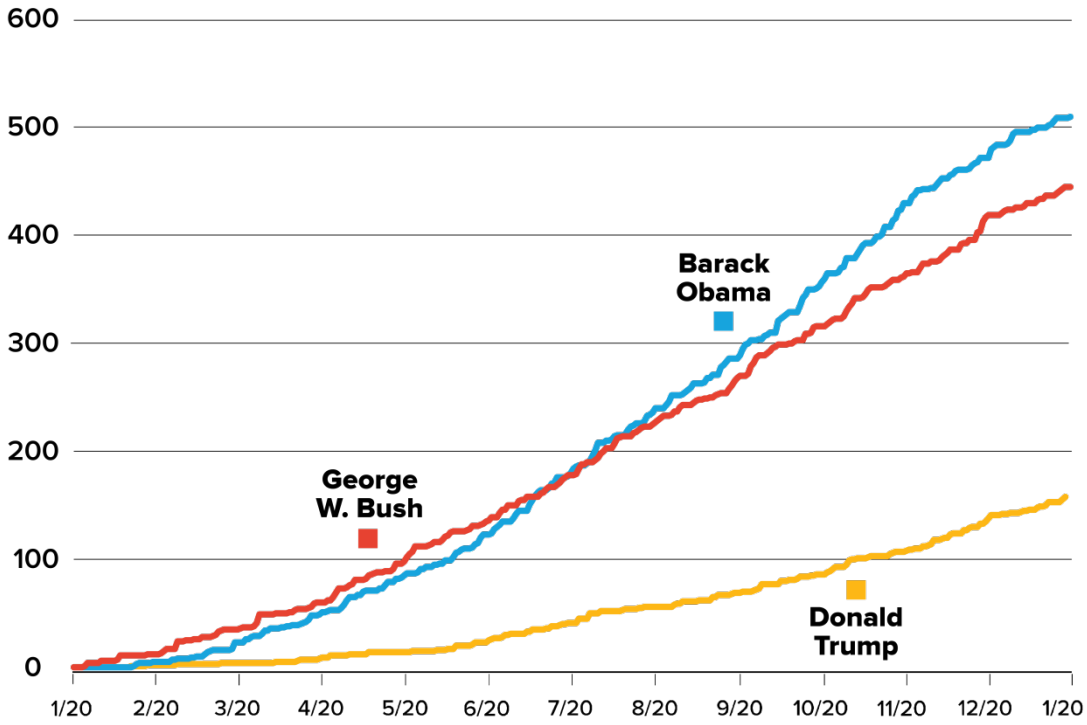
1. Regulatory Agenda under President Trump
2. State, Federal, and Local Law Update
3. Case Law Update

Trump's Regulatory Freeze

- On 1-1-17, President Trump issued a Memo stating no new regs until approved by Trump-appointed official.
- On 1-30-17, Trump issued E.O. directing agencies to take 2 "deregulatory actions" for each new rule.
- On 2-24-17, Trump issued E.O. directing agencies to create deregulation task forces.

Trump's Regulatory Blockage

Most presidents, Democrat and Republican, engage in a certain baseline amount of rulemaking as they govern. Not Trump: His White House approved just 156 major regulations during his first year, a huge dropoff from both the Obama and Bush administrations.



Source: Office of Information and Regulatory Affairs

POLITICO

Dept. of Labor

Federal Contractors

Trump's OFCCP

- More Transparent
  - OFCCP publishes lists of employers being audited.
- Fewer, Less Burdensome Audits
  - In Aug. 2018, OFCCP rescinded Directive 307 regarding analysis of SSAGs and PAGs.
- Smaller OFCCP (possible merger with EEOC).

Am I a Federal Contractor?

- Medicare Parts A and B and Medicaid
  - No, accepting reimbursement does ***not*** make a provider a federal contractor.
- Medicare Parts C (Advantage Plans) and D (Prescription Drug Coverage)
  - Less clear, but likely treated as federal financial assistance (and thus excluded from OFCCP jurisdiction).

Am I a Federal Contractor? (cont.)

- Examples of Covered Contracts
  - Providing health care to active or retired military under a contract with the Department of Veterans' Affairs or the Department of Defense.
  - A teaching hospital doing research for a university that has a contract with the Federal government may be covered.

TRICARE Providers

- A DOD health care program that pays for the medical benefits of active-duty and retired military personnel and their families.
- Directive 2018–02 (amends Directive 2014–01)
  - Extends moratorium on enforcing the affirmative action obligations of TRICARE providers to 2021.
  - Expanded to include VA Health Benefits Program providers.

VA MISSION Act of 2018

- Contractors that enter into agreements with the VA to provide hospital care, a medical service, or an extended care service are subject to the same affirmative action moratorium as is applied to TRICARE contractors and subcontractors in Directive 2014-01.
- VA will likely need time to implement regulations and make the new provider agreements available.

Wage and Hour Division

Trump's WHD

- Less Enforcement, More Guidance
  - DOL Opinion Letters
- New Regulations on the Horizon
  - Updates to Overtime, "Regular Rate" calculation, and joint employment.
  - Other changes possible.

"RIP" 2016 Overtime Rules

- In 2016, new OT rate was scheduled to go into effect on 12-1-2016.
- Would have increased salary threshold:
  - From $455 per week ($23,660) to "40th percentile" ($913 per week or $47,476).
  - HCE threshold increased from $100,000 to "90th percentile" ($134,004).
- 4.2 million more workers eligible for OT.

"New" Overtime Rules

- **11-22-16:** Texas judge issues nationwide injunction.
- **08-31-2017:** New OT regs struck down by judge.
- **09-06-17:** 5th Circuit grants DOL's unopposed request to dismiss its appeal.

DOL Sec. Alexander Acosta

- Confirmed by Senate in April 2017
  - Clerked for Justice Alito.
- Confirmation Hearing:
  - "I believe the salary threshold figure would be ***somewhere around $33,000***," which represents a COL increase since the last increase in 2004.

Overtime Rule 2.0?

- In July 2017, DOL seeks public input (RFI) on 11 questions relating to OT threshold.
- In August 2018, DOL holds public "listening sessions" regarding new OT rule.
  - What is the appropriate salary level (or range of salary levels)?
  - What are the costs and benefits?
  - Should it be updated regularly?

Fall 2018 Regulatory Agenda

- **Updates to OT Rule**
  - DOL will update salary level.
  - Proposed Rules expected ***March 2019***.
- **Updates to Calculation of "Regular Rate"**
  - DOL wants to update rules to address "modern forms of compensation and benefits."
  - Proposed rules expected ***December 2018***.

Fall 2018 Regulatory Agenda

- **Updates to "Joint Employment" Standard**
  - In June 2017, DOL withdrew Obama-era guidance on "joint employment" (FLSA 2016-1).
  - DOL wants to "clarify the contours of the joint employment relationship."
  - Proposed Rules expected ***December 2019***.

DOL's New Intern Rule

- DOL issued new guidance on January 5, 2018 to determine when a worker qualifies as an intern
- Adopted the "primary beneficiary test" followed by multiple appellate courts
- Under this test, the "economic reality" of the intern-employer relationship is examined to determine which party, either the intern or the employer, is the "primary beneficiary" of the relationship
  - If the employer is primary beneficiary → "employee" under FLSA
  - If the intern is primary beneficiary → not an employee
- New rule consists of seven non-exhaustive factors

DOL Opinion Letters

- DOL Opinion Letters are back!
- Since January 2018, the DOL has issued 23 opinion letters addressing many different topics.
  - Not controversial, but helpful guidance.

FLSA Opinion Letters

- On 1-5-18, the DOL "re-issued" 17 opinion letters that were withdrawn in 2009.
- **FLSA2018-1 (On-Call Time)**
  - Five-minute response time for ambulance drivers was not so restrictive as to make the time compensable.
- **FLSA2018-11 (Regular Rate)**
  - "Job bonus" must be included in "regular rate."

FLSA Opinion Letters (cont.)

- **FLSA2018-18 (Travel Time)**
  - Reaffirms that: (1) travel away from the employee's home community is worktime if it cuts across the employee's regular workday and (2) "time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile" is not worktime.
  - "Normal work hours" can be calculated for employees with irregular schedules by (a) averaging hours or (b) establishing a schedule.

FLSA Opinion Letters (cont.)

- **FLSA2018-19 (Breaks)**
  - Employee needs 15-minute breaks every hour due to a serious health condition under the FMLA.
  - DOL concludes that breaks required solely to accommodate the employee's serious health condition, unlike ordinary rest breaks, are ***not*** compensable.
  - But, employee can use paid break time that is otherwise provided by the employer.

FLSA Opinion Letters (cont.)

- **FLSA2018-20 (Wellness Activities)**
  - Employees voluntarily participate in "wellness activities," including biometric screenings, education classes, gym, Weight Watchers, etc.
  - DOL concludes that voluntarily engaging in "wellness activities" is not compensable.
  - But, if an employee uses their paid break time (i.e., 20 min. or less), the time is still compensable.

FLSA Opinion Letters (cont.)

- **FLSA2018-21 (Retail Sales Exemption)**
  - Employees selling credit card processing equipment to businesses could qualify for the retail-sales exemption.
  - Notes that exemptions receive a "fair (rather than narrow) interpretation" under Encino.
- **FLSA2018-22 (Volunteers)**
  - Professionals who "volunteered" to grade exams for a professional organization were "volunteers" and not "employees."
  - Payment of a fee and expenses did not change result.

FMLA Opinion Letters

- **FMLA2018-1 (Attendance Points)**
  - No-fault attendance policy removes points after 12 months of "active service," which is not defined but did not include FMLA leave.
  - By "freezing" points during FMLA leave, DOL concludes that the employee "neither loses a benefit that accrued prior to taking the leave nor accrues any additional benefit."
  - However, the employer must treat equivalent forms of leave (e.g., non-FMLA leave) similarly.

New FMLA Forms

- On 09-04-18, the DOL released the long-awaited new Family Medical Leave Act notices and certification forms.
  - New forms expire on 8-31-18.
- https://www.dol.gov/whd/fmla/2013rule/militaryForms.htm

PAID Pilot Program

- In March 2018, the DOL announced the Payroll Audit Independent Determination (PAID) pilot program.
- Allows employers to self-report FLSA violations to the DOL and attempt to resolve the issues under the DOL's "supervision."
- Limitations
  - Waiver is limited to the "limited to the potential violations for which the employer had paid back wages."
  - State claims are not resolved.
  - Records are not confidential and may be subject to a FOIA request.
- In Oct. 2018, the DOL extended the PAID Program through March 2019.

OSHA Update

OSHA's "Improve Tracking of Workplace Injuries and Illnesses" Rule

- Issued: May 12, 2016.
- Effective: Aug. 10, 2016, but OSHA delayed enforcement until Dec. 1, 2016.
- Includes two components:
  - (1) Electronic Recordkeeping; and
  - (2) Anti-Retaliation.

"Electronic Reporting" Provision

- Employers with 250+ employees ***or*** employers in "high risk" industries with 20-249 employees must electronically submit:
  - Form 300 (Log of Work-Related Injuries and Illnesses);
  - Form 301 (Injury and Illness Incident Report); and
  - Form 300A (Summary of Work-Related Injuries and Illnesses).

Electronic Reporting (cont.)

- In July 2018, OSHA issued Proposed Rule (83 Fed. Reg. 36494)
  - Eliminates e-filing requirement for Form 300 and Form 301.
  - Form 301A would still need to be e-filed.
- OSHA is ***not*** accepting e-filing of Form 300 and 301.

"Electronic Reporting" (cont.)

- Form 300A Deadlines:
  - 2016 Form 300A by ***December 31, 2017***.
  - 2017 Form 300A by ***July 1, 2018***.
  - Beginning in 2019, by ***March 2***.
- Compliance has not been easy:
  - 33% missed the December 31st deadline.
  - 46% missed the July 1st deadline.

Anti-Retaliation Provision

- Prohibits employers from discouraging workers from reporting an injury or illness.
- 2016 Rules provided guidance on:
  - (1) “Incentive Programs,”
  - (2) “Post-Accident Drug Testing,” and
  - (3) “Mandatory Reporting” Rules.

Anti-Retaliation (cont.)

- Drug Testing
  - "[B]lanket post-injury drug testing policies deter proper reporting."
- Incentive Programs
  - Prohibits all programs in which employees are denied a benefit on the basis of any injury or illness report.
- Mandatory Reporting Rules
  - Requiring immediate reporting could be retaliatory.

2018 OSHA Memorandum

- OSHA rules do ***not*** prohibit post-incident drug testing.
- Permissible Drug Testing, includes:
  - Random testing.
  - Drug testing unrelated to the reporting of a work-related injury or illness.
  - Drug testing under a state WC law.
  - Drug testing under DOT rules.
  - Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees.

2018 OSHA Memorandum (cont.)

- With respect to post-accident testing, OSHA notes:
  - "If the employer chooses to use drug testing to investigate the incident, the employer should test ***all employees whose conduct could have contributed to the incident***, not just employees who reported injuries."
- Thus, "blanket" post-accident testing policies may be OK if they apply only to "employees whose conduct could have contributed to the incident."

2018 OSHA Memorandum (cont.)

- Incentive Programs are permissible under OSHA rule.
  - Program that incentivizes reporting of "near-misses or hazards" is always permissible.
  - Rate-based incentive programs are permissible "as long as they are not implemented in a manner that discourages reporting."
- Rate-based programs require the employer to implemented "adequate precautions to ensure that employees feel free to report an injury or illness."

2018 OSHA Memorandum (cont.)

- Employers can counterbalance deterrents by "taking positive steps to create a workplace culture that emphasizes safety," including:
  - An incentive program that rewards employees for identifying unsafe conditions;
  - A training program reinforcing reporting rights and responsibilities and emphasizes non-retaliation;
  - A mechanism for accurately evaluating employees' willingness to report injuries and illnesses.

Transgender Bathroom

- In 2015 OSHA issued "A Guide to Restroom Access for Transgender Workers."
  - Employees should be permitted to use the bathroom of their gender identity.
  - Employees should not be asked "to provide any medical or legal documentation of their gender identity."
- To date, OSHA has not withdrawn the guidance.

DOJ and FTC


DEPARTMENT OF JUSTICE
ANTITRUST DIVISION


FEDERAL TRADE COMMISSION
UNITED STATES OF AMERICA
MCMXV

Antitrust Guidance for HR Professionals

- In 2016, DOJ would "proceed criminally against naked wage-fixing or no-poaching agreements."
- Wage-Fixing Agreements Are Unlawful
  - Agreeing with individual(s) at another company about employee salary or other compensation, either at a specific level or within a range.
- "No-Poaching" Agreements Are Unlawful
  - Agreeing with individual(s) at another company to refuse to solicit or hire that other company's employees.

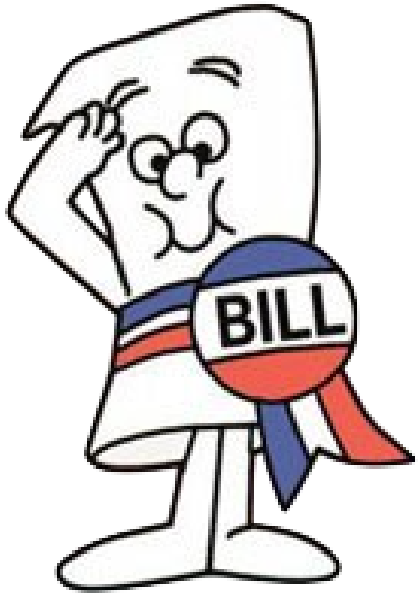
Antitrust (cont.)

- On 04-03-18, DOJ settlement with rival railroad suppliers regarding “no-poaching” agreement.
- Email between executives:
  - *“You and I both agreed that our practice of not targeting each other’s personnel is a prudent cause for both companies.”*
- Information Sharing
  - Common issues include salary and benchmarking studies should be conducted by industry groups.

Federal Legislation

Potential Legislation

- As of October 25, 2018, there were ***303 bills*** relating to labor and employment.
  - Only 6 had passed.
  - Five of 6 bills were “disapproval” bill pursuant to CRA.



Tax Cuts and Jobs Act

- Enacted **December 17, 2017**.
- Amends tax code and prohibits tax deductions for any payment, including payments pursuant to a settlement agreement, that involve sexual harassment or abuse if the payment is subject to a nondisclosure agreement.
- Deductions for attorney's fees are prohibited if they relate to settlements or payments that include nondisclosure agreements that could prevent the disclosure of sexual harassment or assault.

Consolidated Appropriations Act of 2018

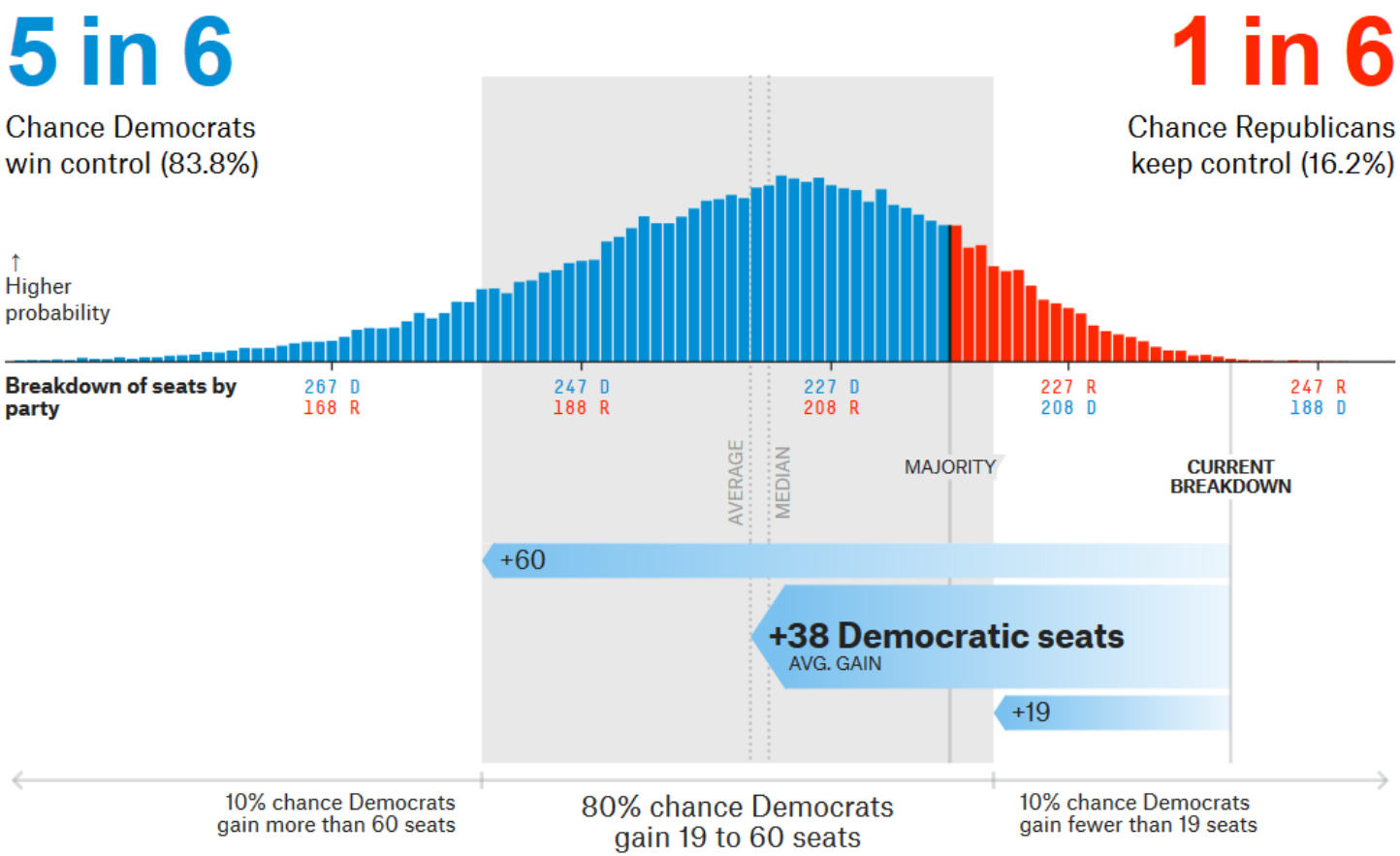
- Signed into law on **March 23, 2018**.
- Vacated DOL's 2011 regulations barred tip pooling when employers do not claim a tip credit under section 3(m) of the FLSA.
- DOL guidance in April 2018 provides that the FLSA does not prohibit employers "from allowing employees who are not customarily and regularly tipped – such as cooks and dishwashers – to participate in tip pools."

Paid Family Leave

- 14% of workers have paid family leave
- GOP Bill
  - Provides workers with 45% of their pay in a Social Security parental benefits for 12 weeks.
- Democratic bill
  - Provides workers with 66% of pay for up to 12 weeks (or 60 working days).
  - Covers same absences as FMLA.

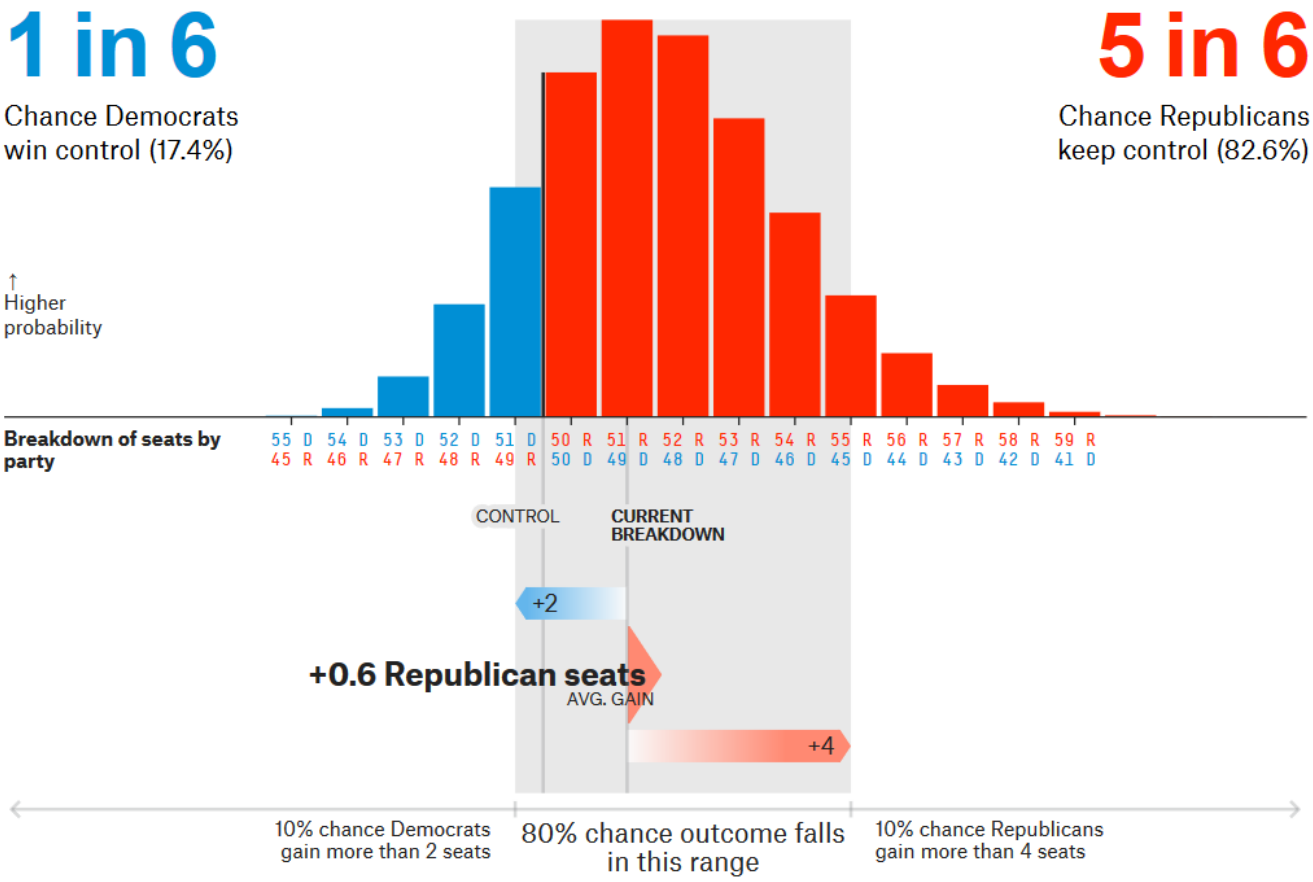
Forecasting the race for the House

Updated Oct. 26, 2018, at 1:17 AM



Forecasting the race for the Senate

Updated Oct. 26, 2018, at 1:17 AM



U.S. Supreme Court

U.S. Supreme Court

Democratic	Republican
Elena Kagan (56)	Neil Gorsuch (49)
Sonia Sotomayor (62)	Brett Kavanaugh (53)
Stephen Breyer (78)	Samuel Alito (66)
Ruth Bader Ginsburg (83)	John Roberts (62)
	Clarence Thomas (68)

Encino Motorcars LLC v. Navarro, (April 2, 2018)

- Group of "service advisors" sued their employer under the FLSA alleging that they were not paid OT.
- Majority (5-4) held concluded that service advisors were "salesmen primarily engaged in servicing automobiles" as defined in the FLSA exemption.
- Expressly ***rejected*** the principle that exemptions to the FLSA should be construed narrowly.

NLRB v. Murphy Oil USA, Inc., Epic Systems Corp. v. Lewis, and Ernst & Young LLP v. Morris, (May 21, 2018)

- Majority (5-4) held that arbitration agreements providing for individualized proceedings must be enforced pursuant to FAA, and neither the Arbitration Act's saving clause nor the NLRA suggests otherwise.
- Dissent claimed that decision would result in "under enforcement" of employment laws.

Janus v. AFSCME Council 31, (June 27, 2018)

- Majority (5-4) held public sector employees who are non-members of a union cannot be legally required to pay agency or "fair share" fees as a condition of employment.
- "Fair share fee" assessed to non-members under Minn. Stat. § 179A.06, subd. 3 is now invalid.
- Questions remain regarding enforceability of dues-deduction authorizations and refunding previously-deducted dues of non-members.

2018-2019 Cases

- *District v. Guido, U.S., No. 17-587*
  - Does the 20-employee threshold for ADEA claims apply to public employers?
- *Lamps Plus Inc. v. Varela, U.S., No. 17-988*
  - Did arbitration agreement waive class proceedings?
- *New Prime Inc. v. Oliveira, U.S., No. 17-340*
  - Does FAA apply to long-haul trucker?

State Law Update

2017-2018 Legislature

2017-2018 MN Legislative Session

- GOP Legislative Majorities
  - House: 76-57
  - Senate: 34-33

- DFL Governor Mark Dayton
- Session began on February 20, 2018 and ended on May 21, 2018.

Preemption of Local Legislation

- H.F. 600 and S.F. 3 (2017 MN Legislature)
  - Preempts any local regulation of (1) "minimum wages," (2) "paid or unpaid leave time," (3) "hours or scheduling of work time" or (4) "requiring an employer to provide an employee a particular benefit, term of employment, or working condition."
- H.F. 600 stalled and Gov. Dayton vetoed S.F. 3 on May 30, 2017.

Legal Challenges (cont.)

- H.F. 600 and S.F. 3 (2018 MN Legislature)
  - Reintroduced on February 28, 2018.
  - New Conference Committee selected in the House and Senate.
- Was not repassed.

Wage History

- H.F. 2913 (2018)
  - Prohibits an employer from "seek[ing] the wage history or information about past wages of an employee or prospective employee."
- Failed to pass.

Revised Definition of "Sexual Harassment"

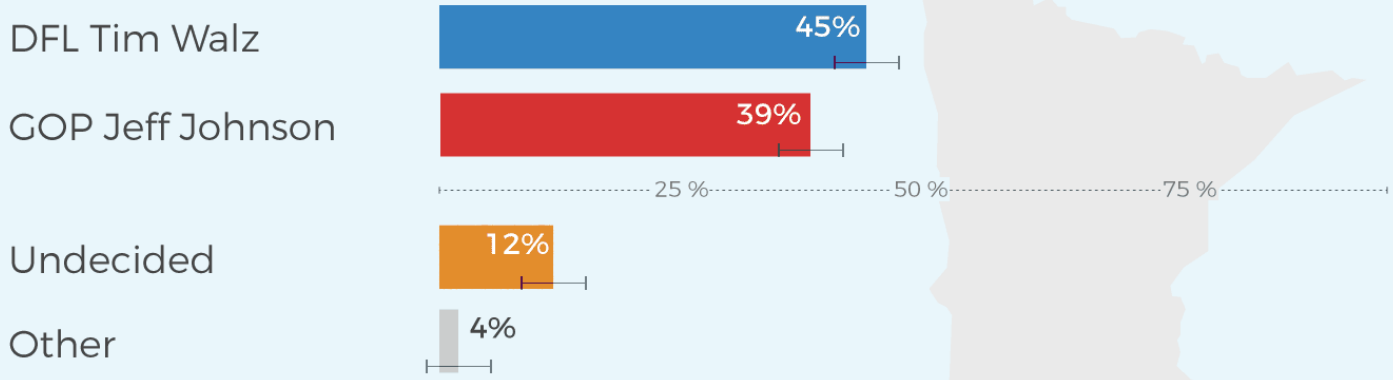
- H.F. 4459 and S.F. 4031 (2018)
  - Removes requirement that harassment be "severe or pervasive" in order to be actionable under the MHRA.
  - Standard was developed by the Supreme Court more than 30 years ago.
- Failed to pass.

2018 Gubernatorial Election

- Walz
  - Supports $15 minimum wage, “fair scheduling,” expansion of sick leave laws, and paid family leave.
- Johnson
  - Does not support raising minimum wage.
  - Supports preemption legislation.

The Minnesota Governor's Race

MPR News | Star Tribune Minnesota Poll



Margin of error +/- 3.5%
Margin of error range shown by

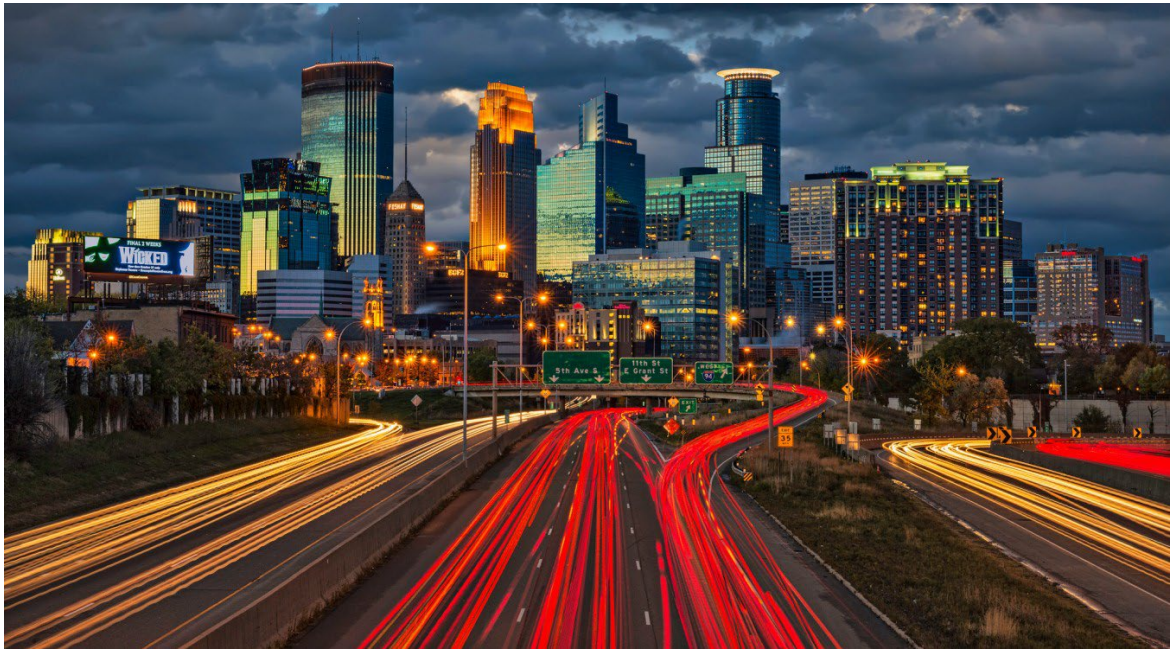
Polling conducted by Mason-Dixon Polling & Strategy on Oct 15-17

MPRnews

2018-2019 Legislature

- Reconvene January 8, 2019.
- Potential Legislation
  - Paid Family Leave
  - Pay Equity
  - Recreational Marijuana
  - Wage History
  - Preemption

Municipal Update



Sick Leave in the Twin Cities

- Minneapolis Ordinance
  - Effective July 1, 2017
- St. Paul Ordinance
  - Effective July 1, 2017 (23+ employees) or Jan. 1, 2018 (<23 employees)

Status of Legal Challenges

- *Minn. Chamber of Commerce v. Minneapolis*, 27-cv-16-15051 (Minn. D. Ct. Jan. 19, 2017)
  - Court enjoined the City from enforcing its ordinance "**against any employer resident outside the geographic boundaries of the City . . . .**"
  - Both cities acknowledge that employer "residence" is required.

Legal Challenges (cont.)

- *Minn. Chamber of Commerce v. Minneapolis*, A17-0131 (Minn. Ct. App. Sept. 18, 2017)
  - Appeals court agreed that the Ordinance was likely ***not*** preempted by state law.
  - But, court left in place the lower court's injunction preventing the City of Minneapolis from enforcing its ordinance against non-resident employers.

Legal Challenges (cont.)

- *Minn. Chamber of Commerce v. Minneapolis*, 27-cv-16-15051 (Minn. D. Ct. May 8, 2018)
  - Held that the Minneapolis ordinance was not preempted by state law.
  - "The City is therefore enjoined from enforcing the Ordinance against ***employers resident outside the geographic boundaries of the City of Minneapolis***."
- Both parties have appealed (A18-0771)

Duluth Sick Leave Ordinance

- In May 29, 2018, the Duluth City Council adopted an ESST ordinance.
- ESST Ordinance:
  - Applies to employers with 5 or more employees.
  - Requires 1 hour of ESST for every 50 hours worked, up to 64 per year.
  - Carryover of up to 40 hours.
- Effective January 1, 2020.

Minneapolis $15 Minimum Wage

- Minneapolis passed a $15 Minimum Wage ordinance on June 30, 2017
- Phased in over 5 years for businesses with 100+ workers
- Phased in over 7 years for businesses with < 100 workers

FIGHT FOR $15

Date	Large Businesses (100+ workers)	Small Businesses (< 100 workers)
Jan. 1, 2018	$10	No increase
July 1, 2018	$11.25	$10.25
July 1, 2019	$12.25	$11
July 1, 2020	$13.25	$11.75
July 1, 2021	$14.25	$12.50
July 1, 2022	$15	$13.50
July 1, 2023	$15 indexed to inflation	$14.50
July 1, 2024	$15 indexed to inflation	$15

MPLS Minimum Wage (cont.)

- On Dec. 10, 2017, Judge Burke ruled in *Minn. Chamber of Commerce et al v. City of Minneapolis*, 27-cv-17-17198 that the minimum wage ordinance did ***not*** have extraterritorial effect.
- Noted that the minimum wage ordinance applied only to "work actually performed within the city limits of Minneapolis."

St. Paul $15 Minimum Wage

- St. Paul City Council propose a $15 minimum wage ordinance in Oct. 2018.
- Proposal would begin phasing in the wage hike in 2020:
  - 100+ workers—$15 minimum wage by July 1, 2023.
  - 6 to 100 workers—$15 an hour by July 1, 2025.
  - 1 to 5 workers—$15 an hour by July 1, 2027.
- No tip credit.

Other Case Updates

How Much Leave Is Too Much?

- Under the ADA, there is a split on how much leave is a reasonable accommodation:
  - **EEOC Guidance:** Unpaid leave must be considered as an accommodation (unless undue hardship).
  - **7th Circuit:** held in *Severson* and *Golden* that a multi-month leave is never a reasonable accommodation.
  - **8th Circuit:** has not adopted *Severson* or *Golden*.

Severson v. Heartland Woodcraft, Inc.,

(7th Cir. Sept. 20, 2017)

- In June 2013, Severson took a 12-week leave for a long-standing back problem.
- At the end of his leave, Severson had surgery on his back, which would require that he be off work for another 2-3 months.
- Severson asked Heartland to continue his leave of absence, but the company declined.
- Instead, Heartland terminated his employment and invited him to reapply when he had recovered sufficiently to return to works.

Severson v. Heartland Woodcraft, Inc., cont.

- Severson sued under ADA for failure-to-accommodate.
- 7th Circuit affirmed lower court's dismissal of the case:
  - "The ADA is an ***antidiscrimination*** statute, not a ***medical-leave*** entitlement."

Golden v. Indianapolis Housing Agency,
(7th Cir. Oct. 17, 2017)

- Golden suffered from breast cancer, requiring surgery and an extended leave.
- As her 12 weeks of FMLA leave was about to expire, she sought an unspecified period of leave, which could have lasted as much as 6 months.
- Her employer, the IHA, declined to grant more than four additional weeks of leave.
- When Golden could not return from work after 16 weeks off (12 weeks of FMLA leave and 4 additional weeks), her employer terminated her employment.

Golden v. Indianapolis Housing Agency, cont.

- Relied on Severson.
- "A multi-month leave of absence is beyond the scope of a reasonable accommodation under the ADA."
- "A request for six months of medical leave in addition to the twelve weeks required by the FMLA removes an employee from the protected class under the ADA and the Rehabilitation Act."

EEOC v. S&C Elec. Co.,

(N.D. Ill., April 10, 2018)

- Rascher worked for S&C for 52 years.
- In May 2014, Rascher was diagnosed with colon cancer and thereafter with melanoma.
- In February 2015, he fractured a hip and was placed on an approved long-term disability leave (12 months) that was scheduled to end on August 29, 2015.
- On August 15, 2015, Rascher contacted S&C to return to work.
- Employer suggested that he retire and, when he refused, discharged him.

S&C Elec. Co., (cont.)

- S&C moved to dismiss, relying on *Severson*, arguing that his 12 month leave meant he was not protected by the ADA.
- Court held "nonsense."
  - "Unlike the plaintiffs in Severson and Byrne he was ready, willing and able to return to his position without any accommodation."
  - "Whether an individual is a qualified individual with a disability is determined at the time of the employment decision."

Hostettler v. College of Wooster,

(6th Cir. July 17, 2018)

- Heidi Hostettler was hired as an HR generalist.
- She was pregnant and provided 12 weeks of FMLA after her child was born, though she didn't qualify.
- At end of her leave, in April 2014, Hostettler was suffering from postpartum depression and anxiety. Requested a reduced work schedule for 2-6 months.
- Returned in May on a reduced schedule of 3 days per week and, in July, she submitted updated medical information stating she could return to full-time in September.
- College terminated her, and did not hire a replacement HR employee until October.

Hostettler, (cont.)

- Reversed district court and held that summary judgment was inappropriate.
- "On its own, . . . full-time presence at work is not an essential function. An employer must tie time-and-presence requirements to some other job requirement."
- "An employer cannot deny a modified work schedule as unreasonable unless the employer can show why the employee is needed on a full-time schedule; merely stating that anything less than full-time employment is per se unreasonable will not relieve an employer of its ADA responsibilities."

Title VII and Sexual Orientation

- Courts find that sexual orientation is protected by Title VII.
  - *Hively v. Ivy Tech*, (7th Cir. 2017)
  - *Zarda v. Altitude Express, Inc.*, (2d Cir. Feb. 26, 2018)
- In *EEOC v. R.G. & G.R. Harris*, (6th Cir. Mar. 7, 2018), the court extended Title VII's prohibition against sex discrimination to include a prohibition of discrimination based on employee's transgender status.

Title VII (cont.)

- In *Evans v. Georgia Regional Hospital* (11th Cir. 2017), held that discrimination based on sexual orientation does ***not*** violate Title VII.
- The Supreme Court denied cert. on Dec. 11, 2017.
  - As a result, the Circuit split will continue to grow.

Other 2018 Trends

- #MeToo Movement
  - New laws to be expected.
- Pay Equity
  - Both federal and state laws
- Stricter Auditing of Contractors
  - OFCCP and state auditors (e.g., MDHR audits, including WCC and WESA).
- Retaliation claims continue to grow

2018 Trends (cont.)

- Definition of "Employee"
  - California adopts "ABC test" for workers in *Dynamex Operations West, Inc. v. Superior Court*, (Cal. April 30, 2018).
- Drug Testing
  - On 02-01-18, Maine became first state to protect workers from adverse employment action based on their use of marijuana and marijuana products, provided the use occurs away from the workplace.

2018 Trends (cont.)

- Salary History
  - CA, CT, DE, HI, KY, MA, NJ, NY, OR, PA, VT, WA prohibit the requesting an applicant's salary history.
- Sexual Harassment Training
  - Effective 1-1-19, California will have mandatory sexual harassment training for supervisors and non-supervisors.

QUESTIONS?

Thank you.