

# WELCOME

## LABOR & EMPLOYMENT SEMINAR

October 8, 2015

---

---

---

---

---

---

---

---

## LABOR & EMPLOYMENT LEGAL UPDATE

Anthony Grice, Kayt Kopen, Terry Potter

---

---

---

---

---

---

---

---

### Paid Sick Leave for Federal Contractors

- Executive Order issued September 7, 2015
- 1 hour of paid sick leave for every 30 hours worked
  - Up to 7 paid sick days per year
  - Applies to full- and part-time workers
- Effective January 1, 2017

---

---

---

---

---

---

---

---

### “Ban the Box” for Federal Contractors

- Fair Chance Act
  - Introduced September 10, 2015
- Prohibits federal contractors from asking about criminal histories of job applicants until after applicants have received conditional offers of employment



---

---

---

---

---

---

---

---

### BMW to Pay \$1.6 Million and Offer Jobs

- BMW’s criminal background policy discriminated against African Americans
  - 80% of disqualified employees were African American



---

---

---

---

---

---

---

---

### *Obergefell v. Hodges*

- Simplified FMLA administration
- Simplified benefits plans
  - Possible exceptions for private employers’ self-insured health and benefit plans
- Future extension of Title VII protection

---

---

---

---

---

---

---

---

## Amendment to Missouri Human Rights Act

- H.B. 1019 (passed) / S.B. 36
  - Eliminate individual liability
  - Modify standard of proof to motivating factor
  - Limitations on whistleblower claims
  - Cap on damages

---

---

---

---

---

---

---

---

## Proposed Changes to FLSA Overtime Exemption Rules

- Increase the minimum weekly salary required for an employee to be exempt from the FLSA's minimum wage and overtime requirements (the "**Standard Salary**").
- Increase the minimum annual compensation required for an employee to qualify as a highly compensated employee and to be examined under the less stringent tests ("**Highly Compensated Rule**").

---

---

---

---

---

---

---

---

## Proposed Standard Salary Rule

- Increase the required standard salary from \$455 per week (\$23,660 per year) to **\$970 per week** (\$50,440 per year).
  - 40th percentile of full-time salaried workers.
- Annually update the salary requirement based on either inflation or the 40th percentile.
- Allow employers to satisfy up to 10% of the salary amount through nondiscretionary bonus compensation.

---

---

---

---

---

---

---

---

### Affected Employees

- The Proposed Rule will impact employees who:
  - Earn more than \$455 per week (\$23,660 per year) but less than \$970 per week (\$50,440 per year);
  - Satisfy the duties test for the executive, administrative, or professional exemptions and are subject to the salary requirements; and
  - Work more than 40 hours per week.

---

---

---

---

---

---

---

---

### Proposed Highly Compensated Rule

- Increase the required annual compensation from \$100,000 per year to \$122,148 per year.
  - 90th percentile of full-time salaried workers.
- Annually update the salary requirement based on either inflation or the 90th percentile.
- The DOL estimates this will impact less than 40,000 workers nationwide.

---

---

---

---

---

---

---

---

### Affected Employees

- The Proposed Rule will impact employees who:
  - Earn more than \$100,000 in total compensation per year but less than \$122,148 per year;
  - Perform some executive, administrative, or professional duties;
  - Do not satisfy the duties test for the executive, administrative, or professional exemptions; and
  - Work more than 40 hours per week.

---

---

---

---

---

---

---

---

## Definition of “Independent Contractor” Under FLSA

- The FLSA uses the “economic realities” test.
  - Multi-factor test focusing on whether the worker is **economically dependent on the employer OR in business for him or herself.**

---

---

---

---

---

---

---

---

## Economic Realities Test

- Is the work performed an integral part of the employer’s business?
- Does the worker have an opportunity for profit or loss?
- Who has a greater investment in the worker’s work?
- Does the work performed require special skills and initiative?
- Is the working relationship permanent or indefinite?
- How much control is exercised or retained by the employer?

---

---

---

---

---

---

---

---

## Economic Realities Test

- This test for employment is broader than the “control” tests used by the IRS and courts under other statutes.
- According to the recent interpretation from the DOL: **“[M]ost workers are employees under the FLSA.”**

---

---

---

---

---

---

---

---

## Illinois Update

- Restrictive Covenants
- Illinois Wage Payment and Collection Act

---

---

---

---

---

---

---

## Restrictive Covenants

- What is adequate consideration for a valid restrictive covenant?
  - OAG Motorcycle Ventures, Inc. (Ill. App. Ct.)
    - At least two years of continued employment
  - Bankers Life and Casualty (N. Dist. Ill.)
    - No bright-line test requiring continued employment for at least two years

---

---

---

---

---

---

---

## Illinois Wage Payment and Collection Act

- Employers permitted to pay employees through payroll debit cards
  - Can not require payroll debit card as condition of employment
  - Must obtain voluntary written or electronic consent

---

---

---

---

---

---

---

### NLRB: Joint Employer Definition

- *Browning-Ferris Industries of California*
- Employers share or codetermine matters governing the essential terms and conditions of employment
- Different:
  - Potential vs. Immediate
  - Direct vs. Indirect

---

---

---

---

---

---

---

---

### NLRB: Right to Use Company Email

- *Purple Communications*
- Employees have presumptive right to use employer email system to engage in protected activity
  - Even in hospital setting (*UPMC*)
- Employer can monitor use
- Working time exception



---

---

---

---

---

---

---

---

### NLRB: Obligation to Deduct Union Dues

- *Lincoln Lutheran of Racine*
- Employer's obligation to deduct union dues from employee paychecks continues after CBA expires
  - Overrules 53-year-old *Bethlehem Steel* decision
- Strike issue

---

---

---

---

---

---

---

---

## Class Action Waivers in Arbitration Agreements

- *D.R. Horton*
  - 2<sup>nd</sup>, 5<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Circuits have denied enforcement
- *Cellular Sales of Missouri, LLC v. NLRB*
  - Pending 8<sup>th</sup> Circuit decision

---

---

---

---

---

---

---

---

## QUESTIONS?

anthony.grice@huschblackwell.com  
kayt.kopen@huschblackwell.com  
terry.potter@huschblackwell.com

---

---

---

---

---

---

---

---

## Immigration Headlines: Breaking Down the Breaking News

Toni Blackwood and Kelli Stout

---

---

---

---

---

---

---

---



## How has immigration law changed in the past year?

NATIONAL FOUNDATION FOR AMERICAN POLICY  
NFAP POLICY BRIEF » SEPTEMBER 2015

THE WORLD HAS CHANGED SINCE 1990,  
U.S. IMMIGRATION POLICY HAS NOT

BY STUART ANDERSON

© 2015 Husch Blackwell LLP

---

---

---

---

---

---

---

---

## Technological Advancements Since Congress Has Updated Immigration Laws

Technological Advancement	1990	Today
Internet	Virtually Non-existent*	3.2 billion users globally; used by all major companies
Smartphones	Non-existent	2 billion owners; transformed industries
Mobile Apps	Non-existent	1.2 billion apps in App Store
Social Media	Non-existent	Used by 74% of internet users
Streaming Video	Non-existent	By 2018, 84% of internet users will stream video

© 2015 Husch Blackwell LLP

---

---

---

---

---

---

---

---

November 2014:

## President Obama Announces Executive Actions on Immigration

© 2015 Husch Blackwell LLP

---

---

---

---

---

---


---

---

**HUSCH BLACKWELL**

### Government Scorecard on Announced Executive Actions

Directive	Grade
Expanded DACA Program	F
L-1B Policy Memorandum	B



U.S. Citizenship and Immigration Services  
Updated Policy Memorandum on L-1B Visa Petition Adjudications

© 2015 Husch Blackwell LLP

---

---

---

---

---

---

---

---

**HUSCH BLACKWELL**

### Government Scorecard on Announced Executive Actions

Directive	Grade
Expand the degree programs eligible for extended OPT	F
H-4 Work Authorization	C
New PERM Regulations	TBD Dec. 2015?
Parole for Investors	F
Encourage Naturalization (Citizenship)	A

© 2015 Husch Blackwell LLP

---

---

---

---

---

---

---

---

**HUSCH BLACKWELL**

### Government Scorecard

Directive	Grade
Improve Visa Allocation System	F?
Job Portability for Employer-Sponsored Green Card Applicants	D



© 2015 Husch Blackwell LLP

---

---

---

---

---

---

---

---

**HUSCH BLACKWELL**

## 2015: Decline in Worksite Enforcement?

**SRM** SOCIETY FOR HUMAN RESOURCE MANAGEMENT Leading People. Leading Organizations. [This Week's 5 HR Must-Haves. Click Here](#)

[HR TOPICS & STRATEGY](#)
[LEGAL ISSUES & PUBLIC POLICY](#)
[TEMPLATES & SAMPLES](#)
[HR STANDARDS & COMPETENCIES](#)
[RESEARCH & METRICS](#)
[EDUCATION & CERTIFICATION](#)
[CONFERENCES](#)

### Workplace Enforcement of Immigration Laws Down, Data Show

*Employer arrests down substantially, while administrative fines have increased*

By Roy Maurer 7/27/2015 [Facebook](#) [Twitter](#) [LinkedIn](#) [Permissions](#)

© 2015 Husch Blackwell LLP

---

---

---

---

---

---

---

---

**HUSCH BLACKWELL**

## Worksite Enforcement

Audits Conducted	Fines Imposed
<ul style="list-style-type: none"> <li>• 2009: 1,444</li> <li>• 2014: 1,320</li> </ul>	<ul style="list-style-type: none"> <li>• 2009: \$6.95 million</li> <li>• 2014: \$16.27 million</li> </ul>

© 2015 Husch Blackwell LLP

---

---

---

---

---

---

---

---

**HUSCH BLACKWELL**

## August 2015:

### OCAHO Clarifies Meaning of "Independent Contractor" for Form I-9 Compliance

© 2015 Husch Blackwell LLP

---

---

---

---

---

---

---

---

### U.S.A. v. Saidabror Siddikov

- Rejects ICE “right of control” argument
- “Totality of Circumstances” 3-prong analysis
  - Regulatory Factors (8 C.F.R. § 274a.1(j))
  - OCAHO Case Law
  - Principles of Agency Law

---

---

---

---

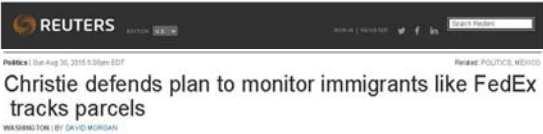
---

---

---

---

### Also in August 2015:



---

---

---

---

---

---

---

---

### What Happens When You Overstay Your Visa?

International flight diverted due to passenger demanding cat  
The Associated Press  
Posted: 09/01/2015 03:33:04 AM MDT  
DenverPost.com



ICE brings into custody Czech woman who exploited non-immigrant visa system, caused disturbance on plane

"They don't teach cat custody at FLETC," joked Special Agent Michael Goodwin, in reference to the Federal Law Enforcement Training Center where newly-recruited federal law enforcement personnel undergo rigorous training.

---

---

---

---

---

---

---

---

**HUSCH BLACKWELL**

**2015:**

**State E-Verify Laws**

© 2015 Husch Blackwell LLP

---

---

---

---

---

---

---

---

**HUSCH BLACKWELL**

**★ THE TEXAS TRIBUNE**

Confusion Over Reach of State E-Verify Use  
by Julián Aguilar | Sept. 22, 2015 | 8 Comments

Portfolio Media, Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com  
Phone: +1 646 253 7200 | Fax: +1 646 253 7161 | customerservice@law360.com

**Calif. Bill To Curtail E-Verify Abuse Hits Governor's Desk**

10/2/2015 Immigration bill clears NC Senate | The Charlotte Observer

**POLITICS & GOVERNMENT**    SEPTEMBER 29, 2015

**Immigration bill clears NC Senate**

© 2015 Husch Blackwell LLP

---

---

---

---

---

---

---

---

**HUSCH BLACKWELL**

**QUESTIONS?**

toni.blackwood@huschblackwell.com  
kelli.stout@huschblackwell.com

---

---

---

---

---

---

---

---

# BREAK

---

---

---

---

---

---

---

---

## TREATING SEPARATION AS IF IT'S GOING TO TRIAL

Joe Guffey & Carrie Claiborne

---

---

---

---

---

---

---

---

### Employee separation is inevitable

- You work hard to support employees & make them successful
- Reality is that some will have to be discharged
- Must treat every separation as if it could go all the way to trial

---

---

---

---

---

---

---

---

### Litigation is expensive and time-consuming

- Full Trial and Litigation
- Administrative Charge
- Mediation
- Responding to a Demand Letter

---

---

---

---

---

---

---

---

### Litigation is not always predictable

- Even a separation that appears simple and straightforward could result in a claim, a charge, or some form of litigation

---

---

---

---

---

---

---

---

### Litigation Statistics

- Employment litigation—one of the fastest *growing* sectors of litigation
  - 1 out of 5 lawsuits nationwide is filed by a current or former employee
  - Threat of litigation—leverage for severance

---

---

---

---

---

---

---

---

### Litigation Statistics (Cont'd.)

- Wide variety of claims being filed:
  - ADA
  - Title VII (Age, Race, Sex, Religion, National Origin)
  - Retaliation (growing)
  - Whistleblower
  - Workers compensation retaliation
  - Reverse discrimination
  - ADEA (Age Discrimination in Employment Act)

---

---

---

---

---

---

---

---

### Litigation Statistics (Cont'd.)

- Not all groundless
  - 4 out of 10 filed have some legitimacy
  - 2 out of 10 filed are in a gray area
  - 4 out of 10 filed are completely bogus

---

---

---

---

---

---

---

---

### Litigation Statistics (Cont'd.)

- Even just figuring out if a claim is legitimate costs money and employee time
- Some steps taken pre-separation and at the time of separation could help cut off bogus or "gray area" claims

---

---

---

---

---

---

---

---



**HUSCH BLACKWELL**

Table 14 (Continued) 11/19/14—Continued

### Litigation Statistics (Cont'd.)

Description	2014		2013		2012		2011		2010	
	No.	Amount	No.	Amount	No.	Amount	No.	Amount	No.	Amount
<b>Employment</b>	<b>10,666</b>	<b>1,628</b>	<b>9,038</b>	<b>5,934</b>	<b>2,863</b>	<b>241</b>	<b>24</b>	<b>217</b>	<b>2.3</b>	

© 2015 Husch Blackwell LLP 49

---

---

---

---

---

---

---

---

---

---

**HUSCH BLACKWELL**

### No good deed goes unpunished

- Workers are more educated about their rights
- While you continue training employees, it's important you continue training supervisors and HR staff on documentation
- Employees often get sympathy of jurors at trial
- Even resulted in a new form of business insurance—Employment practices liability coverage (EPLC)

© 2015 Husch Blackwell LLP 50

---

---

---

---

---

---

---

---

---

---

**HUSCH BLACKWELL**

### CROSS EXAMINATION

- This could be “your day in court”

© 2015 Husch Blackwell LLP 51

---

---

---

---

---

---

---

---

---

---

**HUSCH BLACKWELL**

**EXHIBIT 1**

May 3, 2015 3:00pm

- Meeting w/ Gerry Atack
- big Smith also in meeting
- age jobby - will ask
- called to 3 stores - denied making or hearing any jokes.
- explained to Gerry will fill if more jokes.

- Gifford

© 2015 Husch Blackwell LLP 52

---

---

---

---

---

---

---

---

---

---

**HUSCH BLACKWELL**

**EXHIBIT 2**

**BAD COMPANY CORRECTIVE ACTION FORM**

Employee's Name: Gerald Atack	Employee's Job Title: Senior Mechanic
Department:	Manager:
Facilities:	Plant Handoff:
Date of Corrective Action: June 18, 2015	Type of Corrective Action: <input type="checkbox"/> Verbal Warning <input type="checkbox"/> Written Warning <input checked="" type="checkbox"/> Final Notice
<b>Comments:</b> Gerry made a verbal violation of safety protocol. Because his safety violation was so serious, he is being immediately discharged.	
<b>Comments regarding prior discipline:</b> None to note. Gerry has a lot of problems.	
Employee Signature: <i>[Signature]</i>	Date: 6/18/15
Manager's Signature:	Date:

© 2015 Husch Blackwell LLP 53

---

---

---

---

---

---

---

---

---

---

**HUSCH BLACKWELL**

**Things to avoid for trial**

- Documentation Problems
  - Performance
  - Investigations
  - Discharge decision
- Spoilation
- Red Flags/Sensitive Issues

© 2015 Husch Blackwell LLP 54

---

---

---

---

---

---

---

---

---

---

## Documentation of performance problems

- Be honest
  - Cross exam examples
- Be specific about:
  - What is not acceptable
  - What change is expected
  - Consequences

---

---

---

---

---

---

---

---

## Documentation of investigations

- Cross exam examples
- Be prompt
- Be thorough
  - Obtain signed statements
  - Avoid generalizations
  - Don't make legal conclusions
- Document the follow-up

---

---

---

---

---

---

---

---

## Documentation of discharge

- Cross exam examples
- Be specific
  - Consider who the right person is to complete the discharge paperwork
- Be thorough
  - (did we already say this?)

---

---

---

---

---

---

---

---

## Spoliation

- Intentional destruction or alteration of evidence
- Consequence—adverse evidentiary inference
- Even a “bad” document—must stay in the file
  - Unedited
- Spoliation claim can result in bigger damages than defending “bad” document

---

---

---

---

---

---

---

---

## Spoliation

- Cross exam example
- Example: medical leave forms
- Seek advice
  - At trial, moving records could look much worse than dealing with a “bad document”

---

---

---

---

---

---

---

---

## Legal Hold Notice

- Once a company is “aware” of a potential claim
- Preserve documents
  - Protect company
- Immediately talk with in-house or outside counsel

---

---

---

---

---

---

---

---

### Other red flags

- Long term employees
- Bad timing
- Even the cleanest cases can get ugly

---

---

---

---

---

---

---

---

### Checklist/Take-Away

- Consider using a pre-discharge checklist like the one provided

**PRE-DISCHARGE CHECKLIST**

- 1. Did the employee make an existing bid in good?
- 2. Is the bid in policy period or probation?
- 3. Was the employee aware of the bid or should there have been notice of it?
  - a. Was the bid in policy period or probation?
  - b. Was the bid in policy period or probation?
- 4. Was the employee in a probationary period?
  - a. Was the employee in a probationary period?
  - b. Was the employee in a probationary period?
- 5. Was the employee in a probationary period?
  - a. Was the employee in a probationary period?
  - b. Was the employee in a probationary period?
- 6. Was the employee in a probationary period?
  - a. Was the employee in a probationary period?
  - b. Was the employee in a probationary period?
- 7. Was the employee in a probationary period?
  - a. Was the employee in a probationary period?
  - b. Was the employee in a probationary period?
- 8. Was the employee in a probationary period?
  - a. Was the employee in a probationary period?
  - b. Was the employee in a probationary period?
- 9. Was the employee in a probationary period?
  - a. Was the employee in a probationary period?
  - b. Was the employee in a probationary period?
- 10. Was the employee in a probationary period?
  - a. Was the employee in a probationary period?
  - b. Was the employee in a probationary period?
- 11. Was the employee in a probationary period?
  - a. Was the employee in a probationary period?
  - b. Was the employee in a probationary period?
- 12. Was the employee in a probationary period?
  - a. Was the employee in a probationary period?
  - b. Was the employee in a probationary period?
- 13. Was the employee in a probationary period?
  - a. Was the employee in a probationary period?
  - b. Was the employee in a probationary period?
- 14. Was the employee in a probationary period?
  - a. Was the employee in a probationary period?
  - b. Was the employee in a probationary period?
- 15. Was the employee in a probationary period?
  - a. Was the employee in a probationary period?
  - b. Was the employee in a probationary period?
- 16. Was the employee in a probationary period?
  - a. Was the employee in a probationary period?
  - b. Was the employee in a probationary period?
- 17. Was the employee in a probationary period?
  - a. Was the employee in a probationary period?
  - b. Was the employee in a probationary period?
- 18. Was the employee in a probationary period?
  - a. Was the employee in a probationary period?
  - b. Was the employee in a probationary period?
- 19. Was the employee in a probationary period?
  - a. Was the employee in a probationary period?
  - b. Was the employee in a probationary period?
- 20. Was the employee in a probationary period?
  - a. Was the employee in a probationary period?
  - b. Was the employee in a probationary period?

---

---

---

---

---

---

---

---

### Respect

- Statistics can be daunting
- Some of the simplest ways to help avoid trial---
  - Show respect
  - Show empathy
  - Treat fairly even on the way out

---

---

---

---

---

---

---

---

HUSCHBLACKWELL

# QUESTIONS?

joe.guffey@huschblackwell.com  
carrie.claiborne@huschblackwell.com

---

---

---

---

---

---

---

---

HUSCHBLACKWELL

# So That Just Happened... Now What?

Legal Issues Arising From Real-Life Scenarios

**Moderator:** A.J. Weissler

**Panelists:** Joe Glynias, Brad Hiles, Kate Leveque,  
Sonni Nolan, Bob Tomaso

---

---

---

---

---

---

---

---

HUSCHBLACKWELL

# Thank you

huschblackwell.com  
@huschblackwell

---

---

---

---

---

---

---

---