

ANNUAL LABOR AND EMPLOYMENT  
LAW CONFERENCE

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# What's New In Labor and Employment Law?

Kansas City, Missouri  
November 10, 2016

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FAIR LABOR STANDARDS ACT  
**PREPARING FOR CHANGE:  
DOL'S FINAL RULE ON OVERTIME**

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## **Roadmap**

- FLSA/DOL
- Professional Exemptions
  - Duties Test
  - Salary Basis Test
- New Regulations on Salary Basis
- Strategies for Moving Forward

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## **The Fair Labor Standards Act**

- Requires employers to pay employees at least the minimum wage and overtime pay for work over 40 hours in a week
- Since enacted in 1938, the FLSA has included exemptions from the minimum wage and overtime requirements for executive, administrative, professional and outside sales employees

## **29 C.F.R. Part 541**

- DOL has defined the “white collar” exemptions in regulations at 29 C.F.R. Part 541
  - Executive
  - Administrative
  - Learned Professional
  - Creative Professional
  - Computer
  - Outside Sales
- Duties tests are not changing

## **Executive Exemption**

- Primary duty must be managing the enterprise – or a department or subdivision
- Must regularly direct work of at least two FTEs
- Must have hiring/firing authority or recommendations must be given particular weight

## **Administrative Exemption**

- Primary duty must be office or non-manual work related to general business operations
- Primary duty includes exercise of discretion and independent judgment on matters of significance.

## Professional Exemption

- Learned: Primary duty requires advanced knowledge in a field of science or learning usually obtained through a prolonged course of study.
- Creative: Primary duty requires invention, imagination, originality or talent in a recognized field of creative endeavor.

## What Is Changing

Minimum salary level increased to \$913 per week (\$47,476 annualized)

- Up from the current \$455 per week (\$23,660 annualized)
- Down from DOL's proposed \$50,440
- Set at the 40<sup>th</sup> percentile of full-time non-hourly paid employees in the lowest wage Census region (South)



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### Highly Compensated

- Changed to \$134,004 (up from \$100,000 annually)
- Amount is set to reflect 90<sup>th</sup> percentile of salaried workers nationally
- Will increase every 3 years

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### Bonuses and Commissions

- Nondiscretionary bonuses, incentive payments and commissions, paid at least quarterly, can satisfy up to 10 percent of the minimum salary requirement



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## **How Will This Work?**

- Each workweek, the employer must pay the exempt employee a salary of at least 90% of the minimum salary level -- \$821.70 (\$42,728.40 annualized)
- At the end of the quarter, if that salary plus all bonuses/commissions paid during the quarter do not equal \$11,869 (\$47,476 / 4), to maintain the exemption, the employer has to make up the shortfall in the first pay period of the next quarter

## **Automatic Salary Level Increases**

- The salary levels will automatically increase every 3 years, beginning January 1, 2020
- DOL will provide notice of the new salary levels “not less than 150 days before the January 1<sup>st</sup> effective date” in the Federal Register and at [www.dol.gov/whd](http://www.dol.gov/whd)

## **Legal Challenges**

- Two lawsuits filed in federal court by a 21 state coalition and a coalition of business groups (led by the U.S. Chamber of Commerce) have challenged the overtime rule changes

## **Legal Challenges**

- The lawsuits argue that the new salary threshold is so high that it effectively cuts off the EAP exemptions for large categories of workers.
- The lawsuits also argue that the DOL was “arbitrary and capricious” in adopting the new threshold - i.e., that the Department ignored evidence in the record and failed to sufficiently explain the basis for its new rule.
- Finally, both lawsuits argue that the escalator provision - with its automatic salary increases every three years - violates the Department’s duty under the Administrative Procedure Act to engage in “notice-and-comment” rulemaking every time it alters FLSA guidelines.



## **Legal Challenges**

- The U.S. House of Representatives voted to delay DOL overtime rule change. The bill would delay the effective date of the Department of Labor's new overtime rule by 6 months, from December 1, 2016 to June 1, 2017.
- It must still pass the Senate, which will be no easy task.
- Even if it does somehow pass the Senate, President Obama has already released a statement promising a veto.

## **Strategic Options**

- Retain exempt status – increase salary
- Convert to hourly
- Remain salaried, but pay overtime
- Fluctuating work week

## **Retain Exempt Status**

- Most simple and straightforward
- Increase annual salary to at least \$47,476.00
  - Need to update every three years
- Must still meet primary duties test

## **Convert to Hourly**

- Morale issues
- Track hours worked
- Establish hourly rate
- Pay premium (time and a half) for overtime hours worked
- Manage hours/overtime

## Remain Salaried/Pay Overtime

- Maintains the “prestige” of salary
- Still have to track time actually worked in a given week
- Determine regular rate (salary/time **expected** to work)
- Pay overtime premium for hours worked in excess of 40
- Premium is 0.5 times regular rate for hours over 40 but less than expected; 1.5 times regular rate for hours over expectation

## Fluctuating Workweek

- Used when hours fluctuate weekly
- Paid salary agreed to cover all hours worked
- Must track hours
- Determine regular rate (salary/time actually worked)
- Pay overtime premium for hours worked in excess of 40
- Premium is 0.5 time regular rate for hours over 40

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# **AFFORDABLE CARE ACT: POST-ELECTION UPDATE**

Craig Kovarik

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**Will Affordable Care Act be repealed?**

**Nobody knows!!!!**

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## **Hillary Clinton Approach (2016 Campaign)**

- Keep and build on Obamacare
- Offer a tax credit of up to \$5,000 to offset out-of-pocket costs over 5 percent of income
- Create a “public option; for health insurance
- Increase funding for community health centers
- Establish federal oversight of drug price increases
- Allow people to “buy in” to Medicare starting at age 55

## **Republican/Paul Ryan Approach (July 2016)**

- Refundable tax credits to help buy health insurance in the individual market
- Expansion of use of health savings accounts
- Caps on open-ended tax break on employer-based premiums
- Allow insurance sales across state lines
- Allow small businesses and individuals to band together through new pooling mechanisms to increase their purchasing power so they can negotiate with insurers for lower prices
- Back wellness programs and allow plans to reward employees for making healthy choices
- Medical liability reform

## **Donald Trump Approach (2016 Campaign)**

- Repeal and replace ACA
- Promote tax-free health savings accounts
- Allow all individuals to deduct insurance premiums without regard to itemized deduction limits
- All insurers to sell policies across state lines
- Turn Medicaid into a state block grant program
- Allow consumers to import drugs from other developed countries

## **What to do now?**

- Operate in the ordinary course and continue to comply with current laws, including 2016/2017 ACA reporting
- Continued expansion of high deductible health plans and HSAs
- Wellness and healthy behavior incentives will continue to play a critical role in employer-based health plans
- Partial repeal?
  - Continued protection against pre-existing conditions
  - Coverage for adult children through age 26
  - Eliminate employer and individual mandates

## DRESSING THE PART: Implementing and Enforcing Dress Codes in a Modern Workplace



Lydia Childre

### Office Dress Code Standards

- Office dress code standards have changed for all but the most formal of positions.
- Casual dress Fridays have given way to an era where business casual attire is acceptable everyday in most offices.

## The Need for a Dress Code

- Your idea of casual might mean something entirely different to your employees.
- Best bet is to implement a dress code of some sort.



You will be giving your employees the guidance they need and setting standards that are in line with your company image. At the same time, you will be communicating to your employees that your company cares about its branding and philosophy (safety, professionalism, etc.)

## Dos and Don'ts of Dress Code Policy

- Do communicate in a clear and unambiguous manner.
- Do educate through the company handbook. This is your opportunity to articulate what you envision for the company image and to that end, offer acceptable suggestions.
  - Incorporate lists of appropriate business attire
  - Specify when any other attire may be required (either more formal or casual)



## **Dos and Don'ts of Dress Code Policy**

- Do try to be creative in educating and reinforcing awareness, some examples:
  - When seasons change, send out a dress code reminder.
  - Stage a “What Not to Wear” session at a regular meeting and have employees sign off on a training log verifying they were briefed on the company’s appearance standard.

## **Dos and Don'ts of Dress Code Policy**

- Do communicate how the policy is to be enforced.
- Do enforce consistently.



## Dos and Don'ts of Dress Code Policy

- Don't Single Out Specific Employees
  - While employers are generally allowed to establish dress codes, be careful the policy and practice does not run afoul of anti-discrimination protections:
    - National Origin
      - If you allow casual dress, but prohibit certain kinds of ethnic dress, your policy may violate the law.
    - Religious Practices
      - If your employee, or a prospective employee requests accommodation to wear dress consistent with religious practices, you must either: (1) modify your policy or (2) allow an exception unless it would cause you undue hardship. See *EEOC v. Abercrombie and Fitch Stores, Inc.* 135 S. Ct. 2028 (2015)

## Dos and Don'ts of Dress Code Policy

- Gender Stereotypes
  - Must avoid gender stereotypes, for instance, stating men should wear trousers and women must wear skirts. Consider a provision that workers may dress in accordance with their full-time gender expression.

## **Dos and Don'ts of Dress Code Policy (cont.)**

- Uniforms
  - Present their own special challenges.
  - If you require employees to wear a specific color -> not a uniform, but if a certain type or style is specified, or clothing containing an emblem or logo must be worn at work -> likely a uniform
  - When it comes to paying for a uniform the Federal Fair Labor Standards Act states that the costs of uniforms may not be included as wages.
  - If you require them to pay for their own uniforms, those costs cannot reduce their pay below federal minimum wage, or cut into company overtime pay.

## **Dress Code Take Aways:**

- As you consider your company's dress code in light of equal employment compliance issues under federal or state laws, keep restrictions focused on the business expectations which may be unique to your company or industry, bearing in mind the need to consider potential accommodations.
- Where exceptions or requests for accommodation are considered, document the legitimate reasons for denial.

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# B.Y.O.D.

## Impact on eDiscovery in Employment Litigation

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## Evaluating the BYOD Trend

Cost Savings

Accommodate Employee Preferences

vs.

Business Risks & Litigation Risks



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## Business Risks

# ARE BUSINESS RISKS WORTH THE BENEFITS OF BYOD?

## Common Business Risk of BYOD

### Security

- Company data no longer in Company's control
  - Employees have different versions of documents
  - Easier to move to cloud storage
  - Abandoned data
  - Personal Backups
  - Departed/Terminated employee issues

### Other

- Difficult to enforce document retention policy
- Employee's privacy rights' issues
- Shared ownership of devices
- Shared backups
- Off-the-clock work
- Cost of supporting variety of devices

## Mitigating Business Risks of BYOD

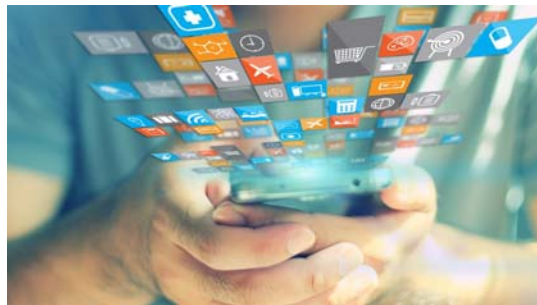
### Mobile Device Management (“MDM”) Software

- Security - passwords, virus protection and encryption
- Ability to locate, wipe device
- File storage – create container for business data

### Use policies and procedures designed to clearly define/provide notice of appropriate use

- Right to Wipe – retain the right to clean the container
- Prohibit Company documents from being stored on non-Company Cloud storage
- Require program participants to sign a separate BYOD agreement / Terms of Use

### Consider excluding high risk employees from BYOD



### Litigation Risks

## BYOD COMPLICATES EDISCOVERY

## BYOD Increases Burdens & Costs of eDiscovery

- Preservation difficult - less control over devices
  - Employee can refuse to assist
  - Employee may not own device (dual ownership)
- Increased costs for preservation/collection
  - Different devices require different tools

## Is Data on a BYOD Device Discoverable?

- Fed. R. Civ. P. 26(b)(1)
- BYOD devices are considered sources of potentially relevant information
- No exception because same device is also used for personal purposes

## Does an Organization Have the Duty to Preserve and Collect Data from a BYOD device?

1. Does the device have relevant data?
2. Is the relevant data unique?

“BYOD devices that contain unique, relevant ESI may be considered sources for preservation and discovery in response to investigation and dispute resolutions.”  
(*Principle 3, Sedona Primer on BYOD*, May 4, 2016 Draft)

## Examples of data that can be found on a BYOD Device:

- *Duplicative Data*: Company Email (if synchronized with Company server)
  - Less costly & less burdensome to collect from server
- *Non-duplicative data*: Text messages, voicemails, pictures, video and unique versions of documents



## Does an Organization Have the Duty to Preserve and Collect Data from a BYOD device?(continued)

3. Does the Organization have “possession, custody and **control**” over the BYOD device as defined by Fed. R. Civ. P 34?
  - Legal Right Standard: When a party has the legal right to obtain the Documents and ESI (8<sup>th</sup> Cir & 10<sup>th</sup> Cir.)
  - Legal Right Plus Notification: If you are aware third party has possession/control, you must notify requesting party (10<sup>th</sup> Cir.)
  - Practical Ability Standard: Practical ability to obtain documents enough (8<sup>th</sup> Cir & 10<sup>th</sup> Cir.)

## Case Law – Possession, Custody, and Control

- *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 636 (D. Minn. 2000)(“Therefore, under Rule 34, control does not require that the party have legal ownership or actual physical possession of documents at issue; rather, documents are considered to be under a party’s control when the party has the right, authority, or practical ability, to obtain the documents.....”)
- *Ice Corp. v. Hamilton Sundstrand Corp.*, 245 F.D.R. 513, 517 (D. Kan. 2007)(“Production of documents not in a party’s possession is required if a party has the practical ability to obtain the documents from another, irrespective of legal entitlement to the documents.”)

## Case Law – Possession, Custody, and Control

- *Cotton v. Costco Wholesale Corp.*, 2013 WL 3819974 (D. Kan. July 24, 2013) (Using legal right standard, court found employer did not have control over text messages sent or received by employees on personal cell phone; no allegation that phone used for work.)
- *In re Pradaxa (Dabigatran Extexilate) Products Liability Litigation*, 2013 WL 6486921 (S.D. Ill. Dec. 9, 2013) (Court found legal hold applied to texts on both company owned and employee owned cell phones when company policy directed employees use text messages for business communications.)

## Practical Ability Standard – In practice

- Difficult to argue that organization does not have “control” over high level employees
  - C-suite, Legal, HR, Managers, Owners
- BYOD Policy itself may demonstrate control
- *Former employees* – *what if person is receiving economic benefit?*
  - *(is notice required?)*

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“An organization’s BYOD usage policies and practices should facilitate preservation and collection of unique, relevant BYOD ESI and should guide application of the Proportionality Principle when the organization is a discovery respondent.”  
*Principle 4, Sedona Primer on BYOD, May 4, 2016 Draft.*



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“Where an organization has adopted and implemented reasonable BYOD usage policies and practices to prevent unique, relevant ESI from being stored on BYOD devices, the organization should not be required to preserve or collection ESI from the BYOD devices.”  
*Principle 5, Sedona Primer on BYOD, May 4, 2016 Draft.*

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## Mitigating Litigation Risks of BYOD

Exclude employees that are often involved in Company Litigation from BYOD

Exclude non-exempt employees from BYOD

Know what data Company's MDM software or other technology is collecting and limit collection if no business or regulatory need for data

## Mitigating Litigation Risks of BYOD (continued)

Use policies and procedures designed to clearly define/provide notice of appropriate use

- Define appropriate business communication
  - Prohibit Texts and other non-Company methods of communications
- Prohibit storage of Company documents on non-Company cloud storage
- Require access in limited circumstances

## Sample Language Regarding Access

- In exceptional situations, where necessary and permitted under applicable laws and regulations, the Company may request access to my Personal Device for purposes of assisting with investigations (e.g., in case of an attempted attack or intrusion by a third party), litigation, or resolving security incidents. I agree to assist the Company with reasonable requests for such access, including providing my Personal Device and any password necessary to access my Personal Device and related data. *To the extent permitted under applicable laws and regulations, I may exercise my right not to provide my Personal Device.*

## Sample Language Regarding Access (continued)

- From time to time, Company may institute a Legal Hold or conduct an internal investigation. If that Legal Hold or internal investigation implicates data stored on User's Personal Device(s) or information stored by the User's service provider, then User agrees to cooperate with Company regarding preservation/collection of such data.

## Tips for BYOD eDiscovery

- New Fed. R. Civ. P. 37 (e)
- Ensure reasonable steps taken
  - Create consistent policy/practice regarding legal holds
    - Tailored to Company's business, litigation portfolio & risk appetite
  - Create preservation/collection plan
    - Workflow/checklist
  - Recognize Triggers
- Train employees regarding BYOD
- Enforce BYOD Policy prohibitions

## Tips for BYOD eDiscovery (continued)

- Custodian interview is critically important
- Questions related to BYOD should include:
  - How does Custodian use device for business purposes?
  - Does Custodian use communication programs other than Company e-mails for business purposes (text messaging, chat programs, social media platforms)?
  - Does device contain relevant, unique data (texts, voice mail, pictures, video, other social media apps)?
  - Has device been backed up and could those back ups contain relevant, unique data?
  - Has custodian stored Company data on non-Company cloud storage?

## Tips for BYOD eDiscovery (continued)

DOCUMENT  
COMPANY'S  
DECISIONS &  
ACTIONS!



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Broad-ranging Effect of New Amendments  
**Changes in OSHA's Injury &  
Illness Recordkeeping Rule**

Brad Hiles  
Brian Hendrix

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## **The New Developments**

1. The Electronic Reporting Obligation.
2. Notifications to Employees.
3. Mandatory Post-Accident Drug and Alcohol Testing policies.
4. Incentive Policies related to Safety and Health Improvements

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## Before We Get Started . . .

- OSHA has been sued over its revisions to the Injury & Illness Reporting rule.
- The case is pending in U.S. District Court for the Northern District of Texas (in Dallas).
- “Injunction case” seeks to have the rule changes struck down.
- The effective dates of many of these rule changes have been delayed until December 1, 2016.
- A decision is expected by the end of November.

## 1. Electronic Reporting

- Large employers (more than 250 workers) must:
  - Submit Form 300 A information to OSHA by July 1, 2017.
  - Submit Forms 300, 300A and 301 to OSHA by July 1, 2018.
  - Continue to submit by March 2 every year thereafter.
- Employers with 20-249 employees in Agriculture, Manufacturing, construction, utilities and certain "high-risk industries":
  - Same reporting obligations as Large Employers.
  - "High-risk industries" are identified on a list published by OSHA.

## What will OSHA do with the Information?

- Post each establishment's data on OSHA's website.
- The Agency will remove "personally identifying data."
- Part of the agency's "regulation by shame" strategy.

*"Since high injury rates are a sign of poor management, no employer wants to be seen publicly as operating a dangerous workplace."*

-- Dr. David Michaels, Assistant Secretary of Labor for Occupational Safety and Health

## 2. Notifications to Employees

- Originally required by August 10, now postponed to December 1, 2016.
- Two notification requirements:
  1. Explain the company's Injury and Illness Reporting Procedure.
  2. Inform employees of their right to report work-related injuries and illnesses free from retaliation.

## Recommendation – Take Credit For Your Anti-Retaliation Policy or Practices

Example:

It is the policy of [company name] not to retaliate against employees report injuries and illnesses. In addition, 29 CFR 1910.35(b)(1)(iv) prohibits employers from retaliating against employees for reporting work-related injuries or illnesses under section 1904.35 consistent with the existing prohibition contained in section 11(c) of the Occupational Safety and Health Act.

## When Must Employees Report Injuries

- OSHA is taking the position that mandatory, immediate reporting should not be required.
- OSHA's published position is that employees may delay reporting until they realize that they have sustained an injury.
- The Problem: Delayed reporting probably thwarts effective drug testing after 36 hours, possibly sooner.

## "Safe Harbor" Reporting Policy

Any injury or illness which occurs at work must be reported to your supervisor as soon as possible after you realize that you have sustained a work-related injury or illness, or that you may have sustained an injury or illness.

### 3. Post-Accident Drug and Alcohol Testing Policies

- Automatic post-accident drug testing, without more, will almost certainly violate the new rule.
- Employers must now determine whether the circumstances of the accident are such that drug impairment - if present- may have contributed.
- This is not "reasonable cause." Symptoms of drug or alcohol impairment need not be observed.
- Ask yourself: If the injured employee was under the influence of drugs or alcohol, might his/her condition have contributed to the accident?
- A bee sting? No. Falling down stairs? Yes.

## Exceptions

Mandatory Post-Accident Drug Testing is still permissible if:

1. It is justified under a state's workers' compensation laws.

Some states (Missouri is one) permit a reduction in benefits if drugs or alcohol was used in violation of a policy in conjunction with an injury or accident.

2. You employ truck drivers covered by DOT's drug testing regulations (but only the drivers would be exempt from OSHA's new rule).

## Impacts on Other Drug Testing Policies

The following types of drug and alcohol testing policies are not covered by OSHA's rule modification:

- Pre-employment testing;
- Reasonable suspicion testing;
- Random testing.

## Incentive Policies Related to Safety and Health Improvements

- OSHA believes that certain incentive plans may thwart employees from reporting workplace injuries and illnesses.
- Clearly suspect (in OSHA's view) are financial rewards tied to:
  - Milestones without a lost workday injury.
  - Lower injury rates (DART rates).
  - Prizes or bonuses for having fewer injuries from the prior year.

## What Incentives Would OSHA Consider Permissible?

OSHA will consider the "specific rules and details of implementation of any given incentive program. . . to determine whether it could give rise to a violation."

### Safe harbor metrics:

- Rewards for following legitimate safety rules;
- Rewards to promote participation in safety related activities, such as identifying hazards or accident investigations,

### Safe harbor rewards:

- T-shirts
- "Recognition parties" at the successful completion of a company-wide safety and health training.



# What's New for Federal Contractors at OFCCP and Other DOL Agencies

Molly Kurt  
November 10, 2016

## Flurry of EOs & New Regulations

- Administration implementing a variety of new obligations for federal contractors
  - Priorities for effecting change in U.S. workplace
  - Using Executive Orders in some cases to accomplish what might be more difficult to achieve through legislation
  - Some enforced by OFCCP, others enforced by other DOL offices and the FAR Council



## Non-discrimination: Sexual Orientation and Gender Identify

Executive Order 13672/ DOL OFCCP

Signed 7-12-14

Final rule effective 4-8-15

Applies to *new contracts* on or after 4-8-15

What: federal contractor EEO policies must include sexual orientation and gender identity language

No requirement for metrics/availability analyses or self-identification

Online resources for outreach: [dol.gov/ofccp/LGBT](http://dol.gov/ofccp/LGBT)

Authorizes individual complaints

## Minimum Wage

- Executive Order 13658/DOL W & H Division
- Signed 2-2-14
- Effective 1-1-15 \$10.10, 1-1-16 \$10.15, 1-1-17 \$10.20
- Applies to new contracts/subcontracts and alteration/amendment/renewals
- Limited to workers performing work under covered federal contracts
- Also limited to certain federal contracts (20%):
  - Construction contracts under Davis Bacon Act (DBA)
  - Service contracts under Service Contract Act (SCA)
  - Concessions contracts (e.g. souvenir shop at National Park)
  - Contracts in connection with federal property (e.g. day care center at federal office building)



## Pay Transparency/Secrecy

- Executive Order 13665/DOL OFCCP
- Signed 4-8-14
- Final rule effective 1-11-16
- *All contractors/subcontractors* with contracts \$10,000 or more and new or renewed after 1-11-16
- *Discrimination*, not retaliation. "A motivating factor."
- Applies to all employees, not just those who work on federal contract
- Broader than NLRA because OFCCP rule includes managers, supervisors and others excluded from NLRA coverage
- OFCCP recommended policy language:

*The contractor will not discharge or in any other manner discriminate against employees or applicants because they have inquired about, discussed, or disclosed their own pay or the pay of another employee or applicant. However, employees who have access to the compensation information of other employees or applicants as a part of their essential job functions cannot disclose the pay of other employees or applicants to individuals who do not otherwise have access to compensation information, unless the disclosure is (a) in response to a formal complaint or charge, (b) in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or (c) consistent with the contractor's legal duty to furnish information.*

## Sex Discrimination



- OFCCP updated regulations at 41 CFR 60-20
- Effective 8-15-16
- Aligns EO 11246 sex discrimination guidelines with Title VII law, including sexual harassment, gender identity discrimination, pregnancy discrimination
- Intended to be consistent with EO 13672

## Fair Play/Safe Workplaces



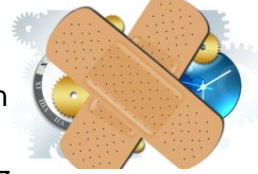
- Executive Order 13673/ FAR Council & DOL
- Signed 7-13-14
- FAR Final Rule and DOL Guidance issued 8-25-16/effective 10/25/16\*
  - Limited to single contracts of \$500,000 or more
- \* Final rule enjoined
  - *ABC of Southeast Texas v. Rung*, 10-24-16; other cases pending
  - Argument: Preemption; debarment before final adjudication; First Amendment; and Due Process

## Fair Play and Safe Workplaces, contd.

- Broad definitions of disclosable matters, including prior to final adjudication



## Paid Sick Leave



- Executive Order 13706/ DOL W & H Division
- Signed 9-7-15
- Final rule published 9-30-16, effective 1-1-17
- Limited to certain federal contracts, same as Min. Wage EO:
  - Construction contracts under Davis Bacon Act (DBA)
  - Service contracts under Service Contract Act (SCA)
  - Concessions contracts (e.g. souvenir shop at national park)
  - Contracts in connection with federal property (e.g. day care center at federal office building)

## Paid Sick Leave, contd.

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Also limited to workers performing work on covered contracts, including those exempt from minimum wage and overtime.

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Rough calculations: 1 hour paid sick leave for every 30 hours worked on covered contracts.

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Exempt employees: do not have to track hours; presume 40 hours a week

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No payout upon termination

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Reasons for leave broader than FMLA and include the common cold

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Specifics available: [www.dol.gov/whdiv/govcontracts](http://www.dol.gov/whdiv/govcontracts)

## EEO-1 Form revisions



- Administrative rule/Executive Branch action, subject to change by next president
- Final notice published 9-29-16
- Effective March 31, 2016
- No EEO-1 forms due September 30, 2017
- Report pay data in bands within each job group.
- [www.eeoc.gov/eeo1survey/2017survey](http://www.eeoc.gov/eeo1survey/2017survey)
- Limited utility?
  - Fewer than 1000 pay discrimination charges at EEOC/state/local discrimination agencies each year (less than 1%); cause finding less than 20%
  - In most recent 8 years at OFCCP, fewer than 1/4000<sup>th</sup> of 1% of *all employees* whose pay data was reviewed in audits were found to be the victims of pay discrimination. Compliance in 99.7% of all audits.

## Missouri Service Letter Statute: MO. Rev. Stat. § 290.140



Lydia Childre

### Missouri Service Letter Statute

- Missouri Law allows a discharged employee to request and receive a letter from his former employer stating the nature of services performed and the true reason for discharge.
- If properly requested by a former employee, the Service Letter Statute requires certain employers to provide such a letter.



## Background

- The Service Letter Statute was originally enacted in 1905 during a period of prominent union activism.
- Motivated by union animus, employers had become notorious for providing false accounts of an employee's employment and reasons for termination. As a result, many former employees were being blacklisted by entire industries.



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## Purpose



- To prevent employers from providing false information about an employee's service and/or reason(s) for termination.
  - As enacted, designed to protect former employees from being retaliated against by employers for union activity.
  - Now, often used to lock in the employer's side of the story for any future challenges, including litigation. As a result, it also serves as a method for a potential Plaintiff and his attorney, to test the Defense and get a fuller sense of the potential arguments to be raised by the employer.

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## Application

- Applies to Employers
  - Whether a corporation could be deemed an “employer” is a question of control.
    - Relevant factors: whether involved in hiring, firing, promotional and salary decisions.
  - Must be doing business in Missouri and employing at least seven (7) employees. Mo. Rev. Stat § 290.140.
    - Includes not-for-profit corporations.

## Application (cont.)

- Applies to Employees
  - Who have been continuously employed in Missouri for 90 days and were discharged or voluntarily quit.
  - Examples:
    - Not Sufficient to Warrant Application: working in an out of state facility of a Missouri based company.
    - Sufficient to Warrant Application: worked in Missouri for an extended period of time, but then transferred out of state for last eleven (11) months of contract.
  - Choice of Law clause cannot shield application if the requirements are met.
  - Discharge and/or voluntary termination must be final in order to trigger application of the statute.

## Employee Request Requirements

- Must be sent to former employer within a “reasonable time” and not later than one year.
- Must be made in writing and must specifically reference the statute.
- Must be signed by the former employee, not just his or her attorney.
- Must be sent via certified mail to employer.
- Must be sent to the superintendent, manager, or registered agent of the corporation.



## Employer Service Letter Requirements

- Must be sent within 45 days of receiving the request. A failure to timely respond is viewed as a failure to issue.
- Must be issued and signed by a superintendent or manager. Omission of a signature will amount to a failure to issue.
- Must contain the nature and character of services rendered by the employee to the corporation.
- Must contain the duration of the employment service.
- Must state the true cause, if any, for why the employee was discharged.

Sufficient responses are vital to a service letter request.

**Failing to meet just one requirement can constitute a complete failure to issue and can subject an employer to liability for damages.**



## Damages

- Under the Service Letter Statute, an employer may be liable for nominal, actual, and/or punitive damages.
  - Nominal
    - May be awarded when a service letter fails to comply with statutory requirements.
    - Need not show actual damages.
  - Actual
    - To recover, employee must show: (1) he was refused new employment or somehow hindered in obtaining employment; (2) the refusal or hindrance was caused by the absence or inadequacy of the service letter; (3) the position he had difficulty obtaining was actually open; and (4) the salary rate of the position.

## Damages (cont.)

- Punitive
  - Only available when evidence establishes an employer's failure to issue.
  - Generally, a showing of inadequacy in the response is not enough. However, a failure to send a timely response has been construed to be a failure to issue, and could subject a corporation to punitive damages.

## **Take Aways**

- Don't ignore a request—even if improperly made
  - Early investigation
  - Educate opposing counsel
  - Avoid damages
  
- Comply with requirements
  - Complete
  - Accurate
  - Timely

# Recent Immigration Changes: What They Mean to You

Toni Blackwood  
Kelli Stout

## New Form I-9

- Published November 22, 2016
  - Current form acceptable until January 21, 2017
- Changes
  - Form I-9 and instructions will be two different documents
  - New “Citizenship/Immigration Status” field in Section 2
  - Dedicated white space for required margin notations
  - Barcode
- Electronic “smart” I-9 form
  - Drop-down menus and error messages
  - Instructional text
- Employers may still complete the form by hand

## I-9 Fine Increases

- Civil penalties for I-9 violations increased 96% in August 2016
- **Paperwork Errors**
  - Before: \$110 to \$1,100 per error
  - Now: \$216 to \$2,156 per error
- **Knowing Hire or Employment of Unauthorized Worker**
  - Before: \$375 to \$3,200 per individual
  - Now: \$539 to \$4,313 per individual
- **Unfair Immigration-Related Employment Practices**
  - Before: \$375 to \$3,200 per individual for first offenses
  - Now: \$445 to \$3,563 per individual for first offenses

## Proposal for New Anti-Discrimination Provisions

- DOJ Proposed Rule: Standards and Procedures for the Enforcement of the Immigration and Nationality Act
  - Expand employer liability for engaging in “unfair documentary practices” during employment eligibility verification processes
    - Strict liability for violations
  - Allows charges to be raised up to 5 years after alleged violation

## New State Immigration Laws

- **Tennessee** (SB 1965): On January 1, 2017, TN “employers” with over 50 employees will be required to use E-Verify.
  - Other states that mandate E-Verify: **Arizona, Mississippi, Alabama, South Carolina**, and more...
  - Many states require state contractors to enroll in E-Verify
- **California** (SB-1001): Expands state prohibitions against “unfair immigration-related practices”.
- **Colorado** (§ 8-2-122, C.R.S., HB 16-1114): Colorado employers no longer have to complete an affirmation of legal work status for the state, unless requested by the state. Colorado officials may conduct random audits.

## Work Authorization Sponsorship Fee Increases

- Effective December 23, 2016
- Fees will increase by an average of 21%
- H-1B Filing Fee
  - Before: \$325
  - Dec. 23: \$460
- Immigrant Petition Fee
  - Before: \$580
  - Dec. 23: \$700

## Effects of the Election on Immigration



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# Equal Employment Opportunity Commission Enforcement Guidance

Julianne P. Story

Timothy A. Hilton

November 10, 2016

HUSCH BLACKWELL

## Agenda

- EEOC's SEP 2017 – 2021
- Harassment Task Force Report
- National Origin Bias Guidance
- Retaliation Guidance

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## **EEOC's SEP 2017 - 2021**

### Guiding Principles

- Issues With Broad Impact
- Issues Affecting Workers Who May Lack Awareness Of Legal Protections
- Issues Involving Developing Areas Of The Law
- Issues Involving Discriminatory Practices That Impair Enforcement Of Anti-discrimination Laws
- Issues That May Be Best Addressed By Government Enforcement

## **EEOC's SEP 2017 - 2021**

### Substantive Priorities

- Eliminating Barriers In Recruitment And Hiring
- Protecting Vulnerable Workers
- Addressing Emerging & Developing Issues
- Ensuring Equal Pay For All Workers
- Preserving Access To The Legal System
- Preventing Systemic Harassment



## EEOC's SEP 2017 - 2021

- Barriers To Recruitment/Hiring
  - Racial/Ethnic Minorities, Religious Minorities, Older Workers, Women, And Those With Disabilities.
  - Steering/Segregation Of Groups Into Positions
  - “Restrictive Application Processes”
  - Screening Tools, Including Disparate Impact Analyses
- Vulnerable Workers
  - EEOC Will Attempt To Identify
  - May Vary From Office To Office

## EEOC's SEP 2017 - 2021

- Emerging And Developing Issues Of Law
  - Commission Claims “Salient Expertise”
  - May Change, But
    - Qualification Standards/Leave Policies
    - Pregnancy Limitations
    - LGBT Rights
    - “Clarifying” The Employment Relationship
    - Anti-muslim/Sikh Sentiment

## EEOC'S SEP 2017 - 2021

- Equal Pay
  - All Protected Statuses
  - “Compensation Systems And Practices”
- Access To The Legal System
  - “Overly Broad” Releases And Arbitration
  - Record Retention
  - Retaliatory Practices
- Systemic Harassment
  - Most Common Complaint
  - “Concerted Effort At Holistic Prevention Programs”

## EEOC'S SEP 2017 - 2021

- Implementation
  - Apply PCHP To Substantive Areas Of Focus
  - Apply “Reasonable Cause” Consistently
  - Streamlining Investigation
  - Focus On ADR
  - Litigation Precedence To Cause Findings Relevant To SEP

## Harassment Report

- 2016 Select Task Force On Workplace Harassment
- One-Third Of Charges Include Harassment Allegations
- Most Workplace Harassment Goes Unreported
- Compelling Business Case To Prevent Harassment
- Leadership And Accountability Are Critical
- Holistic Approach Is Necessary

## Harassment Report

- Risk Factors:
  - Homogenous Workforce
  - Cultural & Language Differences In Workforce
  - Workplaces Where “Rough & Tumble” Behavior Is Common
  - “High Value” Employees
  - Significant Power Disparities
  - Isolated Workplaces or Monotonous Work

## Harassment Report

- Holistic Approach:
  - Effective Policies
  - Regular Training
  - Social Media
  - “Culture” Considerations
  - Reporting & Investigation Systems

## Harassment Report

- Effective Policies:
  - Clear Explanation of Prohibited Conduct – Including Examples and Referencing Social Media
  - Complaint Process With Multiple Access Points
  - Confidentiality to Extent Possible
  - Prompt and Impartial Investigation Process
  - Assurance of Prompt Corrective Action
  - Assurance of Prohibition Against Retaliation

## Harassment Report

- Effective Training:
  - Supported At Highest Levels
  - Live & Interactive On A Regular Basis
  - Civility & Bystander Intervention

## Harassment Report

- Leadership & Accountability:
  - Sufficiency Of Resources
  - Culture Considerations
  - Accountability Of Front-line & Mid-level Managers
  - Disciplinary Actions
  - Climate Surveys

## Harassment Report

- Reporting and Investigation:
  - Take Complaints Seriously
  - Reporting System Must Provide Timely Responses and Investigations
  - Privacy of Both Accuser and Accused
  - System Must Insure a Trained Investigator
  - Investigator Should Document Investigative Steps and Prepare a Written Report
  - Communicate Determination to All “Relevant Parties”

## National Origin Bias Guidance

- Replaces 2002 Guidance
- Increased Cultural Diversity
- New And Evolving Issues
- Although Not Final, Provides Insight

## National Origin Bias Guidance

- Title VII Protects Against Discrimination Based On “National Origin”
  - Broad Coverage, Not Limited To EEO–1 Definitions
  - Regardless Of Immigration Status Or Work Authorization

## National Origin Bias Guidance

- Protections Based On:
  - Place Of Origin
  - National Origin Group Or Ethnicity
  - Multiple Basis And Intersectional Discrimination
  - Human Trafficking

## National Origin Bias Guidance

- Language Issues:
  - 20.9% Of U.S. Population Spoke Language Other Than English At Home (U.S. Census Bureau)
  - Employers Have Legitimate Interest In Regulating Language In The Work Place

## Language Issues

- Accents – National Origin And Accent Are Intertwined, But Decision May Be Legitimate If Accent “Materially Interferes With Job Performance.”
- Fluency – Assess Requirement On A Case-by-Case Basis
- English Only Rules – Because Primary Language Is Tied To A Person’s Cultural And Ethnic Identity, Rules Necessarily Implicate National Origin



## English - Only Rules

- EEOC Guidance: Blanket Rule Requiring English Only In The Workplace At All Times Will Be Presumed Unlawful

## English - Only Rules

- Limited Language Policy May Be Lawful If It Is “Job-Related And Consistent With Business Necessity”
  - Detailed, Fact-Specific, Credible Evidence
  - Sufficiently Necessary For Safe And Efficient Job Performance Or Business Operations
  - Narrowly Tailored

## Guidance Take Aways

- Recruitment Practices
  - Referral Sources And Job Postings
- Hiring, Promotion And Assignment
  - Job-Related Selection Criteria
  - Consistent Treatment
  - Customer Preference
  - Job Segregation
  - Discipline And Termination
    - Client Preferences
    - Legitimate Rationale
  - Policies

## Retaliation Guidance

- Issued In Late August 2016, Replaces 1998 Guidance
  - Intended To Be An Update Based On Intervening Years Of Judicial Decisions
  - Percentage Of Retaliation Complaints Has Doubled Since 1998 To About 45% Of All Charges
- Basic Idea Has Not Changed
  - “Materially Adverse Action” Because Of Actual Or Potential Protected Activity
  - Updates Protected Activities And Interference/Adverse Action

## Retaliation Guidance

- “Protected Activity”
  - Participation
  - Opposition
    - Expansive Definition, Express Or Implied
    - Reasonableness Standard Applies
    - Need Not Be Objectively Correct In Opposition
    - Examples
      - Resisting Advances
      - Passive Resistance
      - Inquiries

## Retaliation Guidance

- Materially Adverse Action
  - Might Deter A Reasonable Person
    - Substantive Employment Actions
    - Disparaging The Employee
    - Scrutinizing Work Closer Than Others
    - Removal Of Responsibilities
    - Action Against Family Member

## Retaliation Guidance

- Differing Standards
  - Non-federal Employees – “But-for”
    - But Not Sole Cause
  - Federal Employees – Motivating Factor
- Relevant Evidence
  - Temporal Proximity
    - Telling But Not Necessary
  - Shifting Explanations
  - Testimonial Evidence
  - Similarly Situated Employees

## Retaliation Guidance

- ADA Interference
  - ADA Prohibits Interference And Retaliation
  - Some Overlap But Disability Status Creates Unique Circumstances
    - Dissuading/Warning Against Accommodations
    - Conditioning Accommodations
    - Unlawful Medical Inquiries

## Retaliation Guidance

- “Promising Practices”
  - Translated – Necessary But Not Sufficient
  - Written Policies Prohibiting Retaliation
  - Training Expressly On Anti-retaliation
  - Active Anti-retaliation Emphasis During Investigations
  - Proactive Follow-up When There’s A Risk
  - Scrutiny Of Serious Actions Looking For Retaliation