The Trump Impact on Labor and Employment Law

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National Labor Relations Board Update

- Consists of 5 Members
  - 3 Republican Appointments
  - 2 Democratic Appointments

NLRB: Joint Employer

- ***Browning-Ferris Industries of California, Inc.,*** 362 NLRB No. 186 (2015) – adopted a broader the definition/application of "joint employer."
- Trump Board over-ruled ***Browning-Ferris*** decision in ***Hy-Brand-Industrial Contractors Ltd.,*** 365 NLRB No. 156 (Dec. 14, 2017)
- Under the reinstated standard, the joint employer finding will require proof that the alleged joint employer actually exercises **direct and immediate control** over the essential terms and conditions of employment of the employee(s) in question

NLRB: Micro Units

- ***Specialty Healthcare*** (357 NLRB 934, 2011)- the Board provided that an employer had the burden of showing an overwhelming community of interest if the employer wanted to add employees to the list as defined by a Union's certification petition.
- This decision was overturned in *PCC Structural* (365 NLRB No. 156, 12/15/17). *PCC* returned the standard back to a general analysis of community of interest.

NLRB: Quickie Elections

- In 2015 the Obama Board began requiring elections to be conducted within 11 days after a certification petition was filed.
- The old rule had been 42 days. The Board has sought comment on the rule. This is required before any change can be made.
- It is likely that the rule will revert back to the old 42 day time frame.

NLRB: Handbook Provisions

- The Obama Board routinely struck down any handbook provision that restricted an employee exercising their NLRA rights. Things like conducting oneself professionally were even found to be inappropriate.
- In *Boeing Co.* (365 NLRB No. 154, 12/14/17) the Board overruled the logic in those cases and set forth a new standard that the Board will use.

NLRB: Handbook Provisions

- The Board established a balancing test requiring it to weigh
  - the nature and extent of the potential impact of the rule/policy on NLRA rights and
  - legitimate employer justifications associated with the rule/policy.
- The Board also identified three categories of the types of workplace rules:
  - Category 1: Always lawful:
  - Category 2: Sometimes lawful;
  - Category 3: Never lawful
- Policies requiring civility, rules prohibiting use of employer trademarks/logos, rules prohibiting taking pictures/recording, and rules requiring confidentiality of workplace investigations fall into the always lawful category.

NLRB: Case Settlements

- Restored the ability of an Administrative Law Judge to accept a settlement of a pending complaint over objections of the charging party and/or the Regional Director.
- Department of Labor: Decision in UPMC overturned the Regional Director ability to hold settlements hostage if they did not provide for a total victory for the NLRB.

Department of Labor (DOL) Update

- **Exempt Salary:**
  - In 2017 the Texas Federal Court issued a final decision invalidating the DOL's new salary rule. The DOL is currently seeking comment.
- **Tip Pooling:**
  - On December 4, 2017, the DOL proposed a new rule that would reverse the regulations on tip pooling that were added by the Obama DOL. The current rule prohibits tip sharing with back of the house staff.
- **Interns**
  - On January 5, 2018, the DOL announced it was eliminating its 6 factor test in determining whether an intern could go unpaid. The DOL is now endorsing the "primary beneficiary" test as established by the 2nd Circuit Federal Court. This test has also been followed by the 9th and 11th Circuits.

Other Trump Activity

- **Judicial Appointments**
  - Trump is filling many open Judge position in Federal Court
  - Numerous conservative Judges appointed
  - Appointments primarily made in States with two Republican Senators
  - Has begun to work through "split" Senator States
  - In 7th Cir. Trump appointed Notre Dame Professor Amy Barrett who took oath in November 2017

Sexual Orientation Discrimination

- *Hively vs. Ivy Tech Comm. Coll. S. Bend*, 853 F.3d 339 (7th Cir. 2017) (*en banc*)
  - Plaintiff, part-time adjunct professor, alleged she was "[d]enied full time employment and promotions based on sexual orientation" in violation of Title VII.
  - District court granted motion to dismiss on the ground Title VII does not apply to claims of sexual orientation discrimination.
  - Seventh Circuit reversed the district court's dismissal, finding that sexual orientation falls within unlawful sex discrimination under Title VII stating "it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex[.]"

Transgender Discrimination

- Since 2014, DOJ's position on Title VII's prohibition on sex discrimination includes prohibition against gender identity discrimination and transgender discrimination.
- In 2016, DOJ initiated actions against the State of North Carolina over their law requiring transgender persons to use public restrooms that correspond to the gender on their birth certificate.

Transgender Discrimination

- On October 5, 2017, Attorney General Jeff Sessions reversed Department of Justice's position that gender identity is protected as part of Title VII's prohibition against sex discrimination. DOJ takes the position that Title VII does not cover bias based on employee's transgender status, and that the DOJ "will take that position in all pending and future matters."
- DOJ's position is now contrary to the Equal Employment Opportunity Commission which views discrimination against an individual because of gender identity as a violation of Title VII.

Reasonable Accommodation

- ***Severson v. Heartland Woodcraft, Inc.*** No. 15-3754, 2017 WL 4160849 (7th Cir. Sept. 20, 2017) – former employee brought a claim against employer for terminating employment in violation of ADA
  - Employee exhausted entirety of his FMLA allotment
  - On final day of leave, had back surgery
  - Requested two to three months off from work
- 7th Circuit held that a long-term leave cannot be a reasonable accommodation – "the ADA is an antidiscrimination statute, not a medical-leave entitlement."
- Disagreed with the EEOC's position that extended leave may be required under the ADA because an employee who needs long-term medical leave cannot work and therefore is not a "qualified individual."
- 7th Circuit noted that a brief leave of absence – "a couple of days or even a couple of weeks" – may be analogous to a part-time work schedule, and thus, short medical absences may be required by the ADA in certain circumstances.

Attorney's Fees

- ***Sommerfield v. City of Chicago***, 863 F. 3d 645 (7th Circ. 2017)
  - Plaintiff, German-Hewish Police Officer sued employer alleging discrimination based on ethnicity and religion
  - Alleged supervisor made offensive remarks about plaintiff's ethnicity
- Jury awarded plaintiff $30,000 and the attorney requested attorneys' fees of $1.5 million
- District court reduced fees to $430,000
- On appeal, the judgment held that the district court properly adjusted the award
- Reasons:
  - Plaintiff lost on most claims
  - Requested hourly rate was not justified
  - Over 800 of the claimed hours worked were unnecessary or frivolous