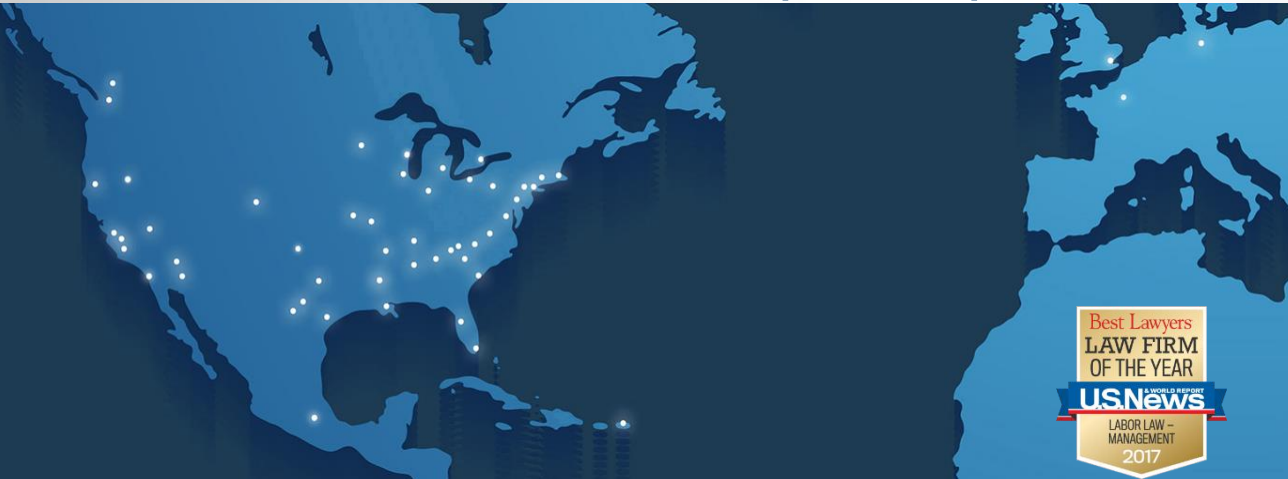


Employment and Immigration Law Update

Canada Arizona Business Council



Presented by: Joseph T. Clees (Phoenix)
Chris Thomas (Denver)



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Employers & Lawyers. Working Together

Illegal Immigration

- Building a wall
- Funding for border security and border patrol
- Deportation of undocumented immigrants with criminal records
 - Reinforced as a top priority



Enforcement and Compliance

- Increase in worksite enforcement/I-9 inspections by Immigration and Customs Enforcement (ICE/DHS)
 - Tripling number of ICE agents
 - Investigations, audits, and raids
- Fraud Detection and National Security Directorate (FDNS/USCIS)
 - Compliance reviews
 - Targeted site visits
- Increase in criminal prosecutions (rather than merely fines)
 - Civil Options
 - Criminal Options



Trade Deals Under Fire

- President Trump has promised to renegotiate or withdraw from the North American Free Trade Agreement (NAFTA)
 - Could end visas for nationals of Canada and Mexico
 - TN (Canada and Mexico)
 - E-3 (Australia)
 - H-1B1 (Chile and Singapore)
 - Withdrawal would require six months' notice
- Other Potential Treaty Changes
 - E-1/E-2 Visa Options



Canadian-Specific Reforms

- Business Visitors
 - Matter of Hira Analysis
 - Review of electronic data (cell phones, laptop computers, social media websites, etc.)
- L-1 Visa Category
 - Visa Free Processing
 - Increased Scrutiny

Possible Visa Reforms (Cont'd)

- Possible Reform Provisions for H-1B and L-1 Categories
 - Recruitment requirement extended to all employers
 - Higher prevailing wage
 - Increase in fees
 - Give priority to higher wage STEM workers
- Primary focus could be large foreign-owned outsourcing companies/third-party placement

Possible Regulatory Changes

- Recently published regulations could be targeted
 - STEM-OPT
 - H-4 EADs
 - EAD Extension Benefits
- Changes would require rulemaking process with notice and opportunity to comment

What Timeframe Should Be Expected

- Executive Orders
 - Can be done very quickly and unilaterally
- Policy Guidance
 - Can start to be implemented without a formal process
- Regulations
 - Must follow formal rulemaking process (APA)
- Legislation
 - Requires congressional action – (legislative process often slow, messy, and drawn out)

Faster paced



Slower paced

Employment Law Update...



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Trends in 2017

- Localization of employment law
 - States, cities and counties
 - Ballot referenda
- Ban the box ordinances
- Salary history prohibitions
- Credit check restrictions

Trends in 2017

- Minimum wage and paid leave
- Paid parental leave
- Pay equity
- Predictive scheduling
- ACA

Arizona Developments

- Minimum wage and paid sick leave
 - Mandated accrual
 - Presumption of retaliation
 - Rebuttable only by “clear and convincing” evidence
 - Legal challenges and legislative work around?
- Public accommodations under ADA/ACRA
 - Facilities
 - Website access

Federal Developments

- New Form I-9
- Paid sick and safe time for federal contractors
- Minimum wage increase to \$10.20/hour for contractors
- OSHA final rules on tracking workplace injuries and illness, requiring some electronic reporting

Where We're Going

- Executive Order Roll-backs
- Demise of Obama Initiatives
- Trump Employment Changes
- OSHA



Executive Orders on the Chopping Block

- Disclosure of labor violations in bidding process
- Federal contractor minimum wage
- Employee notification of federal rights
- No retaliation for discussion of wages
- Paid sick leave
- Project labor agreements or pre-hire CBAs

Immigration

- Increased enforcement efforts through Homeland Security and ICE
- The wall
- Reversal of DACA and DAPA
- Decreased visa availability, especially to “high risk” countries
- Mandatory use of E-Verify

Likely Trump Reveals

- Persuader Rule
 - Increased disclosure requirements for employer consultants and attorneys
 - Permanent injunction in place; attorneys' fees awarded
 - Trump DOL probably won't appeal
- White House Noncompete Initiative
 - Impact on job mobility, employee bargaining power, and consumer choice
 - Initiative won't be a Trump priority

Trump Initiatives

- Paid maternity leave
 - 6 weeks
- Minimum wage increase
 - Previously stated in favor of \$10/hour range

Transgender Rights: Current Laws

- NC: Restroom use must match gender on birth certificate
- MS: Religious freedom law states that gender is objectively determined at birth based on genetics and anatomy
- No Arizona law in effect or pending
- Legislation pending in many states

NLRB: Current Board Composition



Mark Gaston Pearce
Reappointed 2013
Term ends
Aug. 27, 2018



Lauren McFerran
Appointed 2014
Term ends
Dec. 16, 2019



Philip A. Miscimarra
Appointed 2013
Term ends
Dec. 16, 2017
New Board Chair

The Transition: General Counsel and Open Board Seats



Richard Griffin, Jr.
General Counsel
Appointed 2013
Term ends Nov. 2017



To Be Appointed

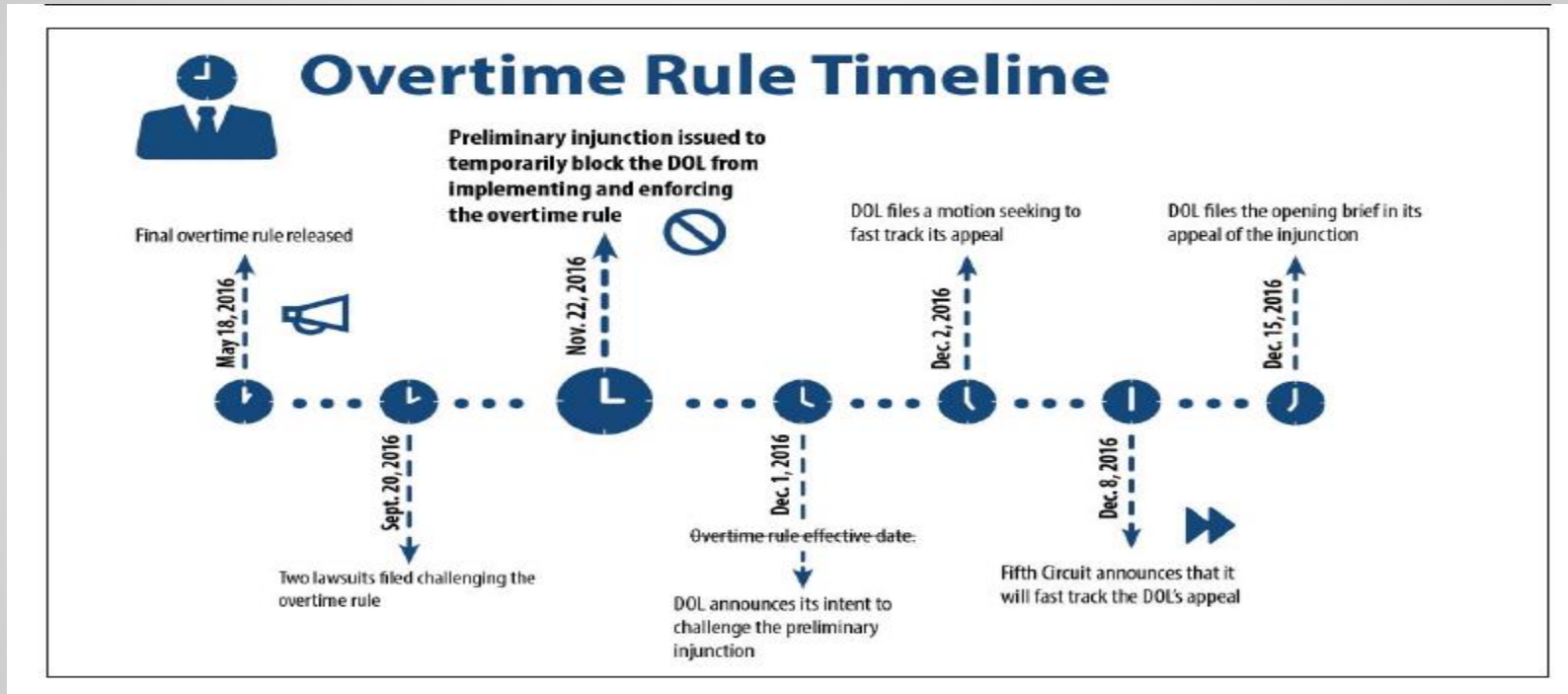


To Be Appointed

NLRB

- A new Board with a Republican majority revisiting recent decisions
- Joint employer status
- Inclusion of temporary workers in the bargaining unit of regular workers
- Quickie elections
- Expansion of protected concerted activities
- Definition of bargaining unit
- Status of college/university adjuncts, grad students, and student athletes
- Class action waivers

Overtime Rule



Wage & Hour Division

- Some experts predict WHD will return to G.W. Bush administration preference for opinion letters responding to employer questions about particular issues
- WHD in 2010 ended the opinion letter policy and shifted instead to broader administrator's interpretations (joint employment/independent contractor misclassification)

NLRB v. Murphy Oil USA

- Whether arbitration agreements that prohibit class actions are lawful under NLRA
- Supreme Court granted cert.
- Consolidated with two other cases: *Epic Sys. Corp. v. Lewis* and *Ernst & Young v. Morris*
- *Murphy Oil* arose in ULP proceeding but *Epic* and *Ernst* arose in private employment disputes

EEOC Crystal Ball

- Chair Jenny Chang (D) recently replaced by Acting Chair Victoria Lipnic (R)
- Expected to be more aggressive about cleaning up backlog than seeking out new cases
- Hiring barriers still a likely focus
- Experts not predicting dramatic shifts in EEOC positions in the short term, except potentially to scrap the newly rolled-out EEO-1
- Pence opposition to pay equity initiatives
- More mediation?
- Heightened Congressional oversight / tighter budgets
- Local developments

Equal Pay

- If new EEO-1 remains on the books, it could drive more litigation
 - FOIA requests and discovery requests will show not only inequities but also Company's knowledge of these inequities.
- Ivanka Trump has spoken in favor of equal pay initiatives

Equal Pay

- State law equal pay initiatives
- Corporate policies covering C-suite women
- Shareholder initiatives
- California's equal pay law (Jan. 1, 2016) has spurred two additional bills aimed at abolishing pay discrimination based on race and ethnicity
- Several other states have bills pending

Marijuana Laws

- Recent elections resulted in three more states (California, Massachusetts and Nevada; Maine will likely join this group before the end of January) legalizing the recreational use of marijuana
- Four more states (Arkansas, Florida, Montana and North Dakota) permitting marijuana use for medical reasons
- As more states change, drug and alcohol policies should too

Right to Work

- January 2017 – Missouri became the 28th state (and fourth in three years) to become a “Right-To-Work” state
- Trend seen in manufacturing states

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