

Inside Baseball: What's Going On in D.C. That Impacts Your Employment Law Practice?

2018 Upper Midwest Employment Law Institute

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These materials are based on David S. Fortney's and Randy K. Johnson's prior presentations at the Employer Counsel Network and the HR Policy Association Conferences, respectively.

This was prepared for the participants' referenced. Attendees should consult with their own counsel before taking any actions based on these reported developments, and attendees should not consider these materials or discussions to be legal counsel or advice.

Judicial Branch



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Membership of Supreme Court



Chief Justice
John G.
Roberts, 63



Justice
Anthony M.
Kennedy, 81



Justice
Clarence M.
Thomas, 69



Justice Ruth
Bader Ginsburg,
84



Justice Neil
Gorsuch, 50



Justice
Stephen G.
Breyer, 79



Justice
Samuel A.
Alito, Jr., 67



Justice Sonya
Sotomayor,
63



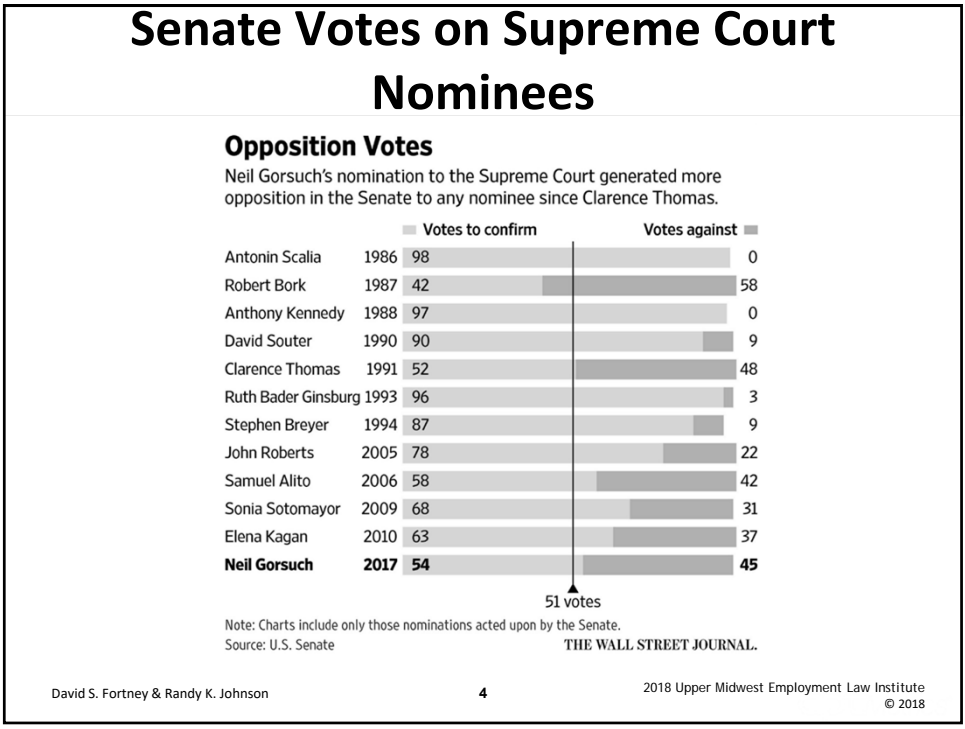
Justice Elena
Kagan, 57



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Important Issues Involving the U.S. Supreme Court

- *Janus v. AFSCME*
 - The Supreme Court heard arguments on February 26th, 2018, on the issue of whether public sector workers can be forced over their First Amendment objections to pay dues or fees to a union as a condition of employment. This case has the potential to have significant financial and operational consequences for the union movement generally, and for public sector unions, specifically. For example, a recent survey by AFSCME of its 1.6 million members found that only 35% of their members would definitely pay dues if not required to do so.



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Important Issues Involving the U.S. Supreme Court

- *Encino Motorcars, LLC v. Navarro*
 - The Supreme Court held in April of this year that automobile dealer service advisors are exempt under the Fair Labor Standards Act. This decision is an important interpretation of the FLSA as it reverses 73 years of precedent and holds that the definition of exempt employee status under the FLSA should be fairly construed and not narrowly construed.
- *DirectTV, LLC v. Hall*
 - The Court earlier this year, declined to hear the issue of whether certain entities that regularly contract with DirecTV to provide services for DirecTV customers are joint employers under the Fair Labor Standard Act. The United States Court of Appeals for the Fourth Circuit had found that such entities, in many instances, were joint employers with DirecTV, and established a new joint employer test that had not been utilized by other circuit courts of appeals.

Important Issues Involving the U.S. Supreme Court and Federal Circuit Courts

- *Murphy Oil* and related cases are pending decision by the Court. These cases involve the issue of whether an employer can require an employee to forgo the filing of class and collective action cases in arbitration proceedings. The lead NLRB case in this area is *D.R. Horton*.
- *Digital Realty Trust, Inc. v. Somers*
 - The U.S. Supreme Court unanimously held that an individual must take allegations of corporate wrong-doing directly to the Securities and Exchange Commission (SEC)—not just internally—in order to qualify for expanded whistleblower protections under the Dodd-Frank Act.
 - The decision effectively mandates that whistleblowers report to the SEC if they want to take full advantage of the anti-retaliation protections.

Important Issues Involving the U.S. Supreme Court and Federal Circuit Courts

- Sexual orientation coverage under federal employment discrimination statutes
 - The Court earlier this year declined to hear an appeal from the Eleventh Circuit on whether sexual orientation is a protected status under Title VII of the Civil Rights Act.
 - The Second Circuit ruled on February 26th, 2018, that discrimination based on sexual orientation violates Title VII, siding with the estate of a deceased skydiving instructor who was allegedly fired for telling a client he was gay. This issue, however, will continue to be litigated in lower courts and may be back to the Supreme Court in the near future.
- Rumors continue to circulate that Justice Kennedy is contemplating retirement.

Important Issues Involving the U.S. Supreme Court and Federal Circuit Courts

- *Rizo v. Fresno County Office of Education*
 - On April 11, the Ninth Circuit ruled that salary history is no protection against equal pay claims, except maybe in individualized negotiations.
 - The Ninth Circuit Court of Appeals expressed the “general rule” that an employee’s “prior salary alone or in combination with other factors” cannot be used by employers as a defense against allegations of pay discrimination under the Equal Pay Act but did not decide “whether or under what circumstances past salary” may be used when negotiating individual salaries.
 - Attorneys for the employer plan to appeal the decision to the U.S. Supreme Court, but it is unclear if or when the high court would take up the case.

Composition of Federal Courts of Appeals and U.S. District Courts

Court	Authorized Judgeships	Vacancies	Nominees Pending	Nominees Pending for Future Vacancies
US Supreme Court	9	0	0	0
US District Courts (includes territorial courts*)	677	124	51	0
US Court of International Trade	9	2	0	0
US Court of Federal Claims*	16	6	2	0
US Court of Appeals	179	19	8	3
Total	890	151	61	3

- The Trump Administration is actively attempting to fill these vacancies and continues to submit nominees to the Senate for confirmation. As of April 2018, 29 of the President's judicial nominees have been confirmed by the Senate.

Source: <http://www.uscourts.gov/judges-judgeships/judicial-vacancies>.

Composition of Federal Courts of Appeals and U.S. District Courts

- U.S. Court of Appeals for the Ninth Circuit
 - The issue of whether the Ninth Circuit, which includes jurisdiction over California, Oregon, Washington, Nevada, Arizona, Idaho, Montana, Alaska, Guam, and Hawaii, should be divided into 2 courts has been debated for some time—over the years, the Ninth Circuit has become one of the more liberal circuit courts in the country and the potential division of the Ninth Circuit has generated legislation in the Congress to achieve that objective, but no action has been taken to date.



Legislative Branch



Composition of the U.S. Senate

- The current composition of the U.S. Senate is 51 Republicans, 47 Democrats and 2 Independents (Independent Senators are Angus King (ME) and Bernie Sanders (VT)—they both caucus with the Democrats).
- Republicans have 8 seats up for election in 2018—only 1 in a state Mrs. Clinton won.
- Democrats have 23 Senate seats up in 2018—with 5 states President Trump won by double-digits.
- The health status of Senator John McCain (R-AZ) remains a concern. Further, Senator Thad Cochran (R-MS) is retiring from the Senate and a special election will be held this year for his replacement.



Composition of the U.S. Senate

- Newly elected Senator Doug Jones (D-AL) and recently appointed Senator Tina Smith (D-MN) have been appointed to the Senate Health, Education, Labor and Pensions Committee (HELP). The political make-up of the HELP Committee remains 12 Republican Senators and 11 Democratic Senators.
- There are a number of labor and employment related nominations pending before the Senate for confirmation votes, and a number of nominees pending before the HELP Committee.



U.S. House of Representatives

- The composition of the U.S. House of Representatives consists of 237 Republicans and 192 Democrats.
- As of April 6, 2018, there are 6 vacancies.
- All House seats will be up for re-election in 2018.
- 60 members of the House announced they will not seek re-election in 2018 and 10 have resigned during this term of Congress.
- Conor Lamb (D) won a special election in Pennsylvania's 18th district in early March, defeating Rick Saccone (R) by an extremely slim margin.



Source: <https://pressgallery.house.gov/member-data/party-breakdown>

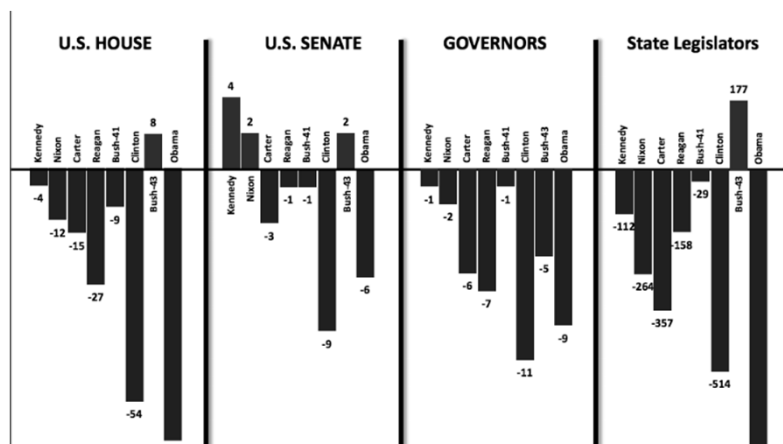
U.S. House of Representatives

- The most important labor and employment bill to pass the House in the current term of Congress is the joint employer bill which is entitled “Save Local Business Act.” This bill passed the House by a vote of 242-181, including “yes” votes from 8 Democrats. The bill will provide the following definition of joint employer status under the National Labor Relations Act and the Fair Labor Standards Act:
 - A person may be considered a joint employer in relation to an employee only if such person directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over the essential terms and conditions of employment such as hiring employees, discharging employees, determining individual employee rates of pay and benefits, day-to-day supervision of employees, assigning individual work schedules, positions, and tasks, or administering employee discipline.

U.S. House of Representatives

- This legislation is presently pending consideration in the Senate, and no Senate HELP Committee hearing to date has been scheduled. The key to moving this legislation in the Senate is finding Democratic co-sponsors as it will take 60 votes to suspend expected debate on this proposal and move it to a final vote where a simple majority can pass the legislation.
- Supporters of the House passed joint employer bill will continue to look to potential legislative strategies, including adding the House passed legislation to budget bills that will be considered by the Congress later this year.

Why Republicans Need to Worry About 2018



Source: CNN Politics

*This chart documents seat losses in the House, Senate, State Legislatures, and Governors' mansions in the first midterm election of the last eight presidents

Percentage of Female State Legislators in 2017

Percentage of Female State Legislators in 2017



Source: Center for American Women and Politics, Eagleton Institute of Politics, Rutgers University

Bloomberg Law

AFL-CIO

- The AFL-CIO has established what it calls a “globalization hub” to prepare for the 2018 November elections. The hub will coordinate the Federation’s election efforts and would be the largest department within the AFL-CIO.
- Record spending can again be expected in the November 2018 midterm elections including substantial spending by the labor movement as the control of the Senate and House are at stake.



U.S. House of Representatives

- The House is also considering an important leave of absence proposal by Congresswoman Mimi Walters of California. Her legislation is known as the Workflex in the 21st Century Act, and would permit employers to avoid the imposition of state and local leave requirements based on the following formula:

Employer Size	Employees with 5+ years of service with the employer at the beginning of the plan year would receive:	Employees with < 5 years of service with the employer at the beginning of the plan year would receive:
1,000+ Employees	20 Days	16 Days
250 – 999 Employees	18 Days	14 Days
50 – 249 Employees	15 Days	13 Days
< 50 Employees	14 Days	12 Days

U.S. House of Representatives

- Further, an employer would have to have one or more of the following leave programs in place:
 - Compressed work schedule - This option would permit an employee to work the equivalent of full-time employment by increasing the number of daily hours, such as a four-day work week.
 - Biweekly work program - This option would permit a basic work requirement of no more than 80 hours, over one 2-week period, and in which more than 40 hours but not more than 60 hours of the work requirement may occur in a week of the 2-week period.
 - Telecommuting - This option permits an employee performs her/his job duties and responsibilities from a worksite approved by the employer other than the location from which the employee would otherwise work.
 - Job sharing - This option permits an employer to approve the sharing of one employment position amongst two or more employees.
 - Flexible scheduling - This option permits an arrangement under which an employee's regular work schedule is altered.
 - Predictable scheduling - This option permits an arrangement under which an employer provides a work schedule (a) with reasonable advanced notice, and (b) that is subject to as few alterations as are reasonably possible.

Labor and Employment Issues That Congress May Address in 2018 Also Include the Following:

- Mandatory alternative dispute resolution procedures that prohibit employees from initiating class action and collective action filings (the *Murphy Oil* and *D.R. Horton* line of cases)
- Proposals to prohibit employers from imposing mandatory confidentiality agreements in sexual harassment arbitration proceedings
- Amendments to the Fair Labor Standards Act regarding flexible workplace procedures including compensatory time options
- Worker center regulation
 - Legislative proposal to require worker centers to follow the same reporting requirements as labor unions

**FIGHT
FOR \$15**

Executive Branch



White House Developments—Some Changes to the Administration...

 Sally Yates US Deputy Attorney General	 Preet Bharara US Attorney for the Southern District of NY	 Katie Walsh Deputy White House Chief of Staff	 Michael Flynn National Security Adviser	 K.T. McFarland Dep. National Security Adviser	 Vivek Murthy Surgeon General	 James Comey FBI Director	 Mike Dubke Communications Director	 Walter Shaub Office of Government Ethics Director
 Sean Spicer WH Press Secretary	 Reince Priebus WH Chief of Staff	 Anthony Scaramucci Communications Director	 Steve Bannon Chief Strategist	 Sebastian Gorka Dep. Asst. to the President	 Tom Price HHS Secretary	 Richard Cordray Consumer Financial Protection Bureau Director	 Dina Powell Dep. National Security Adviser	 Omarosa Manigault Communications Director at the WH Office of Public Liaison
 Rick Dearborn Dep. Chief of Staff	 Brenda Fitzgerald CDC Director	 Rob Porter WH Staff Secretary	 Hope Hicks Communication Director	 Gary Cohn NEC Director	 Rex Tillerson Secretary of State	 Andrew McCabe FBI Dep. Director	 H.R. McMaster National Security Adviser	 David Shulkin Veterans Affairs Secretary

As March 27, 2018
Photos: Getty Images



Trump White House Saw Record Number of First-Year Staff Departures

- The Trump Administration has had a very high turnover rate of senior officials who have resigned, been fired or reassigned.
- This is the highest turnover rate in the last 40 years, which is as far back as the Brookings Institution, who tracks the turnover rates, goes.
- The presidency with the next-highest first-year turnover rate was Ronald Reagan's, with 17% of senior aides leaving the Administration in 1981.

White House Developments

- Emphasis on judicial nominations
- Challenges in the nomination and confirmation process...BUT
- Successful nomination of Justice Gorsuch and nominations for the NLRB and USDOL
- Apprenticeship program initiatives
- Tax reform initiatives
- Immigration reform

President Trump's Immigration Policy Initiatives

1. Build a wall with surveillance and sensor technology, fortified with manpower.
2. End "catch and release" by detaining anyone who crosses the border until they are deported.
3. Enforce zero tolerance for criminal aliens by removing them all from the U.S. and creating a Deportation Task Force.
4. Block funding for sanctuary cities in an effort to eliminate laws that shield undocumented immigrants.
5. Cancel Obama's executive orders giving amnesty and fully enforce all immigration laws.
6. Suspend issuing visas to any place we cannot adequately screen including countries with refugees like Syria and Libya.
7. Require other countries to take back their citizens when they are deported. Some countries refuse to accept people back in such circumstances.
8. Complete the biometric entry-exit visa tracking system in an effort to eliminate Visa overstays.
9. Use E-Verify to the fullest extent, expanding its use and prioritizing the deportation of aliens on welfare.
10. Reform legal immigration to keep it within historical norms and admit immigrants most likely to be financially self-sufficient.

White House Developments

- Reduction in number of regulations
 - The buildup of regulations leads to duplicative, obsolete, conflicting, and even contradictory rules.
 - A recent study finds that regulation—by distorting the investment choices that lead to innovation—has created a considerable drag on the economy.
 - Economic growth in the United States has, on average, been slowed by 0.8 percent per year since 1980 owing to the cumulative effects on regulation.
 - If regulation had been held constant at levels observed in 1980, the U.S. economy would have been about 25 percent larger than it actually was in 2012.
 - In 2012, the economy was \$4 trillion smaller than it would have been in the absence of regulatory growth since 1980.
 - This amounts to a loss of approximately \$13,000 per capita, a significant amount of money for most American workers.

Source: RegProject.org, January 23, 2018



Department of Labor

DOL – Finally Staffing Up

- Secretary of Labor Alex Acosta (4-27-2017)
- Mine Safety and Health (David Zatezalo) (11-30-2017)
- Solicitor (Kate O’Scannlain), Congressional (Katherine McGuire) and Pensions (Preston Rutledge) (12-21-2017)
- Deputy Secretary (Patrick Pizzella) (April 12, 2018)

DOL Agency	Nominee	Status
Wage & Hour Administrator	Cheryl Stanton	Pending before Senate
OSHA	Scott Mugno	Pending before Senate
Bureau of Labor Statistics	William Beach	Pending before Senate
ETA	John Pallasch	Nominated on April 11, 2018
VETS	John Lowry III	Nominated on April 20, 2018

Kate O'Scannlain – Solicitor



- Kate O'Scannlain confirmed as the Labor Department's chief legal officer
- She oversees one of the largest government legal shops and has independent authority to file lawsuits enforcing approximately 180 federal workplace statutes
- 12 years experience at DC's Kirkland & Ellis

DOL Initiatives

- Apprenticeship Task Force established
- Wage and Hour
 - Regulations
 - Overtime rule to be amended; Obama on appeal
 - Tip Sharing rule controversial amendment
 - Wage & Hour Opinion Letters are available (again)
 - Withdrawal of Joint Employer & IC guidance
- OSHA
 - Silica rule delayed; regulatory calendar halved
- Pensions -- EBSA
 - Fiduciary rule vacated
- OLMS
 - NPRM to rescind the Persuader Rule



OFCCP

Ondray T. Harris - OFCCP Director



- Former deputy chief of employment litigation at the Justice Department (DOJ) during the George W. Bush administration
 - Was the deputy chief of employment litigation, and litigated cases on behalf of the federal government and military personnel
- Joined the Labor Department in the Spring of 2017, serving as a senior advisor at the Employment and Training Administration
- Prior to entering public service, was a partner at LeClairRyan, where he practiced management-side labor and employment law
- Earned a law degree from Washington and Lee University School of Law and a bachelor's degree in history from Hampden-Sydney College

Craig Leen –Senior Advisor, OFCCP



- Former City Attorney for Coral Gables, Florida
- Adjunct Professor at FIU College of Law
 - Worked with Secretary of Labor Acosta
- Private sector law firm experience at Morgan, Lewis & Bockius among others
- Law Degree for Columbia Law School, and undergraduate from Georgetown

CSALs

- February 1, 2018 – OFCCP released 1,000 Corporate Scheduling Letters (CSAL)
 - No more than 10 establishments of a single contractor were placed on the 2018 scheduling list
 - No more than four establishments of a single contractor are placed in a single OFCCP district office
 - No establishment that received a CSAL, concluded a review, or concluded progress report monitoring resulting from a conciliation agreement or consent decree, within the last five years, is included on this scheduling list
- OFCCP began mailing scheduling letters on March 19, 2018

Directive 2018-01

- **Requires** OFCCP to issue a Predetermination Notice (PDN) prior to the issuance of a Notice of Violation (NOV)
 - Required for all individual and systemic discrimination findings
- Mandates regional SOL to review the PDN before they are submitted to the national office
- National office will ultimately review and approve all PDNs
- Practical implications?

OFCCP Under Trump

- No Merger with EEOC
- Decreased Budget
 - OFCCP will do more with less
- OFCCP Will Close Some District Offices
- Continued Focus on Pay Equity
- ACM Replaces ACE
- Comp Standards (or something similar) Replace Directive 307
 - Safe Harbor Provision?
- Contract Compliance Certification Program
 - Currently within the regulations at 60-2.31 (Program Summary)
- Regional Centers of Excellence
 - Tech and Financial Industry
- Full Review of OFCCP's Sole Reliance on Statistical Significance to "Prove" Discrimination

Pay Equity Enforcement Will Stay But . . .

- OFCCP took a radical approach to analyzing pay
 - Directive 307
- Pay will most likely remain a focus for OFCCP
- But Agency appears to be planning to return to analyzing pay in more traditional ways as interpreted under 50 years of Title VII case law
 - “Similarly situated” = job titles
 - Along with statistics, anecdotal evidence required

Private Plaintiffs Starting to Bring Class Claims

- Class pay discrimination claims brought against IT sector companies, include
 - Qualcomm – settled for \$19.5 million
 - Google – dismissed in past week – plaintiffs will re-file
 - Microsoft
 - Oracle
 - Twitter
 - Uber -- settled for \$10 million
- This likely just the start as most of the recently-enacted state equal pay laws have yet to become effective



Wage & Hour

Wage & Hour Issues

- Obama tip pooling regulations rescission
 - Allegation that DOL in rulemaking deliberately withheld internal study concluding that employers could take “billions” in employees’ tips
 - DOL IG investigating
- FLSA amendment in FY2018 Omnibus budget (prevents employers from retaining tips) and newly issued Field Assistance Bulletin No. 2018-3
- Litigation update
- Senator Rubio claimed DOL still enforcing Obama-era labor rules on joint employment after DOL removed guidance

Wage & Hour Initiatives

- Issuing opinion letters, including reinstating letters from Pres. George W. Bush Administration
- Initiating a pilot program for self-audit/self-reporting program—Payroll Audit Independent Determination (PAID)
- Possible guidance on independent contractors and joint employment to replace guidance revoked
- Providing guidance on tip-pooling

New Supreme Court Decision

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

- Interpreted a narrow FLSA exemption question on service advisors
- Key Ruling: the proper standard—and the new rule announced in *Encino*—is that FLSA exemptions should be given a “fair (rather than a ‘narrow’) interpretation” and construed plainly
 - Court rejected argument that FLSA exemptions must be “construed narrowly”



EEOC

EEOC Developments and Key Focus Areas

- Trump nominees advanced to full senate and stalled
 - Janet Dhillon – EEOC Chair
 - Daniel Gade – EEOC Commissioner
- Trump nominated Sharon Gustafson to be General Counsel
 - Hearing before the Senate HELP Committee on April 10
- EEO-1 Component 2- suspended and under review
- Title VII –EEOC vs DOJ on LGBT coverage
 - Transgender and Religious Freedom Memos
- EEOC harassment guidance
- Big data

EEOC Predictions

- What's next for component 2 – is another pay reporting proposal possibility?
- Title VII coverage – What can we expect to see happen?
- Thoughts on transgender religious freedom memos
- Harassment training- what should companies start thinking about?
- Insights related to other EEOC strategic initiatives

EEOC and #MeToo

- In 2016 Acting Chair Lipnic and Commissioner Feldblum led a task force on sexual harassment
 - Out of the task force EEOC developed new training to be used for sexual harassment which was rolled out in October 2017
 - Current training found ineffective
 - EEOC is planning to issue new guidance on sexual harassment based on best practices developed by Task Force

Interesting Cases

- LGBT 2nd Circuit Decision – *Zarda v C.R. Bard, Inc. et al*
- Trans Bias Suit 6th Circuit - *EEOC v. R.G. & G.R. Harris Funeral Homes Inc.*
- EEO-1 Component 2 Lawsuit - *NWLC et al. v. OMB et al*
- Equal Pay Act 9th Circuit – *Rizo v. Yorino*

EEOC Operations Enforcement— FY2017 Charge Statistics

84,254 CHARGES FILED
41,097 RETALIATION (48% OF ALL CHARGES FILED)
28,528 RACE (33% OF ALL CHARGES FILED)
26,838 DISABILITY (31.9% OF ALL CHARGES FILED)

99,109 CHARGES RESOLVED
14,642 MERIT RESOLUTIONS

(Defined as Charges with outcomes favorable to charging parties and/or charges with meritorious allegations. These include negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations.)

2,909 REASONABLE CAUSE FINDINGS
1,152 SUCCESSFUL CONCILIATIONS
1,757 UNSUCCESSFUL CONCILIATIONS
\$348 (MIL) IN MONETARY BENEFITS

Source: Equal Opportunity Employment Commission

National Labor Relations Board and Office of General Counsel Developments



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National Labor Relations Board (NLRB)



Lauren McFerran (D)
Member
Term Expiration - December 16, 2019



Marvin Kaplan (R)
Member
Term Expiration - August 27, 2020



Mark Gaston Pearce (D)
Member
Term Expiration - August 27, 2018



William Emanuel (R)
Member
Term Expiration - August 27, 2021



John Ring (R)
Chairman
Confirmed April 11, 2018




Peter Robb (R)
General Counsel
Confirmed November 8, 2017 for a
4-year term

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NLRB Developments

- December 2017 Significant Board Decisions:
 - *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017) 
 - In a 3-2 decision, with Republican Members Miscimarra, Emanuel, and Kaplan in the majority and Democratic Members McFerran and Pearce in the minority, the Board adopted a new approach to workplace rule cases. The decision invalidated the prior *Lutheran Heritage* standard that the Board had utilized to invalidate numerous employer rules and handbook provisions if “employees would reasonably construe the language to prohibit Section 7 activity”.
 - Under the new standard, the Board will determine whether a facially neutral rule could be reasonably interpreted to be consistent with both Section 7 rights of employees and legitimate objectives of employers.

NLRB Developments

- Three new categories of employer rules will be examined under the *Boeing* standard by the Board:
 - Rules that are lawful because, when reasonably interpreted, they do not interfere with NLRA rights or the potential adverse impact on protected rights is outweighed by justifications associated with the rules.
 - Rules that “warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.”
 - Rules that are unlawful because they prohibit NLRA-protected conduct and the adverse impact is not outweighed by the rules’ justifications.

NLRB Developments

- *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 15, 2017)
 - In another 3-2 decision, with the same alignment as in the *Boeing* case, the Board majority changed the joint employer standard back to “direct and immediate” control, and away from “indirect” or “reserved” control, and holds that control must not be “limited and routine.”
 - The new standard according to the *Hy-Brand* decision will require “a finding of joint employer status shall once again require proof that putative joint employer entities have exercised joint control over essential employment terms (rather than merely having ‘reserved’ the right to exercise control), the control must be ‘direct and immediate’ (rather than indirect), and joint employer status will not result from control that is ‘limited and routine.’”



NLRB Developments

- On February 26, 2018, Chairman Kaplan and Members Pearce and McFerran voted to rescind the Board’s December 2017 *Hy-Brand* decision. The stated rationale for such vote was the alleged improper vote of Member Emanuel in the December 3-2 vote regarding *Hy-Brand*. The Office of Inspector General ruled that *Hy-Brand* and *BFI* were the same “particular matter” and therefore Member Emanuel due to his prior law firm’s participation in *BFI* should not have voted in the December *Hy-Brand* decision. A motion to reconsider the Board’s second *Hy-Brand* decision is presently pending before the Board.
- The OIG report is highly controversial and appears to be without precedent. In the interim, the *BFI* case may be back before the D.C. Circuit for decision.



NLRB Developments

- *PCC Structural, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017)
 - In another 3-2 decision, the Board revived the traditional “community of interest” standard for determining whether a petitioned-for unit in representation cases constitutes an appropriate bargaining unit.
 - The Board majority rejected the overwhelming community of interest test that had been established by the Obama Board in its *Specialty Healthcare* decision.
 - Specifically, the Board majority stated in reaffirming the traditional community of interest test that the Board in each case shall determine:
 - whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with our employees; have distinct terms and conditions of employment and are separately supervised.



NLRB Developments

- *Raytheon Network Centric Systems*, 365 NLRB No. 161 (Dec. 15, 2017)
 - In another 3-2 decision, the new Republican majority held that during collective bargaining, when an employer takes unilateral actions that are “not materially different from what it has done in the past, no ‘change’ has occurred and the employer’s unilateral actions are no longer violations of Section 8(a)(5) of the Act.”
 - The important practical takeaway from this decision is that employers now have a degree of latitude to make initial changes in terms and conditions of employment during collective bargaining without being required to engage first in what could be protracted discussions before making any changed working conditions.

Raytheon

NLRB Developments

- *UPMC*, 365 NLRB No. 153 (Dec. 11, 2017)
 - In yet another significant 3-2 decision, the Board majority reinstated the prior practice of permitting administrative law judges to accept a respondent's proposed settlement terms, over the objection of the General Counsel and the charging party, if the proposed settlement terms were deemed reasonable based on the factors set forth in the Board's *Independent Stave* case.

UPMC

NLRB Developments

- *Hendrickson*, 366 NLRB No. 7 (Jan. 25, 2018)
 - This is a *Tri-Cast* type of case. In *Tri-Cast*, the employer stated in a letter to employees in the context of a union organizing campaign, "we have been able to work on an informal and person-to-person basis. If the union comes in this will change. We will have to run things by the book, with a stranger, and will not be able to handle personal requests as we have been doing." The Board found that such statements were permitted under Section 9(a) of the Act, and specifically held that "the Employer's statement, crafted in layman's terms, simply explicates one of the changes which occur between employers and employees when a statutory representative is selected." 274 NLRB 377 (1985).

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NLRB Developments

- In *Hendrickson*, on a 2-1 vote, with Members Pearce and McFerran in the majority and Emanuel dissenting, the Board majority did not follow *Tri-Cast*, and found that the employer communications were a threat under Section 8(a)(1) of the Act.
- Specifically, the Board majority reviewed the employer's powerpoint presentation during an election campaign where the employer said, "the culture will definitely change," "relationships suffer," and "flexibility is replaced by inefficiency" if the union is successful in being voted in as a representative of the employees. The employer also, in the same communication, stressed the positive aspects of its current work environment stating that there was an "easy-going atmosphere," employees have the "freedom to do [their] job," and there is "reward/advancement for those that work hard and produce."



NLRB Developments

- Member Emanuel would not find a violation for the employer's powerpoint comments. He found that such comments were a "fact of industrial life," and that the onset of union representation changes the manner in which employment issues may be addressed in the workplace. Relying on the Board's earlier *Tri-Cast* decision, he further stated that in the event of unionization, employers may no longer implement unilateral changes in employment terms and conditions without giving the union notice and the opportunity for bargaining, and that employers are prohibited from having direct dealing with employees that unlawfully bypass the union.
- Finally, he noted that with unionization, there is the potential to resort to economic weapons that do in fact potentially create inefficiency, reduced flexibility, and arguably an adverse work relationship.



NLRB Developments

- *Ashford TRS Nickel, LLC*, 366 NLRB No. 6 (February 1, 2018)
 - The Board unanimously ruled that the Sheraton Anchorage Hotel and Spa hotel owner violated the National Labor Relations Act when it sued a UNITE HERE! local union after it organized a consumer boycott. The Board held that the employer will be required to pay the attorneys' fees that the union incurred defending the lawsuit.
 - TRS claimed the Union defamed the Hotel by telling the public that management officials were illegally firing employees. The employer also argued that the union threatened hotel customers by stating they would have to cross a "vigorous" picket line to enter the Hotel.

NLRB Developments

- Potential Election Rule Changes
 - The Board in January of this year requested comment on potential changes to its recently adopted expedited election or ambush election rules. The Board specifically requested comment on or before April 18, 2018, of the following questions:
 - Should the 2014 Election Rule be retained without change?
 - Should the 2014 Election Rule be retained with modifications? If so, what should be modified?
 - Should the 2014 Election Rule be rescinded? If so, should the Board revert to the Representation Election Regulations that were in effect prior to the 2014 Election Rule's adoption, or should the Board make changes to the prior Representation Election Regulations? If the Board should makes changes to the prior Representation Election Regulations, what should be changed?

NLRB Developments

- Democratic NLRB Members Mark Pearce and Lauren McFerran objected to this request for comment. Member Pearce stated this is a “notice and quest for alternative facts.” He further argued that it was a waste of Board resources, that the courts had rejected a constitutional challenge to the 2014 Election Rule changes, and that statistics show that the number of petitions and elections has not increased since the new rules were implemented.
- Member McFerran also argued this is simply an exercise to “raise your hand if you don’t like the 2014 Rules.” She stated in her dissent that the request for comments were premature, unlikely to solicit meaningful feedback, and were a transparent effort to manufacture justifications for revising the rules.

NLRB Developments

- The change in the Board’s composition with the establishment, at least temporarily in December 2017, of a new Republican majority led to the increase of Board Members utilizing Twitter. Prior to December 2017, Members of the Board, with the exception of former Chairman Philip Miscimarra, virtually never communicated through social media including Twitter. With the issuance of the major policy decisions of the new Republican Board in December of 2017, NLRB Members Pearce and McFerran began to post long, critical statements regarding the Majority’s decisions. There probably will be more of such activity to come in this social media area from more Members in the future.

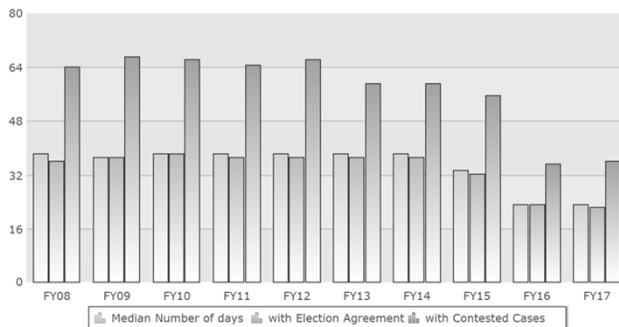


Pigs Outnumber People in Denmark



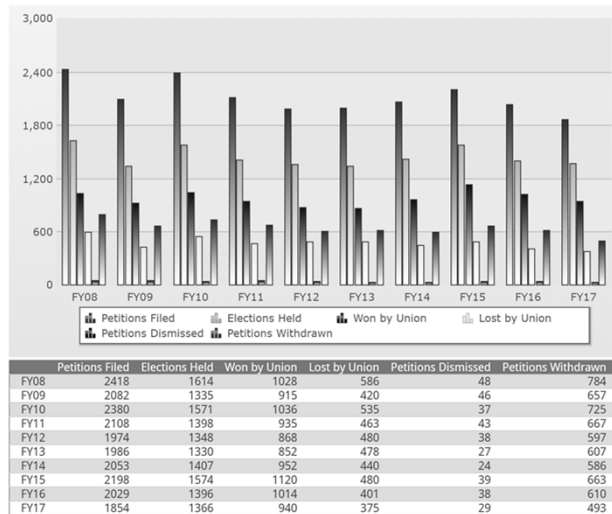
- According to a report by Eurostat Statistical Agency released in March 2018, pigs outnumber people in Denmark by more than two-to-one (215 pigs to every 100 residents).
 - Not coincidentally, it's also a country known in Europe for its quality bacon.
- In several Midwestern U.S. states, pigs also outnumber people. Iowa, Nebraska, North Dakota and Minnesota all have more hogs than humans, comparing 2017 estimates from the U.S. Department of Agriculture and the U.S. Census Bureau.

Median Days from Petition to Election



	Median Number of days	with Election Agreement	with Contested Cases
FY08	38	36	64
FY09	37	37	67
FY10	38	38	66
FY11	38	37	64.5
FY12	38	37	66
FY13	38	37	59
FY14	38	37	59
FY15	33	32	55.5
FY16	23	23	35
FY17	23	22	36

Representation (RC) Petitions

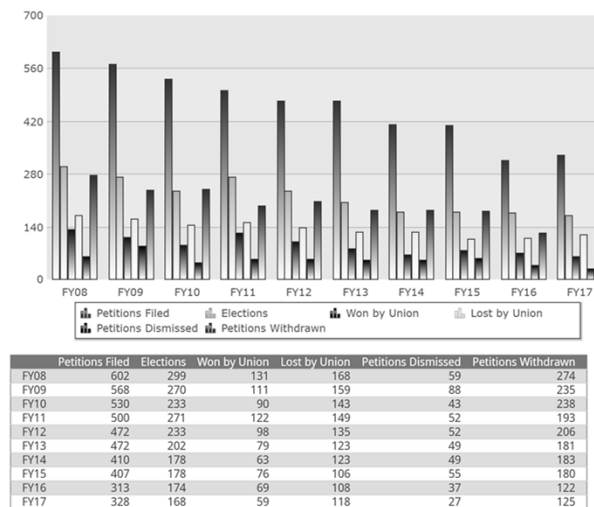


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Decertification (RD) Petitions

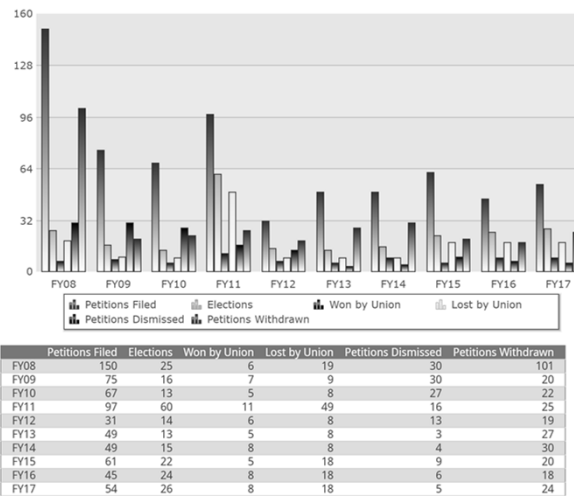


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Employer (RM) Petitions

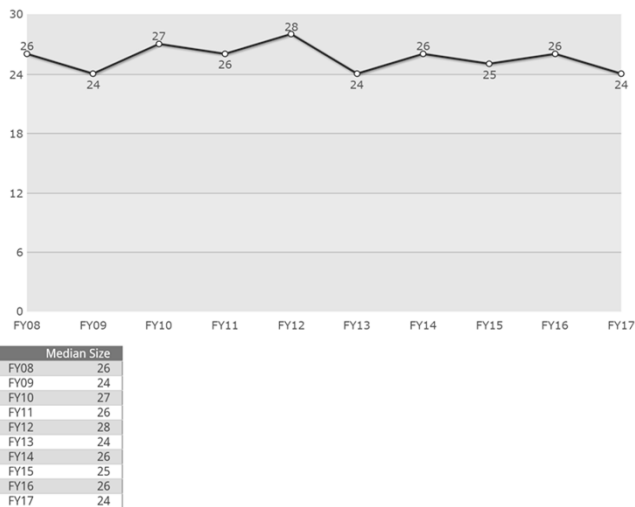


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Median Size of Voting/Bargaining Unit

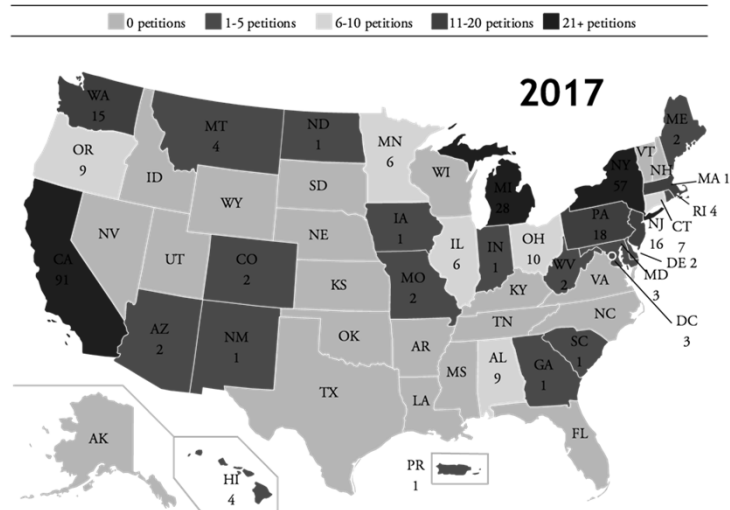


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RC Petitions in Health Care by State

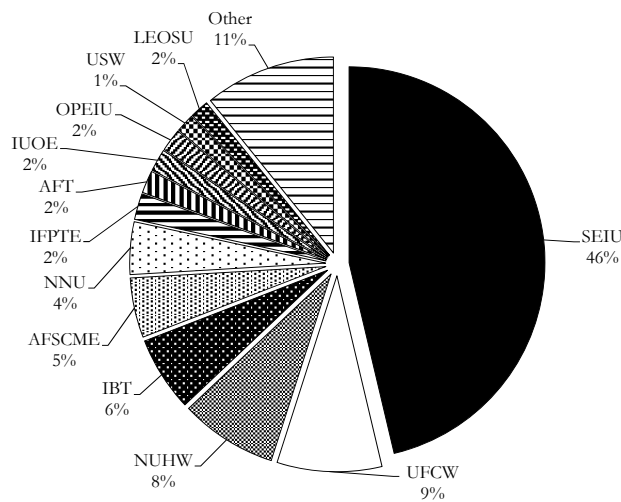


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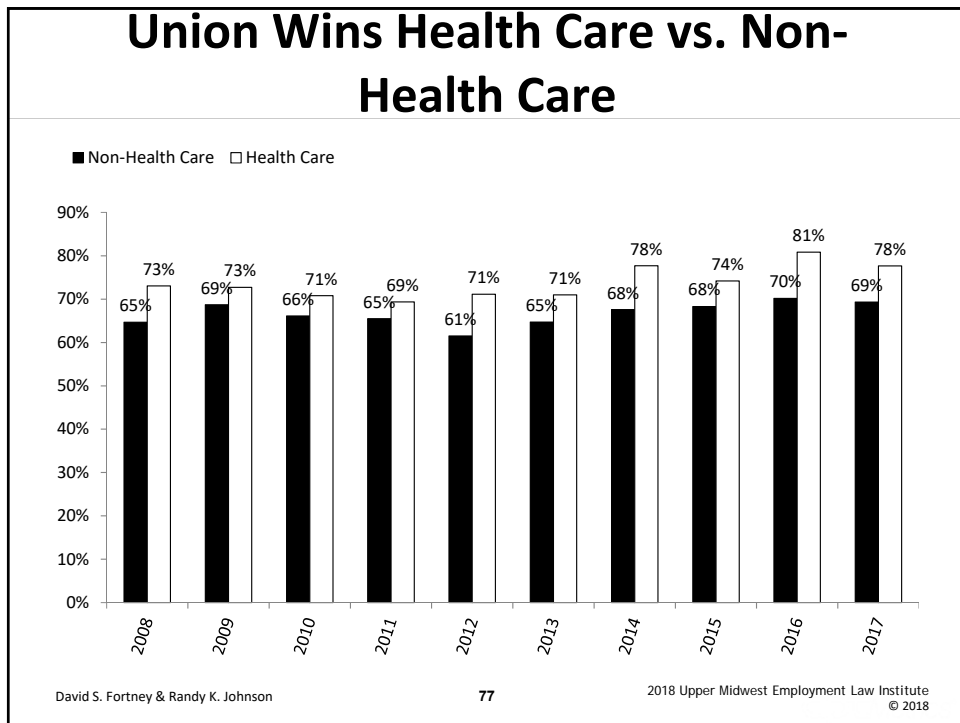
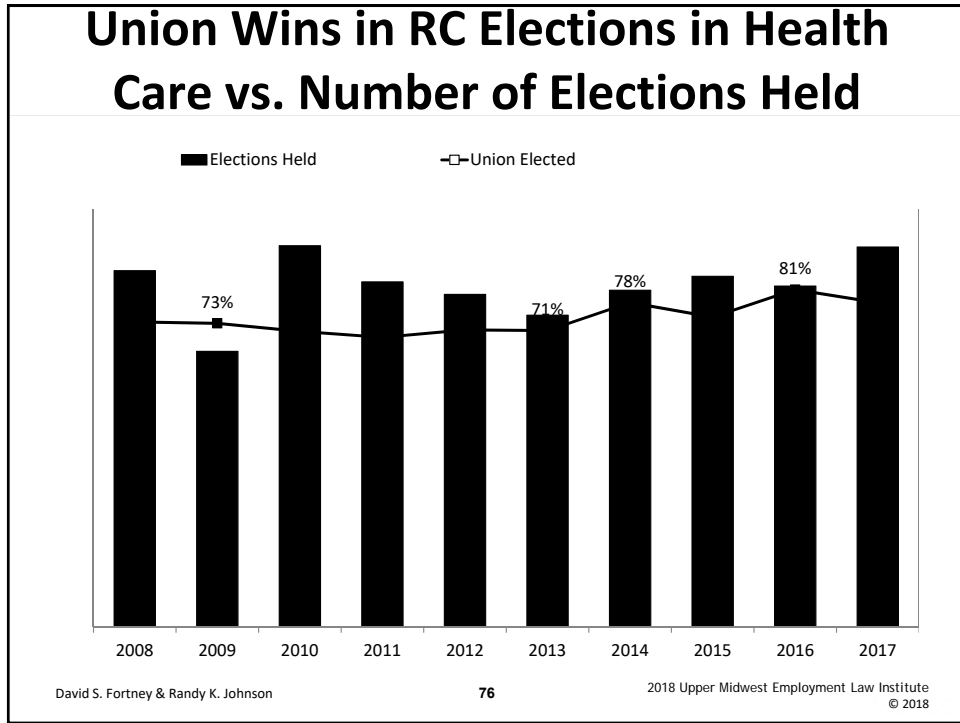
RC Petitions in Health Care by Union- 2017



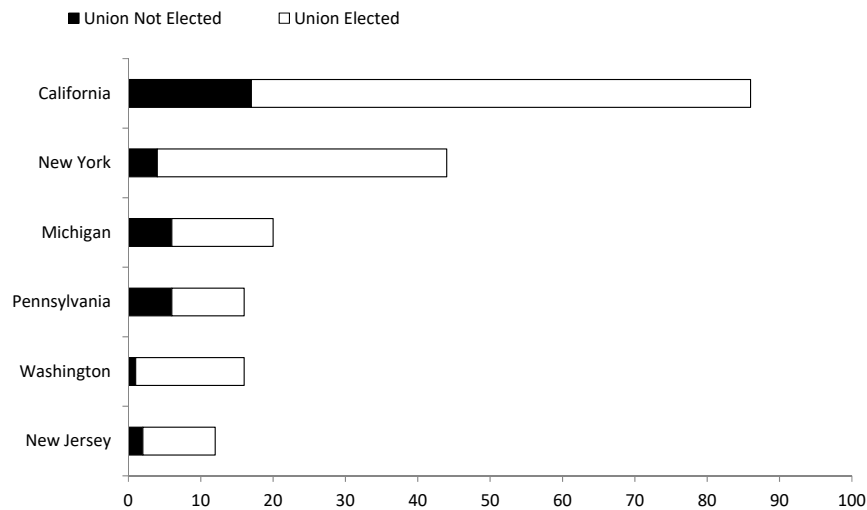
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Most Active States- RC Elections in Health Care 2017



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NLRB Developments

- Significant Circuit Court Case Remands
 - *Browning-Ferris Industries v. NLRB*
 - The *Browning-Ferris* case, which established the expansive new joint employer doctrine and was essentially overruled by the *Hy-Brand* decision, has been remanded to the Board from the U.S. Court of Appeals for the D.C. Circuit for further consideration.
 - *Volkswagen v. NLRB*
 - The pending challenge to the Board's decision approving a separate maintenance unit election for the Volkswagen Chattanooga, TN plant has also been remanded from the U.S. Court of Appeals for the D.C. Circuit to the Board for further consideration in light of the Board's December 17th, 2017 decision in the *PCC* case rejecting the overwhelming community of interest standard.

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Issues/Subjects the New NLRB is Expected to Consider

- Additional policy related issues that the Board is expected to address after the Republicans again gain majority status:
 - Class and Collective Action Restrictions
 - The new Board is also expected to review the prior Board's holdings that an employer violates the NLRA if it implements and enforces an arbitration policy that requires employees to waive their right to pursue class action and collective action litigation regarding employment related disputes. As noted, these issues are pending before the Supreme Court in the *D.R. Horton* and *Murphy Oil* cases.
 - Employee Access to Employer Property and Employee Picketing Rights
 - The new Board may also reexamine the previous Board's holding in the *Walmart* case and the *Capital Medical Center* case, both which involve employee access rights to employer private property. In both of these cases, the prior Board granted significant latitude to employees to engage in picketing and other disruptive activity on employer premises.

Issues/Subjects the New NLRB is Expected to Consider

- Misclassification of Employees
 - The Board asked for amicus participation to be submitted on or before April 16th, 2018, on the issue of whether an employer misclassified employees as independent contractors and thereby precluded such employees from receiving the protections under Section 8(a)(1) of the National Labor Relations Act. The case is *Velox Express, Inc.* (15-CA-184006).
- The Board also may consider this year addressing how its traditional *Spruce Up* successorship doctrine is to be applied. This doctrine is applicable when an employer purchases in an asset transaction. Business that has workers represented by one or more unions. The issue in these cases is often whether the purchasing employer has an opportunity to unilaterally establish terms and conditions of employment for those employees on the purchased entity who are represented by a union.

Office of General Counsel Developments

- *McDonald's* Case Status
 - General Counsel Robb has reached a settlement with McDonald's regarding the pending unfair labor practice cases which, in part, touch upon the definition of a joint employer relationship between McDonald's and its franchisees. This settlement is pending review and decision by the NLRB administrative law judge assigned to the McDonald's litigation. The McDonald's litigation had over 100 days of hearings and has been one of the most expensive cases in the Board's history.
- Reorganization Potential
 - General Counsel Robb has indicated an intent to potentially reorganize the Regional Office operations of the Board and to consolidate regions into broader geographic reporting arrangements. Any plan developed by the General Counsel will, in all likelihood, have to be approved by the Board.



Office of General Counsel Developments

- Mandatory Submission Memorandum (General Counsel Memo 18-02)
 - General Counsel Robb, at the beginning of his term, distributed a comprehensive memorandum directing regional offices to send to Washington cases involving a number of subjects including the following:
 - Concerted activity where only one employee had an immediate stake in the outcome, or where the Act was found to protect obscene, vulgar, or other highly inappropriate conduct.
 - Handbook rules concerning "disrespectful" conduct; prohibitions against the use of employer trademarks and logos; no camera/recording policies; and requiring employees to maintain confidentiality of workplace investigations.

Office of General Counsel Developments

- Employees' presumptive right to use their employer's email systems to engage in Section 7 activities.
- Whether on premises work stoppages are protected under the Quietflex standard.
- Off-duty employee access to company property.
- Joint employer status under Browning-Ferris.
- The application of Weingarten rights
- Cases involving a number of successorship issues including "perfectly clear" successor status and successorship liability based on local statutory requirements to hire a predecessor's employees.
- Dues check-off issues
- Remedy issues

Office of General Counsel Developments

- Further, General Counsel Robb revoked a number of policies and directives issued by former General Counsel Griffin, including the following:
 - GC 17-07 (General Counsel's Report on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context)
 - GC 16-03 (Seeking Board Reconsideration of the Levitz Framework)
 - GC 15-04 (Report of the General Counsel Concerning Employer Rules)
 - GC 13-02 (Inclusion of Front Pay in Board Settlements)
 - GC 12-01 (Guideline Memorandum Concerning Collyer Deferral)
 - GC 11-04 (Default Language)
 - OM 17-02 (Model Brief Regarding Intermittent and Partial Strikes)

Office of General Counsel Developments

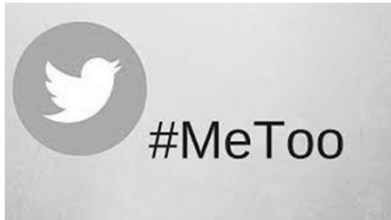
- Additionally, Mr. Robb revoked former initiatives to extend the Purple Communication line of cases which permit employees to utilize employer email systems for union activities. He also revoked initiatives to overturn the *Tri-Cast* doctrine which permits employers in election campaigns to make statements about restricted access rights of employees to management if the union prevails in the election. He also revoked General Counsel Griffin's initiative regarding misclassification of independent contractors.
- General Counsel Robb has also issued a memorandum (OM-05) to the regions directing them to reanalyze pending unit determinations proceedings in light of the the Board's December 2017 decision in PCC case essentially removing from consideration in representation cases the overwhelming community of interest test.
- Reduced Board caseload and potential budget reduction
 - The impact of the Board decreasing caseload and reduction in budget funding no doubt will continue to be subjects for discussion, including potential reorganization options outlined by General Counsel Robb.

President Trump's FY 2019 Budget Proposal – NLRB

- Under the budget proposal, the NLRB's funding would decrease by about 9%, resulting in a 7.2% decrease in the number of full-time employees.
- There are currently about 170 open positions at the NLRB that have not been filled.
- The NLRB envisioned additional personnel cuts under the current fiscal year but has not implemented such cuts. It is unclear whether the additional reductions resulting from the decreased budget would be in addition to the numbers already targeted for removal.

Source: Littler Mendelson P.C.

Other Significant Labor and Employment Issues



Other Significant Labor and Employment Issues

- #MeToo Movement and #TimesUp Movement
 - Beyond addressing continual sexual harassment and hostile work environment issues in the workplace, pay equity issues and related gender discrimination issues will continue to be in the forefront for discussion.
 - Employers may be rated on the number of sexual harassment claims they have experienced and how they are resolving such claims. The Council of Institutional Investors is now urging boards of directors to consider to: recoup executive pay from alleged harassers, encourage staffers to divulge sexual misconduct to the Board, enact steps to ensure that Board's learn about every settlement of a sexual harassment cases, and implement requirements that would require rules for office romances.
 - Wynn Resorts Ltd. recently lost about 2.1 billion from its market capitalization the day after a Wall Street Journal article that described a pattern of alleged sexual harassment by Company Founder and CEO, Steve Wynn.



Other Significant Labor and Employment Issues

- Prohibition and limitation on confidentiality and non-disclosure agreements (NDA's)
 - Federal, state, and local developments will surface regarding restrictions on employers mandating confidentiality agreements in sexual harassment and hostile work environment cases.
- The recently enacted tax reform legislation specifically provided a 12.5% tax credit for paid leave programs (2018 and 2019 only as of this date). This new law also prohibits employers from taking a tax deduction for sexual harassment lawsuit settlements that included mandatory confidentiality requirements.



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Other Significant Labor and Employment Issues

- Union Membership
 - The Bureau of Labor Statistics recently issued its annual report on union membership in the country and it included the following findings:
 - Public and private sector union membership is at 10.7% compared to 20.1% in 1983.
 - Only 6.5% of the private sector workforce belongs to a union.
 - The union membership rate of public sector workers is 34.4%.
 - The states of California and Hawaii remain the highest unionized states in the country with South Carolina continuing to be the least union-dense state.
 - Union membership rates continued to be highest among workers ages 45 to 64. In 2017, 13.2% of workers ages 45 to 54 and 13.5% of those ages 55 to 64 were union members.

Source: U.S. Bureau of Labor Statistics

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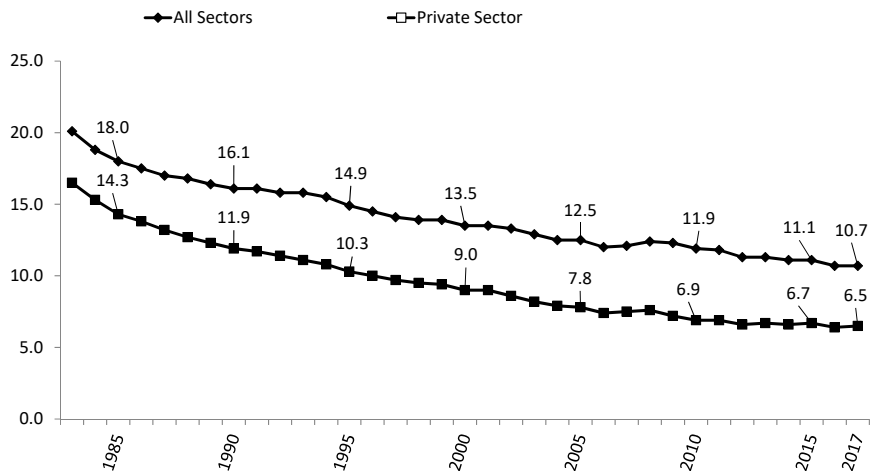
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Other Significant Labor and Employment Issues

- Men continue to have higher union membership (11.4 % and women 10%).
- Black workers remain more likely to be union members than White, Asian or Hispanic workers.
- Non-union workers have median weekly earnings that were 80% of earnings of workers who were union members (\$829 v. \$1000).
- The number of workers belonging to unions was approximately 14.8 million in 2017 with an increase of approximately 262,000 from 2016.
- The new tax reform legislation eliminated the deductibility of union dues—will that have any impact on union membership?

Source: U.S. Bureau of Labor Statistics

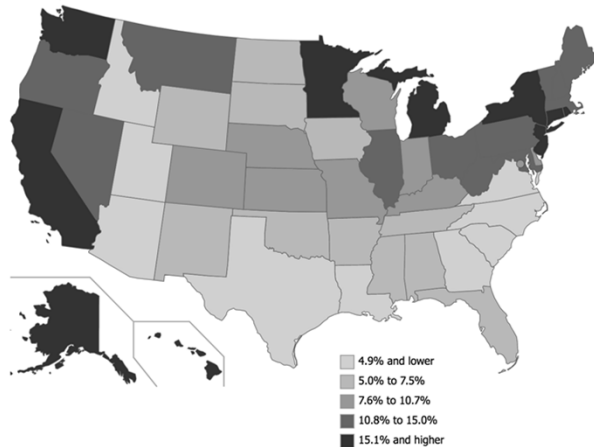
BLS Union Membership 1983-2017



Source: U.S. Bureau of Labor Statistics

Union Membership by State – 2017

Union membership rates in each state, 2017 annual averages
 U.S. average rate 10.7%



Source: U.S. Bureau of Labor Statistics

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Troubles at UAW



- UAW's solidarity under threat as corruption investigation grows
- FCA U.S. Labor Relations Chief Alphons Iacobelli plead guilty

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CNA Union Leader RoseAnn DeMoro Retiring, but Remains “On Call”



- Senator Bernie Sanders called her “very tough” and “an invaluable ally,” and longtime consumer advocate Ralph Nader praised her as “the greatest labor organizer of her time.”
- After leading the organization for 32 years, DeMoro is retiring, but says she is leaving the union “100 percent” ready to fight its battles.

Source: San Francisco Chronicle

Why Teachers’ Strikes are Becoming a National Movement

- The statewide teachers strike in West Virginia is a significant labor and employment development particularly with respect to public sector workers. The strike was successful and forced the West Virginia legislature to increase teacher salaries.
- Similar strikes have now occurred in Kentucky and Oklahoma and more such job actions can be expected by teachers and other public sector workers in other states.
- These new signs of “worker activism” could spread into the private sector.



Other Significant Labor and Employment Issues

- Worker Center Issues
 - The worker center movement continues to remain strong, especially in major metropolitan areas. The fast food industry also continues to be the primary target of this movement.
 - In New York City, the worker center Fast Food Justice group was successful in having New York City adopt an ordinance that requires fast food employers with more than 20 employees to do the following:
 - Give employees 2 weeks advance notice of their schedules
 - Regulate the common practice of “clopenings”
 - Refrain from scheduling employees for on-call shifts
 - Deduct and remit if their employees request contributions to certain not-for-profit organizations



Other Significant Labor and Employment Issues

- The deduction portion of the new ordinance is particularly controversial. Fast Food Justice recently announced under this deduction requirement that it already has 1,200 members pledging a \$13.50 contribution each month. The target is to get at least 5,000 fast food workers out of New York City’s approximately 65,000 workers to contribute by the end of 2018 and at least 10,000 workers contributing by 2020.



Other Significant Labor and Employment Issues

- This new ordinance is being challenged in the courts by the Restaurant Law Center and the National Restaurant Association on a number of theories including an argument that the ordinance is preempted by the National Labor Relations Act.
- More scheduling ordinances and voluntary contribution deduction initiatives can be expected in the future throughout the country.



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Other Significant Labor and Employment Issues

- Although worker centers disavow an intent to organize and negotiate traditional union contracts and otherwise function as a traditional union, they nevertheless have a number of characteristics of a traditional union. Worker centers may be subject to Labor Management Reporting and Disclosure Act requirements and also be the subject of legislations by the Republican controlled Congress.



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Other Significant Labor and Employment Issues

- A.I. Disruption
 - The Teamsters union wants to prohibit United Parcel Services (UPS) from using drones and driverless vehicles to deliver packages.
 - A new study by ManpowerGroup provides a real-time view of the impact of automation on workforces, finding that 86 percent of employers surveyed plan to maintain or increase headcount over the next two years due to automation.
 - The study entitled "Robots Need Not Apply: Human Solutions for the Skills Revolution," further found that automation is taking tasks, not jobs, emphasizing the urgency for a new look at the skill sets needed for workers to thrive in the changing economy.



Other Significant Labor and Employment Issues

- These skills include communication, collaboration, problem solving, organization, customer service, leadership, and management.
- A man driving a Tesla on autopilot with a blood alcohol level double the legal limit slammed into the back of a parked firetruck. The driver told authorities he wasn't driving—his car was.
- CaliBurger now has a cook that doesn't require a paycheck or benefits and can grill 150 burgers per hour called "Flippy".



Other Significant Labor and Employment Issues

- Continuation of State and Local Labor and Employment Initiatives
 - Paid and unpaid leave initiatives
 - Employee scheduling rights—the next “Fight for 15” movement
 - Prohibitions on employer requests for applicants to disclose prior compensation history
 - State preemption of municipal and county labor and employment legislation
 - Pay equity proposals
 - “Ban-the-Box”

Other Significant Labor and Employment Issues

- In a recent classification case involving the “gig” or shared economy, a U.S. magistrate judge handed down a significant win for Grubhub, concluding that a driver who sued the Company under California’s minimum wage, overtime, and employee expense reimbursement laws was not covered by those laws because he was an independent contractor, not an employee.
- This holding, which was reached after a bench trial, is a potentially significant decision. This decision, however, only involved an interpretation of California wage and hour laws and may not be followed in other jurisdictions.

GRUBHUB

Source: Littler Mendelson P.C.

RIGHT-TO-WORK

Right to Work States



- It is important to watch how many of the local jurisdictions avail themselves of the opportunity to become right-to-work zones as a result of a decision in the Sixth Circuit Court of Appeals last year. In that case, the Sixth Circuit unanimously held that jurisdictions in the state of Kentucky had the right to become a right-to-work zone. Recently, Sandoval County, New Mexico voted to become a right-to-work local jurisdiction. The New Mexico Attorney General is expected to challenge that status.

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Decreasing Unemployment and Pressure for Greater Wage Increases

- Hiring Picks Up, Wage Gains Strongest in Nine Years
 - Employers added 200,000 payroll jobs in January and hourly pay increased at its fastest yearly pace since 2009.
 - Employment gains were broad-based and the unemployment rate remained at 4.1 percent.
 - Average hourly wage growth rose to 2.9 percent over the past year.



Source: HR Policy Association.

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Decreasing Unemployment and Pressure for Greater Wage Increases

- With the passage of the new tax reform legislation, many companies will experience potential significant profit increases. Some of these companies are already paying bonuses to their employees by way of cash payments and/or distribution of company stock. Such increasing profits will no doubt put continual pressure on companies to increase wages and benefits.
- The passage of the new tax reform legislation will also have an impact on unionized employers. Collective bargaining settlements through the end of January 2018 are already seeing some impact from the new tax law with first-year wage increase, according to BNA, averaging 2.9%. It will be interesting to see whether the landscape of increasing corporate profits in this country will lead to increased union organizing initiatives.



Decreasing Unemployment and Pressure for Greater Wage Increases

- Boeing is using part of the \$100 million in tax relief it will get from the new tax law to enhance its “Dollars for Doers” program, which rewards employees who give their time and resources to local communities.
- Besides the satisfaction of doing good, corporations that match financial donations and volunteer hours appear to gain a competitive edge in recruiting, especially with millennials.
- Boeing is joining the field of other corporations that America’s Charities lists as having top gift-matching programs including companies such as General Electric, Johnson & Johnson, ExxonMobile, Apple and PepsiCo.
- Another area where employers are increasing employee benefits involves “financial” wellness. Employers are providing training and education to employees to be better able to handle their financial status.



Source: Bloomberg BNA

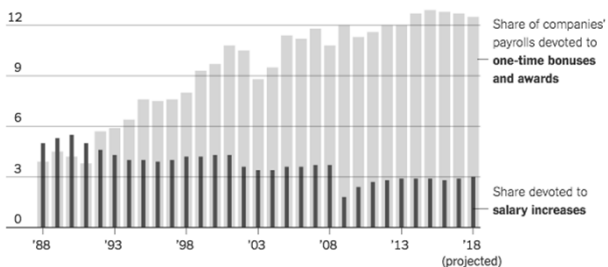
Where Did Your Pay Raise Go? It May Have Become a Bonus

The Envelope, Please

Since the late 1980s, an increasing share of companies' payrolls has gone toward one-time bonuses and awards, while the share devoted to salary increases has fallen, according to data collected by Aon Hewitt, a human resources consulting firm.

Company spending on one-time bonuses, versus salary increases

15% share of payroll



By The New York Times | Source: Aon Hewitt

The Right to Disconnect?

- A new law could make it illegal for employers in New York City to expect their employees to check their emails outside of their official working hours.
- Brooklyn Councilman Rafael Espinal put forward The Right to Disconnect Bill in March. If passed, it would make New York City the first American city to ban private employers from demanding workers be on-call after they have clocked off.
- France has had a similar law in place for a relatively short period of time



Does Federal Law Preempt State Drug Use Laws?

- In a recent decision from a Federal District Court in Connecticut, a judge held that Connecticut state marijuana use laws trump federal law.
- The judge held that the Connecticut law which permits use of marijuana for medical use treatments protected an employee who failed a drug test, but who had been prescribed under state law to use marijuana for medical treatment purposes from termination.
- This appears to be the first case of its kind in the country – there may indeed be many more cases involving the conflict between state and federal law in this area.



Use of Medical Marijuana: A Defense to Termination?

- In a recent case decided by the Massachusetts highest state court, the issue of whether an employer could terminate an employee who has a physician's approval for medical use of marijuana was addressed.
- The employee in question was terminated after testing positive for drug use. The employee had advised the employer in advance that the test would be positive due to medical marijuana use approved by his physician. Nevertheless, the employee was terminated.
- The Massachusetts Supreme Judicial Court in the *Barbuto v. Advantage Sells and Marketing*, case number SJC 12226, held that the employee could proceed with a discrimination suit against the employer on the basis of a recently enacted Massachusetts law permitting medical use of marijuana.



Increasing Number of State Actions in the Drug and Opiate Area

- An increasing number of states have enacted legislation permitting the recreational use of marijuana. Other states, including Ohio, have enacted legislation to permit the medical use of marijuana. This trend no doubt will continue at the state level. Correspondingly, however, the federal government under the Trump Administration continues to take the position that marijuana use is a violation of federal law. These contrasting views will be litigated in years to come.
- Effective January 1, 2018, the U.S. Department of Transportation (DOT) requires employers regulated by the Department to conduct opioid testing.
- The rule applies to commercial motor vehicle drivers, flight crew and other aviation-related workers, railroad employees, transit workers, certain pipeline employees and marine employees regulated by the U.S. Coast Guard.



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Increasing Number of State Actions in the Drug and Opiate Area

- Opioid testing of workers who are not covered by the DOT regulations has become more common over the last several years, but is it legal? As long as employers follow these guidelines:
 - State drug testing laws are followed
 - A medical officer reviews positive test results to ensure that an employer is informed only of the use of a prescription drug that is illegal without a valid prescription. It is up to employees to coordinate communication between their physicians with the medical officer to show that they have prescriptions for drugs that show up in the test results
 - Drug-free workplace policies clarify which substances are prohibited, including opioids when there aren't prescriptions



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