

EMPLOYMENT LAW: A LOOK BACK AND THE TRUMPIAN WORLD AHEAD

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ACEC of Minnesota

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Paid Sick & Safety Leave

▶ Minneapolis:

- Enacted 5/31/16
- Amended 9/28/16 to more closely align with components of St. Paul Ordinance re frontloading, payment of employees on leave, tracking/recording requirements
- Effective date July 1, 2017
- Applies to all employers who have employees (including temp and part-time) who perform work within Mpls for at least 80 hours/year
 - 6+ employees = paid leave
 - <5 employees = unpaid leave
 - Employers (other than chain establishments) operating in first 12 months after hire of first employee = unpaid
 - Exception sunsets on July 1, 2022

Paid Sick & Safety Leave

▶ St. Paul:

- Enacted 9/7/16
- Effective date
 - Employers with 24+ employees = July 1, 2017
 - Employers with <23 employees = January 1, 2018
 - Count temp and part-time employees
 - Temp employee supplied by staffing agency deemed to be employee of staffing agency absent contract stating otherwise
- Eligible “employee” is one who performs work in St. Paul at least 80 hours/year
- Paid leave regardless of employer size
 - Exception for employers operating in first 6 months after hire of first employee
 - Unpaid first 6 months of operations
 - Paid after 6 months of operations
 - Sunsets January 1, 2023

Paid Sick & Safety Leave

- ▶ **Accrual:** 1 hour for every 30 hours worked
 - Accrual in hour–unit increments only; no accrual of fraction of an hour
 - Accrual begins from day one of employment or ordinance effective date, whichever is later
 - Max of 48 hours in calendar year (MPLS), calendar or fiscal year (STP)
 - Carryover up to cap of 80 hours
 - MPLS: Exempt employees deemed to work 40 hours each workweek; except if employee's normal workweek is less than 40 hours, accrual based on normal workweek
 - No similar provision in STP ordinance

Paid Sick & Safety Leave

- ▶ **Alternative to Accrual Based on Hours Worked**
 - Front Loading
 - Provide at least 48 hours of sick/safe time following initial 90 days of employment for use by employee during first year
 - Provide at least 80 hours of sick/safe time beginning each subsequent year
- ▶ **Must record sick/safe time accrual no less frequent than a monthly basis**

Paid Sick & Safety Leave

- ▶ **Termination or Transfer of Employee**
 - Not required to pay out for accrued but unused leave time
 - If employee transferred to a separate division, entity, or location outside City and employer does not allow use of accrued sick/safe time outside City, employee's accrued time stays on the books for 3 years and returned to employee if he transfers back to City within 3-year period
 - Accrued but unused sick/safe time reinstated if employee separated from employment is rehired within 90 days of separation, and entitled to use immediately upon rehire

Paid Sick & Safety Leave

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Paid Sick & Safety Leave

▶ Use of Accrued Leave Time

- Employees entitled to use accrued time beginning 90 calendar days following commencement of employment
- May be used for:
 - Employee's (a) mental or physical illness, injury, or health condition; (b) need for medical diagnosis, care or treatment of same; or (c) need for preventive medical or health care
 - Care of "family member" for same reasons

Paid Sick & Safety Leave

▶ Use of Accrued Leave Time

- “Family Member” defined
 - MPLS: child, step-child, adopted child, foster child, adult child, spouse, sibling, parent, step-parent, mother-in-law, father-in-law, grandchild, grandparent, guardian, ward, members of the employee’s household, or registered domestic partner
 - STP: child, step-child, adopted child, foster child, adult child, spouse, sibling, parent, step-parent, mother-in-law, father-in-law, grandchild, grandparent, registered domestic partner, or “any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship”

Paid Sick & Safety Leave

▶ Use of Accrued Leave Time

- Absence due to domestic abuse, sexual assault, or stalking of the employee or the employee's family member, to (a) seek medical attention, (b) obtain services from a victim services organization, (c) obtain psychological or other counseling, (d) seek relocation due to domestic abuse, sexual assault or stalking, or (e) take legal action (STP: or seek legal advice), including participating in any criminal or civil legal proceeding related to or resulting from domestic abuse, sexual assault or stalking
- Closure of employee's place of business by order of a public health official to limit exposure to an infectious agent, biological toxin or hazardous material or other public health emergency

Paid Sick & Safety Leave

▶ Use of Accrued Leave Time

- Accommodate employee's need to care for a family member whose school or place of care has been closed by order of a public health official to limit exposure to an infectious agent, biological toxin or hazardous material or other public health emergency
- Accommodate employee's need to care for a family member whose school or place of care has been closed due to inclement weather, loss of power, loss of heating, loss of water, or other unexpected closure

Paid Sick & Safety Leave

▶ Use of Accrued Leave Time

◦ Employee Notice:

• MPLS:

- If need for use foreseeable, may require advance notice of not more than 7 days
- If need not foreseeable, may require notice “as soon as practicable”

• STP:

- Earned sick/safe time must be provided upon request of employee, with expected duration provided when possible
- May require employee to comply with usual and customary notice and procedural requirements for requesting leave, provided such requirements do not interfere with the purposes for which leave is needed

Paid Sick & Safety Leave

▶ Use of Accrued Leave Time

- Must allow employee to use sick/safe time in increments consistent with current payroll practices as defined by industry standards or existing employer policies, provided such increment is not more than 4 hours
- May not require employee to find replacement
- May require “reasonable documentation” that the sick/safe time is covered by ordinance but only for absences of more than 3 consecutive days

Paid Sick & Safety Leave

▶ Pay for Sick/Safety Leave Time

- MPLS: Employer with 6+ employees must compensate employee at same hourly rate with same benefits as employee's "regular rate of pay" for hours employee was scheduled to work during leave time
 - Comp only required for hours employee is scheduled to have worked
 - "Regular rate of pay" means employee's hourly rate, including payments for shift differentials, for an hourly employee or an equivalent rate for an exempt employee, but does not include:
 - Tips
 - Commissions
 - Reimbursement for expenses incurred on employer's behalf
 - Premium payments for OT; work on Saturdays, Sundays, holidays, or scheduled days off
 - Bonuses
 - Cash or other valuables in the nature of gifts on special occasions
 - Payments made to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan
 - Contributions irrevocably made by employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees

Paid Sick & Safety Leave

▶ Pay for Sick/Safety Leave Time

- STP: Must compensate employee at employee's standard hourly rate, for hourly employees, or an equivalent rate for salaried employees

- Not entitled to compensation for lost tips
- Not entitled to compensation for commissions
- Compensation required only for hours employee is scheduled to have worked

▶ Donation: May permit employees to donate accrued but unused sick/safe time to another employee

Paid Sick & Safety Leave

▶ Recordkeeping and Notice Requirements

- MPLS: Must maintain accurate records showing (a) For non-exempt employees, hours worked; (b) Hours of leave available for sick/safe time purposes; and (c) Hours of leave used for sick/safe time purposes
 - Retain for 3 years in addition to current calendar year
- STP: Must maintain accurate records showing (a) hours worked by employees, and (b) earned sick/safe time taken by employees for a period of 3 years
 - No presumption of hours worked by exempt employees
 - Arguably requires tracking of hours worked by exempt employees

Paid Sick & Safety Leave

▶ Recordkeeping and Notice Requirements

- Upon request of employee, must provide electronically or in writing the employee's then current amount of (a) earned sick/safe time available, and (b) used sick/safe time
 - Can elect to list on each paystub or develop on-line system where employees can access their own information
- If employer fails to maintain or retain adequate records, it shall be presumed that the employer violated the ordinance absent clear and convincing evidence otherwise
- Medical records must be kept confidential and separate from usual personnel files, and in compliance with ADA (if ADA applies to employee situation)

Paid Sick & Safety Leave

▶ Impact of Existing PTO Policies

- MPLS: “Employers who provide their employees sick and safe time under a [PTO] policy or other paid leave policy that is sufficient to meet the accrual requirements for sick and safe time under [the Ordinance] and may be used by the employee for the same purposes and under the same conditions as sick and safe time under [the Ordinance], are not required to provide additional sick and safe time.”
- STP: “If an employer has a paid-leave policy, such as a [PTO] policy, or a combination of sick and vacation time, that makes available to employees an amount of paid leave that may be used for the same purposes and under the same conditions as earned sick and safe time under [the Ordinance] and that is sufficient to meet the requirements for earned sick and safe time [under the Ordinance], the employer is not required to provide additional earned sick and safe time. Satisfaction of [the Ordinance] may be made through any combination of sick, vacation, or paid time off.”

Paid Sick & Safety Leave

▶ Legal Challenge to City Ordinances

- *Minneapolis Chamber of Commerce, et al. v. Mpls.*
 - Preempted by State Leave Statute
 - Minn. Stat. 181.9413: Employees may use personal sick time provided by employer for safe time leave or leave to care for certain family members
 - Extraterritorial Application
 - Extends beyond geographic borders to reach non-City based employers with employees who work 80+ hours in the City

Paid Sick & Safety Leave

▶ Legal Challenge to City Ordinances

- *Minneapolis Chamber of Commerce, et al. v. Mpls.*
 - Motion for TRO to enjoin enforcement
 - Decided by Hennepin County Judge Mel Dickstein on January 19
 - Rejected Chamber's state law preemption argument
 - Held that Ordinance "runs afoul of the City's territorial reach"
 - "The Minneapolis Ordinance imposes specific requirements, extraterritorially, on companies, wherever in the world they may be located, for an employee's presence in Minneapolis that may be de minimis. Moreover, the Ordinance does not attempt to regulate only those companies whose employees work in Minneapolis full time, or substantially full time, or two-thirds time, or half time, or even on a regular part-time basis. Rather, the Ordinance seeks to impose its requirements on companies, wherever located in the world, whose employees work in Minneapolis for as little as one and a half hours per week (eighty hours per year). ... The public policy supporting the Minneapolis Ordinance may be a good one, and the City is free to impose it on companies resident within its borders. But the City is not free to impose its public policy initiative on companies beyond its territorial jurisdiction."

Paid Sick & Safety Leave

▶ Legal Challenge to City Ordinances

- *Minneapolis Chamber of Commerce, et al. v. Mpls.*
 - Impact of District Court Decision
 - Ordinance largely remains intact
 - Application to non-Minneapolis employers with employee who work at least 80 hours/year in Minneapolis struck down
 - Chamber has appealed the decision to the Minnesota Court of Appeals
 - Order is temporary in nature; not necessarily final and binding
- No pending challenge to St. Paul Ordinance

Paid Sick & Safety Leave

- ▶ **Legislative Challenge to City Ordinances**
 - Bills introduced in Minnesota House and Senate to prohibit adoption and enforcement of local laws relating to private sector employment
 - Minimum wage higher than state minimum wage
 - Requiring private employer to provide paid or unpaid leave time
 - Regulating the hours or scheduling or work time that an employer provide to employees
 - Requiring employer to provide an employee a particular benefit, term of employment, or working conditions
 - Applicable to local laws enacted on or after 1 / 1 / 16

Department of Labor

- ▶ **“White Collar” Overtime Exemption Changes**
 - Raised minimum salary threshold from \$455/week (\$23,660/year) to \$913/week (\$47,476/year)
 - Raises minimum salary for those covered under “highly compensated employee” exemption from \$100,000 to \$134,004
 - Escalator provision to raise the minimums every three years (indexed to inflation)
 - No changes to “duties” test components
 - Set to go into effect December 1, 2016

Department of Labor

▶ Status of New “White Collar” Exemption Regulation

- Texas Federal Judge enjoined enforcement of the new regulations nationwide (11/22/16 Order)
 - DOL exceeded its rule-making authority by imposing a minimum salary threshold increase because the FLSA defines the “white collar” exemption by duties performed, not compensation level
 - Former salary level of \$455/week set purposefully low to screen out obviously nonexempt employees and make an analysis of duties in such cases unnecessary
 - New regulation supplants “duties test” with salary requirement
 - “This significant increase to the salary level creates essentially a de facto salary-only test. ... Congress did not intend salary to categorically exclude an employee with EAP duties from the exemption.”

Department of Labor

▶ Status of New “White Collar” Exemption Regulation

- DOJ filed an appeal of the Texas court order with the 5th Circuit Court of Appeals
- Signs that the New Regulation may be Dead
 - DOJ recently requested and received 30-day extension of deadline to file appellate brief “to allow incoming leadership personnel adequate time to consider the issues”
 - Inauguration Day directive from Trump’s Chief of Staff directing federal agencies to freeze all pending regulations that have not been formally published in the Federal Register, and postpones implementation of all published regulations that have not taken effect for at least 60 days

Department of Labor

- ▶ **Paid Sick Leave for Federal Contractors**
 - Final Rule issued on September 29, 2016
 - Applies to new covered contracts issued on or after January 1, 2017
 - Procurement contracts for construction covered by Davis Bacon Act (\$2,500 threshold)
 - Contracts for services covered by Service Contract Act (\$2,000 threshold)
 - Contracts for concessions; *i.e.*, grant of right to use Federal property for furnishing services
 - Subcontracts under covered contracts

Department of Labor

▶ Paid Sick Leave for Federal Contractors

◦ Employees Covered:

- Those that (1) “work on, or in connection with” covered contracts, and (2) whose wages under contracts are governed by DBA, SCA, or FLSA (including exempt employees)
 - “Work on” = Employee performs the specific services called for by the contract (*e.g.*, trade workers)
 - “In connection with” = Employee performs work activities that are necessary to the performance of contract but are not the specific services called for by the contract (*e.g.*, HR professional, accounting, clerical support)
 - Accrual requirements do not apply to employees who spend less than 20% of hours worked in a particular workweek performing in connection with covered contracts

Department of Labor

▶ Paid Sick Leave for Federal Contractors

- Accrual: 1 hour of paid sick leave for every 30 hours worked on or in connection with a covered contract
 - Aggregate hours when multiple covered contracts involved
 - Records must accurately identify and distinguish work hours spent working “on” covered contracts and those spent on non-covered contracts
 - For “in connection with” employees, contractor may estimate portion of employee’s work hours attributable to covered contracts provided estimate is reasonable

Department of Labor

▶ Paid Sick Leave for Federal Contractors

- Accrual: 1 hour of paid sick leave for every 30 hours worked on or in connection with a covered contract
 - Exempt Employees:
 - Track actual work hours on covered contracts
 - Assume works 40 hours/week on covered contracts
 - If employees regularly works <40 hrs/wk on covered contracts (part-time, split between covered and non-covered), may accrue based on “typical” number of hours worked “on” covered contracts or reasonable estimate if work “in connection with” – must be able to back up and verify

Department of Labor

▶ Paid Sick Leave for Federal Contractors

- Accrual: 1 hour of paid sick leave for every 30 hours worked on or in connection with a covered contract
 - Must calculate employee accrual at conclusion of each pay period or monthly, whichever interval is shorter
 - No fractional accrual for <30 work hours, but hours carry over to next pay period
 - Written notice to employee of amount of paid sick leave accrued but not used (1) no less than each pay period or each month, whichever is shorter, (2) upon separation from employment, and (3) upon reinstatement of paid sick leave
 - Alternative: Frontload 56 hours paid sick leave at beginning of each accrual year

Department of Labor

- ▶ **Paid Sick Leave for Federal Contractors**
 - Accrual Limit and Carry Over:
 - May limit amount of accrued hours to 56 in accrual year (12-month period selected by contractor)
 - Paid sick leave carries over from one year to next
 - May limit paid sick leave employee has available at any point to 56 hours
 - No required to pay out accrued but unused upon termination
 - But accrued balance reinstated if rehired within 12 months

Department of Labor

▶ Paid Sick Leave for Federal Contractors

◦ Permitted Uses:

- Employee's physical or mental illness, injury or medical condition
- Diagnosis, care or preventive care from health care provider
- Care of employee's child, parent, spouse, domestic partner, or "any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship" and need diagnosis, care, or preventive care
- Domestic violence, sexual assault, or stalking (care, diagnosis, counseling, relocation, victim support services, take legal action)

Department of Labor

▶ Paid Sick Leave for Federal Contractors

- Limited to time absent from work “during the time the employee would have been performing work on or in connection with a covered contract”
 - Except if estimate hours working “in connection with” a covered contract, then any workweek
- Account for use in increments no greater than 1 hour
 - May not require employee to use more leave than necessary
 - May not reduce accrued leave by more than time actually absent

Department of Labor

▶ Paid Sick Leave for Federal Contractors

- 7-day notice for foreseeable leave, and may ask employee to make reasonable effort to schedule so as not disrupt operations unduly
- May not condition on finding replacement
- Oral or written notice of request sufficient to show employee seeking covered leave
 - May not require “extensive or detailed information about the need to be absent for work or the employee’s family or family-like relationship”
 - May request a reasonable estimate of duration, but must permit early return to work or extension if employee has available leave time

Department of Labor

- ▶ **Paid Sick Leave for Federal Contractors**
 - Denial of leave request must be in writing and explain basis for denial
 - Insufficient information about need for leave
 - Reason not form of permitted use
 - No date for leave given
 - Insufficient accrued leave to cover
 - Request is to use leave during time employee scheduled to be performing non-covered work

Department of Labor

- ▶ **Paid Sick Leave for Federal Contractors**
 - May not require certification from health care provider to verify need for leave unless employee absent for 3 or more consecutive full workdays
 - Must notify employee of obligation to provide certification for absences of 3+ days either (1) each time employee requests to use or uses leave, or (2) by general policy advising of required certification or documentation for absences of 3+ days
 -

Department of Labor

- ▶ **Paid Sick Leave for Federal Contractors**
 - Deadline for providing certification can be no less than 30 days from the first of three consecutive workdays
 - If insufficient, must afford employee at least 5 days to supplement
 - If no supplementation or supplementation remains insufficient, may retroactively deny request to use paid sick leave and recover value of pay/benefits received through payroll deduction compliant with wage/hour laws
 - Denial must occur with 10 calendar days of employee's deadline for providing sufficient certification or documentation

Department of Labor

- ▶ **Paid Sick Leave for Federal Contractors**
 - Contact with Certification Provider
 - Yes, but only for purposes of authenticating document and clarifying its contents
 - May not request additional details re condition, seek second opinion, or otherwise question the substance of the certification
 - Contact only through HR professional, leave administrator, or management official (other than employee's direct supervisor)

Department of Labor

▶ A Flurry of New Guidance

- Joint Employment under FLSA (Admin. Interp. 1/20/16)
- Enforcement Guidance on Retaliation (8/25/16)
- EEOC Proposed Enforcement Guidance on Harassment (1/10/17)
- Guide on Mental Health Accommodation

Department of Labor

- ▶ **Updated Guidance on National Origin Discrimination (11/21/16)**
 - “National Origin” broadly defined to prohibit discrimination based on where the person (or the person’s ancestors) is from, or because the person has “the physical, cultural, or linguistic characteristics of a particular national origin group”
 - Prohibited discrimination includes differential treatment based on the fact that a person is not from a particular ethnic group (*e.g.*, not Arabic or Hispanic)
 - Caution on accent and English fluency rules/decisions
 - Must be job-related in consistent with business necessity
 - Employer must provide solid proof that a strong accent or lack of English fluency materially interferes with the person’s job performance
 - “English Only” rules presumptively unlawful

Department of Labor

▶ EEOC Guidance on Leaves as ADA Accommodation (5/19/16)

- Disabled employees must be provided access to leave on the same basis as all other similarly-situated employees
 - If employer allows paid sick leave without requiring a doctor's note, a disabled employee may not be required to provide a doctor's note to use paid sick leave
 - May require all employees to provide a doctor's note or other documentation to substantiate the need for leave
- Must consider unpaid leave as a possible reasonable accommodation even when (1) employer does not offer leave as an employee benefit, (2) employee is not eligible for leave under the employer's policy, or (3) employee has exhausted the leave the employer provides as a benefit (including work comp and FMLA leave)

Department of Labor

▶ Leave as ADA Accommodation

- When employee requests leave for a medical condition, employer must treat request as one for a reasonable accommodation under the ADA
 - If request for leave can be addressed by employer's leave program, the FMLA, or work comp program, employer may provide leave under those programs
 - If leave cannot be granted under any other program, then must engage in "interactive process" to determine feasibility of providing leave as a reasonable accommodation with causing undue hardship
- Employer that has granted leave with a fixed return date may not ask the employee to provide periodic updates, but may reach out to employee on extended leave to check on employee's progress
 - Call to check on how employee is doing and whether employee needs anything from employer to assist in recovery and return to work
 - Call to confirm return date and whether any additional accommodations required)

Department of Labor

▶ Leave as ADA Accommodation

- Maximum leave policies cannot be applied inflexibly
 - May be required to grant an extension beyond policy and/or initial anticipated leave duration, unless would cause an undue hardship
- Counsel against use of “form letters” to communicate with employee’s nearing end of leave, instructing employee to return to work by a certain date or face termination or other discipline
 - Better to inquire as to whether employee is ready to return or may require additional leave, and if upon return any accommodation may be necessary
- Cannot condition return to work on “no medical restrictions” requirement if employee can perform her job with or without reasonable accommodation unless needed accommodation causes undue hardship

Department of Labor

▶ Leave as ADA Accommodation

- Cannot deny return to work on grounds that medical restrictions pose a safety risk unless employer can prove that employee poses a “direct threat” to the health/safety of herself or others
 - Significant risk of substantial harm that cannot be eliminated or diminished with a reasonable accommodation
- Obligation to hold job open for employee on leave?
 - Not if doing so would cause undue hardship
 - If job filled during leave, consider other vacancies for which employee may be qualified (reassignment)
 - EEOC position that if reassignment required, employer must place returning employee in vacant position for which she is qualified without requiring employee to compete with other applicants for position
- Indefinite Leave constitutes an undue burden and is not a reasonable accommodation

Department of Labor

▶ **Modified EEO-1 Reporting Requirements**

- Applies to all employers with 100+ employees
- Report aggregate hours worked and number of employees by race, sex and ethnicity falling within 12 pay bands
 - Employer has 10 African American male employees whose W-2 earnings for the reporting period are in pay band 4 (\$30,680–\$28,999) for the “Laborer and Helpers” job category
- Exempt employees track and report actual hours worked, or can assume 40 hrs/wk fulltime and 20 hrs/wk part-time
- Changes reporting deadline to March 31 of year following reporting year, and report calendar year data
 - March 31, 2018 for 2017 calendar year
 - Possible modification by Trump Administration

Department of Labor

▶ **Fair Pay and Safe Workplaces Rule**

- Final rule issued August 25, 2016
- Applicable to federal contractors and subcontractors
 - 10/25/16: prime contractors on all federal contract solicitations valued at more than \$50 million
 - 4/24/17: prime contractors on all federal contract solicitations valued at more than \$500,000
 - Not applicable to contracts \$500,000 or less
 - 10/25/17: subcontractors at any tier valued in excess of \$500,000

Department of Labor

▶ Fair Pay and Safe Workplaces Rule

◦ Key components:

- Requires public disclosure of “labor law violations” during 3–year–period preceding date of solicitation, and update every 6 months after award
- Labor law compliance a component of determining whether prospective contractor is a “responsible source” – *i.e.*, one that “has a satisfactory record of integrity and business ethics”
- “Paycheck Transparency” Rules
- Arbitration Agreements: Contractor must agree that a decision to arbitrate Title VII, sexual assault or harassment claims shall only be made with the voluntary consent of employees or independent contractors after such dispute arises
 - Exceptions for CBAs and valid contracts entered into prior to bidding (unless contractor permitted to change or agreement is renegotiated or replaced)

Department of Labor

▶ Fair Pay and Safe Workplaces Rule

- Texas Federal Judge issued an order enjoining enforcement nationwide
- Republican Congress doesn't like it
 - Joint Resolution of Disapproval introduced 1/30/17 under Congressional Review Act (CRA)
 - CRA allows Congress to repeal new regulations that were issued within 60 legislative days of the new Congress
 - Requires simple majority of House and Senate, and signature by Trump

Department of Labor

▶ The Trump Administration DOL

- Freeze on regulations
 - “One in, two out” plan
- Reigning in enforcement?
 - Federal hiring freeze
 - Civil service reform
- Andy Puzder – Secretary of Labor Nominee
 - CEO/Owner CKE Enterprises (Hardees & Carl’s Jr.)
 - History wage/hour lawsuits and claims
 - Critic of minimum wage increase
 - Very pro-business/employer
 - Opponent of Joint Employment exposure for franchisees
 - Favors rolling back enforcement efforts
 - Confirmation hearing February 16

New Form I-9

- ▶ Revised Form I-9 issued on 11/14/16 by USCIS
 - Must be used on/after 1/22/17
 - Paper or Smart Digital form
 - Digital version advantages:
 - Checks whether required field entered correctly (*e.g.*, missing field, date format, SSN missing a digit)
 - Drop-down lists and calendars
 - Automatically populate “N/A” in certain subsequent fields depending on answers provided
 - Embedded instructions

Increased I-9 Enforcement

- ▶ Fines doubled effective 8/1/16 for “paperwork” violations occurring after 11/2/15
 - Minimum \$216 per form (up from \$110)
 - Maximum \$2,126 per form (up from \$1,100)
- ▶ Violations
 - Completion Timing
 - By employee no later than 1st day of employment
 - By employer no later than 4th day of employment
 - Must examine original work authorization documents
 - No photocopy, scanned copy, or faxed copy

Increased I-9 Enforcement

▶ Violations

- Cannot accept expired documents for new hires
 - Only exception is 90-day grace period for new hires that are U.S. Citizens or permanent residents that have already applied for replacement (passport, DL)
- Must have completed I-9 for each employee, and retain for duration of employment plus 3 years
- All required fields must be completed, and completed accurately
 - Missing fields
 - Wrong dates or numbers

Increased I-9 Enforcement

▶ They are not kidding

- 1 / 30 / 17 Notice of Intent to Fine small client \$55,000 for I-9 violations
 - 53 total employees over years, but small employer
 - Violations included:
 - Not completed by employee by 1st day of employment
 - Attaching copy of DL with name and address information rather than filling in boxes
 - Employee listing date-of-hire in DOB box
 - Number transposition
 - Missing forms for some long term employees, including owner

Increased I-9 Enforcement

▶ Correcting Errors

- Employer may only correct errors in Sections 2 or 3
- Employee must correct errors in Section 1
 - On original form: (1) draw line through incorrect information; (2) enter correct information; (3) initial and date correction
 - Complete new I-9 Form and attach to old form
 - If major error, such as entire sections left blank or Section 2 completed based on unacceptable documentation, a note should be included in the file regarding the reason you made changes to an existing I-9 or completed a new I-9
 - Cannot conceal changes on form
 - If use correction fluid, attach a signed and dated note to corrected form explaining what happened
- USICE Guidance: www.justice.gov/crt/file/798276/download

LGBT Issues

▶ Restroom/Locker Room Access

- EEOC Position: Transgender employees and students must be allowed to use restroom and locker facilities consistent with their gender identity
 - Cannot mandate use of unisex facilities
 - Brought numerous lawsuits and looking for more
- *Grimm v. Gloucester County School Board*
 - 4th Circuit (4/19/16): Title IX protects right of transgender students to use sex segregated facilities consistent with their gender identity
 - Supreme Court: Emergency stay granted (8/3/16)
 - Cert granted 10/28/18

LGBT Issues

▶ Restroom/Locker Room Access

◦ *EEOC v. G.R. Harris Funeral Homes*

- Male employee hired in 2007 advised employer in 2013 that he was transitioning to female and would thereafter be dressing as a female
- Owner, a devout Christian, fired employee because of intent to “dress as a woman”
 - Dress code requires men to wear suits & ties; women to wear jackets and skirts/dresses
 - Business no formal religious affiliation; but website contains scripture and bible verses dispersed at its locations
- Employer argued that Religious Freedom Restoration Act prohibits EEOC from applying Title VII to force funeral home to violate their sincerely held religious beliefs

LGBT Issues

▶ Restroom/Locker Room Access

- *EEOC v. G.R. Harris Funeral Homes* (2014)
 - Michigan Federal Judge found for employer (August 2016)
 - Rejected argument that sex-specific dress code cannot constitute impermissible sex stereotyping under Title VII
 - “An employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging sex discrimination because the discrimination would not occur but for the victim’s sex.
 - But agreed that forcing employer to comply with Title VII in violation of sincerely held religious beliefs violates the RFRA

LGBT Issues

▶ Restroom/Locker Room Access

- DOJ Guidance (May 2016): “A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity.”
 - Suit filed by Texas and 12 other states
 - Texas Judge enjoined enforcement nationwide (8/21/16)
 - DOJ filing with 5th Circuit last week withdrawing challenge to “nationwide” nature of injunction
 - Parties are “currently considering how best to proceed in this appeal”

NLRB Activism

- ▶ Quickie Elections
- ▶ Use of employer email for pro-union activity
- ▶ Expansive view of “Protected Concerted Activity”
 - Social Media Policies
 - Standard Handbook Provisions
 - Facebook and other on-line rants/complaints
 - Class Action Waivers
 - Misclassification of employees as independent contractors
- ▶ Expanded Joint Employer Test

NLRB Future

- ▶ 5 Member Board appointed by President with consent of Senate for 5-year terms
 - Currently 2 Democrats, 1 Republican, 2 Vacancies
 - Republican member named Chair
 - Trump has ability to establish Republican majority
 - Little respect for precedent at NLRB of late
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