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Employment and Immigration Law Developments Under the Trump Administration

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Agenda

- **Federal Wage and Hour update;**
- **Latest developments on federal discrimination laws;**
- **FMLA, ADA, and Workers' Compensation interplay;**
- **Federal immigration law changes including worksite enforcement developments and E-Verify**

WAGE AND HOUR UPDATE



FLSA – Basics

- **Generally requires covered employers to pay non-exempt employees a minimum wage (\$7.25/hr) and overtime of at least 1 1/2 times the regular rate of pay for every hour worked over 40 in a week**
- **Employees can be exempt from minimum wage and overtime requirements by satisfying:**
 - **Salary Threshold Test;**
 - **Salary Basis Test; and**
 - **Duties Test**

FLSA – Employer Coverage

- **Enterprise Test: All employees of the organization covered.**
 - **Test: Whether the organization engages in ordinary commercial activities that result in at least \$500,000.00 in annual revenues**
 - **Revenues do not include contributions, memberships, and donations**
- **Individual Test: Only particular worker covered.**
 - **Test: Whether the worker engages in interstate commerce or in the production of goods/services for interstate commerce.**
 - **Fact specific examples are: (1) making out-of-state phone calls; (2) receiving interstate mail or electronic communications; (3) ordering/receiving goods from an out-of-state supplier; (4) handling credit card activities.**
- **Non-profits commonly have most/all employees covered under the Individual Test.**

FLSA – Salary Threshold

- **2016 Obama-era rule – Raise exempt threshold from \$23,660.00 per year to \$47,476.00 per year.**
- **Rule challenged and enjoined just before effective date.**
- **August 2017 – Appellate Court upholds injunction.**
- **Result – Obama-era rule will not go into effect.**
- **July 15, 2017 – DOL issues Request for Information on revisions to FLSA.**
- **New OT rule included in 2018 DOL regulatory agenda but no specifics.**

FAIR LABOR STANDARDS ACT



Salary Basis Test

- Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis)
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed
- As a general rule, employee must be paid the full salary for any week in which the employee performs **any** work
- Need not be paid for any workweek when no work is performed
- Fee basis may be used as alternative



Deductions from Salary

- **An employee is not paid on a salary basis if deductions from the predetermined salary are made for absences occasioned by the employer or by the operating requirements of the business**
- **If the employee is ready, willing and able to work, deductions may not be made for time when work is not available**

No Salary Requirements

- **The salary level and salary basis tests do not apply to:**
 - **Outside Sales Employees;**
 - **Doctors;**
 - **Lawyers;**
 - **Teachers (employed in educational establishment with primary duty of teaching); and**
 - **Certain computer-related occupations paid at least \$27.63 per hour (Salary must be at least \$913/week).**



“White Collar” Exemptions

- **Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees who qualify as:**
 - **Executive;**
 - **Administrative;**
 - **Professional;**
 - **Highly Compensated Employees;**
 - **Outside Sales; or**
 - **Certain Computer Employees.**
- **Position must meet certain “Duties Tests”**

Primary Duties

- **The principal, main, major or most important duty that the employee performs.**
- **Factors to consider include, but are not limited to:**
 - **Relative importance of the exempt duties;**
 - **Amount of time spent performing exempt work;**
 - **Relative freedom from direct supervision; and**
 - **Relationship between the employee's salary and the wages paid to other employees for the same kind of non-exempt work.**

Executive Duties

- **Primary duty is management of the enterprise or of a customarily recognized department or subdivision;**
- **Customarily and regularly directs the work of two or more full-time employees; and**
- **Authority to hire or fire other employees or make recommendations as to hiring, firing, advancement, promotion or any other change of status; authority is given particular weight.**

Administrative Duties

- Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Learned Professional

- The employee's primary duty must be the performance of work requiring advanced knowledge
- In a field of science or learning
- Customarily acquired by a prolonged course of specialized intellectual instruction
- Examples

Creative Professional Duties

- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor



Intern Rule Update

- **Prior rule required employees to satisfy 6 factors in making the intern/employee analysis**
- **New rule considers 7 factors with no single factor being determinative:**
 1. **Whether there is an expectation of compensation;**
 2. **Whether internship provides training similar to an educational environment (including hands-on training provided by an educational institution);**
 3. **Whether internship is tied to a formal education program;**
 4. **Whether internship accommodates the worker's academic commitments by corresponding to the academic calendar;**
 5. **Duration of the internship;**
 6. **Whether the intern complements rather than displaces paid employees;**
 7. **Whether there is an understanding of a paid job at the conclusion of the internship.**

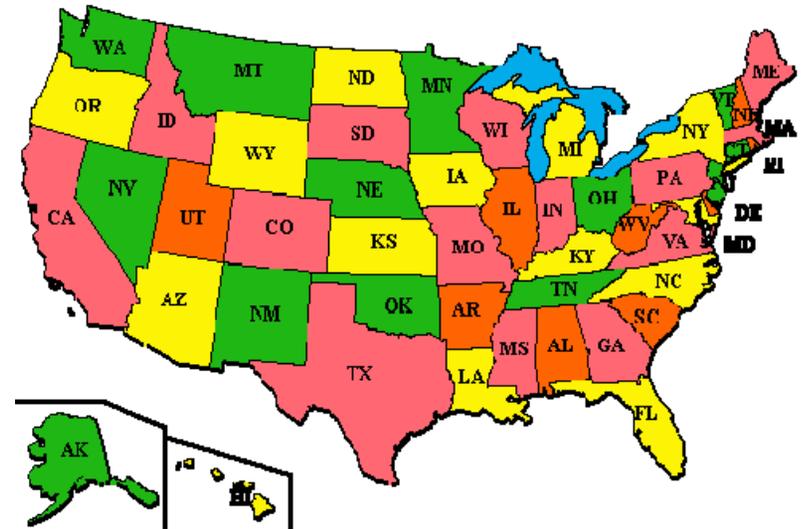
EEOC Enforced Statutes

- **Title VII of the Civil Rights Act of 1964 – Race, Color, Religion, Sex, or National Origin**
- **Americans with Disabilities Act of 1990 – Disability**
- **Age Discrimination in Employment Act – Age**
- **Genetic Information Nondiscrimination Act of 2008 – Genetic Information**
- **Note: SCHAC investigates similar issues.**



EEOC Enforcement Update – FY 2017

- EEOC collected more than \$355.6 million in employment discrimination related cases.
- Received 84,254 charges of employment discrimination (Down 8% from 2016).
- Nationwide, 33.9% of the cases filed by the EEOC were race-based (highest category) and 31.9% were disability-based (second highest category).
- 1,278 total charges filed in S.C.
- 38.9% of the charges filed in S.C. were race discrimination cases and 31.4% were gender-based.



Sexual Harassment

- **Several high profile sexual harassment allegations over the last 10 months**
- **Tangible Employment Action**
- **Hostile Work Environment**
- **Different standards apply depending on whether a supervisor is involved and whether the harassment results in Tangible Employment Action.**

Sexual Harassment Standards

- **Co-worker harassment: Employer was “negligent” (failed to exercise reasonable care) in preventing harassment from taking place.**
 - **Ex: lack of monitoring; failing to respond to complaints, etc.**
- **Supervisor w/ TEA: Employer subject to strict liability with no affirmative defense.**
- **Supervisor w/out TEA: Employer subject to strict liability with an affirmative defense.**
- **Affirmative Defense:**
 - **Employer exercised reasonable care to prevent the behavior; and**
 - **Employee unreasonably failed to take advantage of any preventative or corrective opportunities to avoid the harm.**

Proactive Steps to Limit Exposure in Harassment Claims

- **Review/Revise Harassment Handbook Policy:**
 - **Specifically define harassment**
 - **Anti-retaliation provision**
 - **Multiple reporting avenues / Complaint procedure**
 - **Signature requirement**
 - **Discipline for violations**

- **Harassment Training**
 - **Annually / Do not wait till issues arise**
 - **Different sessions for supervisors and lower-level employees**
 - **Train HR professionals on how to properly investigate**

Zarda v. Altitude Express, Inc. (2nd Cir. 2018)

- Plaintiff sky-diving instructor claims a female student was uncomfortable with being tightly strapped to a man.
- Plaintiff told the student, “Don’t worry. I’m 100% gay.”
- The student’s boyfriend complained to the company.
- Company fired the Plaintiff and Plaintiff claimed it was on the basis of his sexual orientation.
- Federal District and Appellate Courts ruled against Plaintiff and dismissed the suit because sexual orientation is not explicitly listed in Title VII.
- Appellate Court reheard the case “en banc” and reversed finding:
 - “Sexual orientation discrimination is a subset of sex discrimination because sexual orientation is defined by one’s sex in relation to the sex of those to whom one is attracted.”

Zarda v. Altitude Express, Inc. (2nd Cir. 2018)

- **Third Federal Appellate Court to decide the issue**
- **Currently 2 Circuits have found Title VII coverage for sexual orientation and 1 Circuit has found against coverage.**
- **EEOC has issued opinions that sexual orientation is covered by Title VII.**
- **Case could go to the Supreme Court as early as next spring.**
- **Take away: Employers should take a conservative approach because momentum seems to be towards coverage for sexual orientation in Title VII.**

FMLA, ADA, AND WORKERS' COMP.



General Principles

- **FMLA states it does not “modify or affect” state or federal anti-discrimination laws, so comply with all applicable laws**
- **If a federal or state law (besides FMLA), a collective bargaining agreement (CBA), or your own policy gives employees greater benefits than FMLA, follow it**



FMLA and ADA

- Does employee have FMLA-covered serious health condition and disability?
- 2008 ADA amendments created greater overlap
- Broader definition of disability
 - Major life activities, major bodily functions
 - Mitigating measures: Can consider only corrective eyeglasses, contact lenses
 - Impairment can be disability even if in remission

FMLA and ADA

- **FMLA's purpose**: Allows employees to take leave for health, family reasons
- **ADA's purpose**: Helps people become and stay employed by forbidding employment discrimination against qualified persons with disabilities



FMLA and ADA Comparison of Coverage

- **FMLA applies to ERs with 50 or more EEs**
 - **Be wary of joint employer scenarios**
 - **Remember 50 employees within 75 miles of worksite requirement for EE eligibility**
- **ADA applies to ERs with 15 or more EEs**

FMLA and ADA Comparison of Eligibility

- **FMLA applies to EEs only after they meet 12-month, 1,250-hour service requirement**
- **ADA applies immediately to all EEs and applicants who have a disability as defined by the law**

ADA Qualified Person with Disability

- **Qualified**: Can perform essential job functions with or without reasonable accommodation
- **Disability**: Physical or mental impairment that substantially limits a major life activity, or record of such impairment, or being regarded as having such impairment
- Compare this with ...

FMLA Serious Health Conditions

- **Inpatient care**
- **Pregnancy**
- **Incapacity lasting more than 3 days**
- **Chronic health conditions**
- **Conditions for which treatment may not be effective, under supervision of HCP**
- **Multiple treatments from healthcare provider**

If Both Laws Apply Leave as Accommodation

If FMLA leave exhausted, extension may be required as reasonable accommodation under ADA

- **Only if leave would enable employee to return to work and perform essential functions**
- **No time limit on ADA leave if no undue hardship to employer (but indefinite leave unreasonable)**
- **No automatic termination after exhaustion of other leave**
- **Be consistent**

If Both Laws Apply Leave as Accommodation

- **Leave may not be reasonable accommodation if:**
 - **Job is time-sensitive**
 - **You can't find adequate substitute within organization for EE seeking leave**
 - **Absence will adversely affect key areas of organization or require more OT for other EEs**

If Both Laws Apply Other Accommodations

- **Can offer other reasonable accommodation in lieu of FMLA leave, but employee does not have to accept**
 - **Examples: light-duty, flexible work schedule**
 - **Telecommuting may be a reasonable accommodation when all essential duties can be performed at home. *EEOC v. Ford Motor Co.* (6th Cir. 2014).**

FMLA and ADA

Leaves and Health Benefits

- **ADA**: No requirement to maintain health-care benefits during leave, unless you provide them to others on leave; may not discriminate against disabled workers regarding benefits
- **FMLA**: Must maintain health benefits as if EE hadn't taken the leave
 - Must also restore other benefits



FMLA and ADA Light Duty Jobs

- **ADA**: No duty to create job, but removing non-essential job functions may be reasonable accommodation
- **FMLA**: May offer EE light-duty job, but can't require him to take it instead of FMLA leave.
 - However, EE with work-related serious health condition may have to accept light duty to keep workers' comp benefits

FMLA and ADA Light Duty

- **Light duty does not count as FMLA leave**
 - **Reduced hours is FMLA, not light duty**
- **EE returning from FMLA leave to light duty retains FMLA rights when light duty ends**
 - **Job restoration**
 - **Benefits**



FMLA and ADA Attendance Policies

- **ADA**: If EE is reasonably accommodated, you may enforce attendance rules, especially if regular attendance is essential job function
(Mecca v. Florida Health Services Center, D.Ct. FL. (2014)).
- **FMLA**: You generally may require EEs to follow usual call-in procedures to request FMLA. May not use FMLA leave against EEs in discipline, promotion, other job decisions

Pregnancy Discrimination and FMLA

- **Pregnancy Discrimination Act (PDA) requires that women affected by pregnancy, childbirth, or related medical conditions be treated in the same way as others who are similar in their ability or inability to work.**
- **2015 EEOC guidance gives more expansive look at PDA, disability, and accommodations for pregnant employees.**

FMLA and Workers' Comp (WC)

- **Determine whether on-the-job injury is serious health condition on case-by-case basis.**
- **As under ADA, ER isn't required under WC alone to continue health insurance benefits during leave.**
 - **EE also not entitled to continue other benefits (vacation, seniority, etc.).**



FMLA and Workers' Comp (WC)

- How does your state protect EEs on WC leave?
- How does it treat transfer to another job, modified duty, counting absences?
- What if EE refuses modified duty job?
- If state law offers greater benefits than FMLA, follow state law.

WORKERS COMP

IMMIGRATION AND E-VERIFY



U.S. Immigration
and Customs
Enforcement

Immigration Climate

- **Immigration has been an important focus of the Trump administration.**
 - **Border security**
 - **Interior enforcement (worksite enforcement; undocumented alien priorities)**
- **National security and supporting American workers are key drivers of immigration policies, interpretations and proposed changes.**
- **High scrutiny for Visa and Green Card applications.**
- **Immigration reform is a hot topic in Congress.**



Worksite Enforcement Update

- **October 2017 – Acting ICE Director.....'we will quintuple worksite enforcement actions next year'.....we want to crack down on undocumented workers and their employers**

New Form I-9s in 2017

- New I-9 Forms on **January 22, 2017 & September 18, 2017.**
- New features:
 - Smart-error checking to minimize technical errors
 - Instructions/text boxes included
 - Validation on fields for accuracy (SSN, expiration dates)
 - New I-9 form is NOT an electronic I-9! Does not comply with electronic I-9 requirements. No e-signature feature.
 - Changes in instructions and list of acceptable documents.



Federal and State Immigration Audits

- **Federal Immigration Audits** – conducted by Homeland Security Investigations (ICE); personally serve Notice of Inspection and employer has three (3) days to respond by submitting I-9 forms and other documents requested in subpoena
 - **Penalties:** civil fines or criminal penalties in certain circumstances
- **State Immigration Audits** – conducted by SCLLR; issue letter to employer asking for E-Verify confirmations for employees hired in past three (3) years; do not submit I-9 forms
 - **Penalties:** probation, suspension of employment license

I-9 Internal Audits – Good, Proactive Strategy

- **Employer guidance issued by ICE and DOJ with tips for conducting internal I-9 audits.**
- **Conduct periodic I-9 internal audits and correct problem areas ASAP**
- **Provide detailed and specific training for those engaged in I-9 internal audit process.**
- **Work with legal counsel to properly document corrections.**
- **I-9 changes are always acceptable before ICE arrives; in some states (SC), corrections are not accepted after notification of ICE audit.**

Defining Scope

- **Determine the appropriate I-9 audit scope**
 - **Full Internal Audit vs. Sample Size Audit**
 - **Sample Selection Considerations**
 - **How are the individuals selected – disparate impact?**
 - **Documentation of selection criteria**
 - **Citizenship and national origin are inappropriate considerations.**
 - **Key: Consistency and uniformity.**
 - **Not based on discriminatory criteria.**



Communication to Employees

- **Communicate with employees**
 - **Written communication about audit and reasons**
 - **Define process for answering questions**
 - **Create plan for dealing with I-9 mistakes/corrections**
 - **Address language barrier issues**



E-Verify

- **Already mandatory in South Carolina**
- **President Trump was a big proponent of nationwide E-Verify throughout the campaign**
- **Trump's administration asked for \$132 million to implement nationwide E-Verify**
- **Will likely still be some time before E-Verify is implemented nationwide because of needed upgrades**
- **Proposed legislation would make E-Verify mandatory for all US employers within one year of enactment**

DACA UPDATE

- **September 5, 2017 – DHS issued a memo rescinding DACA and winding the program down on or before March 5, 2018**
- **Legal challenges resulted in the wind down being enjoined.**
- **Supreme Court recently refused to hear the case on an expedited schedule**
- **Result is that USCIS must continue to renew DACA for individuals who were previously beneficiaries until litigation ends**
- **USCIS is not accepting new requests for DACA**



With You Today



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Melissa has more than 20 years of experience advising clients on business immigration and employment law issues. She represents clients in multiple industries including healthcare, manufacturing, technology, quick service/food service, hospitality, government and education. Ms. Azallion leads the firm's Immigration Practice Group.

Immigration

Ms. Azallion represents companies in numerous industries as well as individuals on immigration matters before U.S. Citizenship and Immigration Services, the U.S. Department of Labor and U.S. Consulates and Embassies worldwide. Ms. Azallion assists businesses in obtaining and maintaining temporary/nonimmigrant work visas including E, H, L, O and TN petitions as well as green cards. She has substantial experience representing healthcare clients on J-1 waiver/H-1B and National Interest Waiver petitions among others. She also works with clients on worksite enforcement issues including audits by the Department of Homeland Security and various state agencies.

Employment

Ms. Azallion provides advice and consultation to clients and assists in litigation matters on topics including harassment and discrimination, wage and hour issues, restrictive covenants, FMLA, ADA and worker's compensation issues, affirmative action and OFCCP compliance. She also conducts client training on a diverse range of employment topics.

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