Federal Labor and Employment Law Compliance Under the New Administration: Are You Prepared?

Presented by
Todd Fredrickson, JD

HR15
4/3/2017
4:00 PM - 5:15 PM
Federal Labor and Employment Law Compliance Under the New Administration: Are You Prepared?

Presented by: Todd Fredrickson
Fisher Phillips
tfredrickson@fisherphillips.com

THE BIG 4

• United States Department of Labor (USDOL)
• Equal Employment Opportunity Commission (EEOC)
• National Labor Relations Board (NLRB)
• Department of Homeland Security (DHS)
"CONVENTIONAL WISDOM"

- "Conventional Wisdom" is a major FLSA problem
  - "Everybody I know of pays this way."
  - "Salaried people don't have to be paid overtime."
- "This is what our employees want us to do."
- "The employee agreed to this."
- "We're too small for anyone to sue us."
LITIGATION LANDSCAPE

• Tens of thousands of FLSA lawsuits filed in last decade
• No slowdown in 2016
• Both individual claims and "Collective Actions"
• Millions in judgments and settlements

U.S. LABOR DEPARTMENT

• USDOL has hired hundreds more investigators
• Now trained and experienced, "True Believer" mindset
• Tougher Enforcement/Audits
• Adversarial, "Employers-Are-Morons" attitude
• Using "Shame", press releases, adverse publicity as tools
U.S. LABOR DEPARTMENT

• So What’s in Store for 2017 and Beyond?
  ▪ Shift Back from Enforcement to Compliance
  ▪ Roll-Back of Regulations and Executive Orders
  ▪ Campaign To Raise FLSA Minimum Wage?
  ▪ Effort To Recover Maximum Back Wages and Other Amounts (Like "Liquidated Damages")?
  ▪ Campaign Relating To "Misclassification" and "Joint Employment"?

"HOT" ISSUES FOR LAW FIRMS

• Exemption Changes
  ▪ And Incorrectly Treating Employees as Exempt
• “Off-The-Clock” Work, Incorrect Time Records
• Overtime Violations
• Unlawful Deductions/Employee Payments
Overtime Exemption Regulation

- Under FLSA, bona fide executive, administrative and professional employees are exempt from overtime pay
- Regulation raised salary threshold for the exemption to $913/week ($47,476/year)
- “Highly compensated employee” exception increased from $100,000 to $134,004
- No duties-related requirements were changed
- Was to take effect 12/1/16

The Injunction

- To block rules from taking effect, 21 states sued in federal court.
- On 11/22/16, federal court in Texas temporarily blocked rule –Now up on appeal to Fifth Circuit.
- Trump opportunities:
  - Don’t fight injunction
  - Roll back rule if injunction lifted
  - Series of measures introduced in Congress to delay implementation or to do away with rule altogether
- Leaves employers in a tight spot
  - Costs of implementation vs. risk of retroactive application if injunction lifted
What to Do Now

• Analyze whether the requirements for the “white collar” exemptions you have been relying upon are met
• Evaluate what might be changed about one or more jobs so that the incumbents may be treated as exempt in the future
• Consider the possible application of alternative FLSA exemptions and
• Develop FLSA-compliant pay plans for employees who have been treated as exempt but who no longer will be

Analyze Current Exempt/Nonexempt Classifications

• Failure to pay required overtime is the most common claim in litigation
• Title and salary alone are insufficient
• Exemptions are strictly interpreted
• USDOL default position: every employee is non-exempt and subject to FLSA's overtime requirements
Are they really exempt?

- Exemptions relate to individuals – not to titles, job descriptions, pay classifications, positions, job groups, customs, etc.
- Detailed, accurate, current job information is essential
- Must be based upon actual work, real facts

Identify and prioritize analysis of:

- Employees paid a salary between $455 and $913 per week (annualizes to between $23,660 and $47,476)
- Whether any other employees in the same position are above or below the $913 threshold
- Highly-paid employees who are not paid on a salary basis
- Highly-paid employees paid a salary less than $134,004
U.S. LABOR DEPARTMENT

• Make any necessary corrections
  ▪ Reclassify?
  ▪ Change job duties?

• Implement appropriate policies
  ▪ Require accurate recordkeeping
  ▪ Prohibit off-the-clock work
  ▪ Require reporting of requests/demands for off-the-clock work, pay errors, etc.

• Training of managers/supervisors is critical

U.S. LABOR DEPARTMENT

Consider Alternative FLSA Exemptions

• Salary-level change will NOT affect employees who are:
  ▪ Not subject to the salary test
    ❖ “Teachers” are not subject to the salary test
  ▪ Exempt under some other FLSA provision

• Note: state and local laws might define exemptions differently
For employees who would otherwise change from exempt to nonexempt status under the rule, consider:

- Increasing salaries
- Bonus/commission 10% rule
- Alternate pay plans
- Cost-control measures
  - Limit hours worked by non-exempts
  - Increase use of part-time employees

**U.S. LABOR DEPARTMENT**

**Bonus/Commission 10% rule**

- Under the new rule, employers would be able to satisfy up to 10% of the salary threshold from "nondiscretionary bonuses and incentive payments", including commissions, paid on a quarterly or more-frequent basis
  - N/A to highly compensated employee exception
  - If bonuses and incentives fall short, need to pay the difference or the overtime
Consider Alternate FLSA-Compliant Pay Plans

- Accurate timekeeping is critical
- Need to consider state and local laws
- Consider financial, operational and practical aspects
- In general, some options may include:
  - Salary as straight-time for hours worked up to 40 in a week
  - Salary as straight-time compensation for all hours worked in a week
  - Variable wage rate based on tasks performed

Develop a communications plan

- Identify the changes
- Cover the nature of and reasons for changes affecting the employee/group of employees
- Expect pushback from employees being reclassified from exempt to nonexempt
U.S. LABOR DEPARTMENT

Implementation
• Impress on newly nonexempt employees the importance of keeping accurate records of worktime
• Have a system and policies for capturing the time accurately
• Train employees to follow
• Train supervisors/managers to enforce
• Periodically check whether the time records appear to be accurate

U.S. LABOR DEPARTMENT

Costs of Noncompliance
• Back pay, liquidated damages, and attorneys’ fees
• Two years, three if willful
• Potential individual manager liability
• Limited defenses
• Collective actions, class actions, and multiple individual actions
• Diversion, distraction, disruption
• Adverse publicity
OTHER "HOT" ISSUES

• "Off-The-Clock" Work, Inaccurate Time Records
  ▪ **Basic Obligation:** To Keep Accurate Records Of All Time A Nonexempt Employee Works Each Workday And Each Workweek

• Overtime Violations
  ▪ **Basic Obligation:** Must Pay Nonexempt Employees 1.5 Times The "Regular Rate" For Time Worked Over 40 Hours In A Seven-Day "Workweek."
  ▪ Not Including All Wages In The "Regular Rate" (Bonuses, Commissions, Incentives); "Comp Time;" Not Adding All Hours Together

OTHER "HOT" ISSUES

• Unlawful Deductions/Employee Payments
  ▪ Shortages, Property Damage, Holding Final Paycheck
  ▪ Can't Cut Into FLSA Minimum Wage Or Overtime
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

LAWS ADMINISTERED BY THE EEOC

- Equal Pay Act of 1963
- Title VII Civil Rights Act of 1964
- The Age Discrimination in Employment Act of 1967
- The Americans with Disabilities Act of 1990, as amended
- Genetic Information Nondiscrimination Act of 2008
- Fair Pay Act of 2009
NOT ADMINISTERED BY THE EEOC (Contrary to Popular Belief)

- Family and Medical Leave Act
- Fair Labor Standards Act
- Fair Credit Reporting Act

THE EEOC CHARGE PROCESS
EEOC UPDATE

New EEOC Enforcement Priorities as of October 2016

• EEOC announced new series of enforcement priorities over the next five years. 4 Main categories:
  ▪ 21st Century Employment Relationships
  ▪ Muslim/Sikh and Arabic/Middle Eastern/South Asian backlash discrimination
  ▪ Data-driven employment screening that has a negative effect on diversity.
  ▪ Equal pay for equal work.

CHARGES – 2015

• Retaliation: 39,757 (44.5% of all charges filed (89K))
• Race: 31,027 (34.7%)
• Disability: 26,968 (30.2%)
• Sex: 26,396 (29.5%)
• Age: 20,144 (22.5%)
• National Origin: 9,438 (10.6%)
• Religion: 3,502 (3.9%)
• Color: 2,833 (3.2%)
• Equal Pay Act: 973 (1.1%)
• Genetic Information Non-Discrimination Act: 257 (0.3%)
EEOC LAWSUITS FILED IN 2015

• EEOC Filed 142 Lawsuits:
  ▪ 100 individual suits
  ▪ 42 suits involving multiple victims or discriminatory policies (versus discriminatory treatment), of which 16 were systemic suits
  ▪ At the end of the fiscal year, EEOC had 218 cases on its active docket, of which 48 (22%) involved challenges to systemic discrimination and 40 (18%) were multiple-victim cases

EEOC UPDATE

EEOC Enforcement Guidance - Retaliation
• EEOC issued new guidance in August 2016
  ▪ Replaces old guidance on this topic from 1998
• Retaliation claims comprised 44% of all charges in 2015.
• Defines what type of activity is protected “opposition”
• Expansive discussion of prohibited adverse actions.
• Also re-affirms the “but-for” causation standard.
• Accompanied by FAQ document and short Fact Sheet
EEOC UPDATE

EEOC Enforcement Guidance - National Origin Discrimination
- EEOC issued new guidance in November 2016
  - Replaces old guidance on this topic from 2002
- New guidance discusses national origin discrimination in a wide variety of employment situations, and includes employer suggestions that may reduce risk of these claims.
- Much more comprehensive guidance on how the EEOC will investigate national origin discrimination claims. Useful if faced with a potentially risky situation.

WHAT WE ARE SEEING

- Investigation of Systemic Discrimination Allegations
- More Aggressive Tactics – Pushing the Envelope
- EEOC Attorneys Involved in Charge Investigations
- Settlement of No-Cause Cases
LIKELY DEVELOPMENTS

Same Number/Types of Charges, But . . .

• Fewer cause determinations
• Fewer “Novel” cases filed
• De-emphasis on “Joint Employers”
• Greater emphasis on Mediation
• De-emphasis on pay equity issues

NATIONAL LABOR RELATIONS BOARD
What is the NLRB’s role?

• The National Labor Relations Board (“NLRB”), is a five (5) member board appointed by the President to enforce the National Labor Relations Act (“NLRA”).

• Shifts between pro-management and pro-union positions have been common, but recently those shifts have become more pronounced.

Who’s Covered by the NLRA?

• All employers engaged in interstate commerce above specified minimal standards

• Applies to both union and non-union employers

• Ways the NLRB currently gets involved in your business, regardless . . .
NLRB TINKERING

• Employee Handbooks
• Social Media Police
• Second-Guessing Internal Investigations
• Expanding “Joint Employer” Doctrine
• Expansion of the Unionized Workforce
  ▪ “Quickie” elections
  ▪ Relaxed Board rules and regulations
  ▪ Ignoring decades of precedent

What is the Basis for NLRA Application to Employee Handbooks?

• Statutory rights under Section 7 of the NLRA.

• Right of employees to engage in concerted protected activity.

• Employee handbook provisions may address or affect concerted activities.
How Are Employee Handbooks Impacted?

On March 18, 2015, NLRB General Counsel Griffin issued a Memorandum titled “Report of the General Counsel Concerning Employer Rules.”

Even though a rule may not explicitly prohibit Section 7 activity, it can still be found unlawful in any one of three circumstances:

1. Employees would reasonably construe the rule’s language to prohibit Section 7 activity,
2. The rule is promulgated in response to union or other Section 7 activity, or
3. The rule is actually applied to restrict the exercise of Section 7 rights.
CONFIDENTIALITY POLICIES

“A confidentiality rule that broadly encompasses ‘employee’ or ‘personnel’ information, without further clarification, will reasonably be construed by employees to restrict Section 7–protected communications.”

CONFIDENTIALITY POLICIES

General Counsel found the following policies to be facially lawful:

• No unauthorized disclosure of “business ‘secrets’ or other confidential information.”
• “Misuse or other unauthorized disclosure of confidential information not otherwise available to persons or firms outside [Employer] is cause for disciplinary action, including termination.”
• “Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers.”
EMPLOYEE CONDUCT TOWARDS THE COMPANY AND SUPERVISORS

“A rule that prohibits employees from engaging in ‘disrespectful,’ ‘negative,’ ‘inappropriate,’ or ‘rude’ conduct towards the employer or management, absent sufficient clarification or context, will usually be found unlawful.” He also noted that an employee’s criticism of an employer does not lose its protection under the NLRA if the criticism is false or defamatory but rather, it must be “maliciously false.”

The General Counsel cited the following as overbroad **unlawful** rules:

- “[B]e respectful to the company, other employees, customers, partners, and competitors;”
- Do “not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors;”
- “Be respectful of others and the Company;”
- No “[d]efamatory, libelous, slanderous, or discriminatory, comments about [the Company], its customers and/or competitors, its employees or management;
- “Refrain from any action that would harm persons or property or cause damage to the Company’s business or reputation;”
- Do not make “[s]tatements that damage the company or the company’s reputation or that disrupt or damage the company’s business relationships.”
The General Counsel cited the following as **lawful** rules:

- No “rudeness or unprofessional behavior toward a customer, or anyone in contact with” the company.

- “Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of [company] business.”

The General Counsel cited the following as a **lawful** rule:

- “Being insubordinate, threatening, intimidating, and disrespectful or assaulting a manager/supervisor, coworker, customer or vendor will result in discipline.”
Employees have Section 7 rights to discuss terms and conditions of employment and criticize the Company’s labor policies. They also have the right “to argue and debate with each other about unions, management, and their terms and conditions of employment. These discussions can become contentious, but … protected concerted speech will not lose it protection even if it includes intemperate, abusive and inaccurate statements.”

Examples of unlawful employee conduct rules toward fellow employees:

- “Don’t pick fights” online.
- Don’t make “insulting, embarrassing, hurtful or abusive comments about other company employees online”, and “avoid the use of offensive, derogatory, or prejudicial comments.”
- Do not send “unwanted, offensive or inappropriate” emails.
CONDUCT TOWARDS FELLOW EMPLOYEES

The following types of rules would be lawful:

• Don’t make “inappropriate gestures, including visual staring.”
• Any logos or graphics worn by employees “must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional message.”
• “Threatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors.”
• No “use of racial slurs, derogatory comments, or insults.”

How else are employee handbooks impacted?

Communications Regarding Internal Investigations

• Confidentiality is essential to conducting an investigation that is it not tainted by discussions among employees.
• The NLRB views these topics as issues of mutual concern which employees cannot be prohibited from discussing.
LIKELY DEVELOPMENTS

- Impact May Take More Time
- Board Member Appointments
- Replacement of GC Griffin (Eventually)
- Funding Likely to Be Lowered
- Expected Scaling Back of Current Agenda

DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION & DHS

New I-9 Form Published

• In November 2016, USCIS published a revised Form I-9.
• Beginning 1/22/17, employers are required to use the new form.
• Key changes:
  ▪ Asks for "other last names used" instead of only "other names used"
  ▪ Can now enter multiple preparers and translators, where necessary.
  ▪ Dedicated area for additional information – no more writing in margins
  ▪ Instructions separated from form and improved to assist employers in completing each field.
  ▪ Easier to complete electronically

DHS UNDER THE NEW ADMINISTRATION

• Hostile towards immigration
• Campaign promises to curb outsourcing of U.S. jobs via illegal and legal immigration, including free-trade and guest-worker programs
• Recently said top priority will be to “direct the Department of Labor to investigate all abuses of visa programs that undercut the American worker”
• Still a lot of uncertainty
LIKELY DEVELOPMENTS

• Mandatory E-Verify nationwide
• Tightening up/securing the border
• Increased size of ICE
• Increased enforcement actions (e.g., I-9 audits, inspections, and raids)
• Increased deportations
• Cancellation of DACA (Deferred Action for Childhood Arrivals (Obama executive order)).
• Changes in the H-1B Professional Worker category

Q&A
Please take a moment now to evaluate this session.
Thank You!

Presented by: Todd Fredrickson
Fisher Phillips
tfredrickson@fisherphillips.com
303-218-3650