As the current presidential administration is winding down, there has been an upsurge in executive orders impacting employment law. Additional developments by congress, federal and state courts, and state legislatures have also created much change with the world of labor and employment law. This presentation addresses some of the highlights.
FLSA

• Upcoming Changes to White Collar Exemptions

  – July 6, 2015 – DOL issued proposed new regulations regarding who is classified as exempt under the Fair Labor Standards Act.
FLSA

– Anticipated Provisions
  • Minimum salary threshold will move from $455/week or $23,660/year to $921/week or $47,892/year with future adjustments
  • Highly compensation exemption will move from $100,000/year to $122,148/year
  • Undetermined adjustments to duties test are possible
FLSA

- **Impact according to the DOL**

  - DOL believes 4.6 million workers will lose their exempt status and begin receiving overtime

  - Direct costs anticipated for employers range from $239.6 and $255.3 million per year

  - New regulations will result in higher pay to workers through overtime pay or wage adjustments
FLSA

- **ACTUAL Impact on Employers and Workers**
  - Operations have to be restructured to anticipate and budget overtime and salary adjustment expense
  - Duties reclassified or modified to avoid unnecessary overtime in excess of budget
  - Analysis of whether to increase workers’ pay to maintain exemption
FLSA

– Procedures need to be set up to carefully review job duties and job descriptions so they fit with exemptions where permissible

– Morale of employees needs to be factored into transition of pay and classifications and corporate culture

– Revise organizational charts and reporting responsibilities
FLSA

• “It’s Time for America to Lead On Leave,” says DOL
• DOL awarded $1.55 million in grants to reach and analyze leave issues
• DOL strategic plan also includes identification of worker’s misclassified as independent contractors
WORKING OFF THE CLOCK

• Cell phones, tablets, computers present opportunities for off the clock work.

• DOL is currently reviewing its position on compensability for this time.
EEOC

- Enlarging scope of Title VII to increase coverage of LGBT related sex discrimination
- Targeting systemic discrimination

- 2014 Statistics  88,778 charges
  296.1 million monetary benefits

- 2015 Statistics  89,385 charges
  356.6 million monetary benefits
EEOC

• “Ban the Box”
  – This EEOC position is based on the premise that questions regarding criminal history results in a negative desperate impact on protected groups
Several states have adopted “Ban the Box” rules including:

- California
- Georgia
- Maryland
- Nebraska
- New York
- Rhode Island
- Connecticut
- Hawaii
- Massachusetts

- New Jersey
- Ohio
- Vermont
- Delaware
- Tennessee
- Minnesota
- New Mexico
- Oregon
- Virginia
OFCCP

• Executive Order 11246 was amended to prohibit federal contractors from discriminating based on sexual orientation. EEO-1 reports have been updated for implementation by September 30, 2017.

• Federal contractors who enter into contracts after January 1, 2016 must provide certain information on pay transparency; specific language in handbooks; paid sick leave starts in 2017; and sex discrimination.
OFCCP

• REHABILITATION ACT AND VEVRAA
  – Now requires contractors, including construction contractors, to have written affirmative action plans.
OSHA

- Guidance released on restroom / locker room policies
- OSHA penalties are increasing as part of the Bipartisan Budget Act of 2015.
- Recordkeeping and data collection in proposed rulemaking
- Safety and Health Program Management Guidelines are in the process of redevelopment
HANDBOOKS

- Must reconcile federal, state and local laws.

- Statement of an organization’s brand and culture.
HANDBOOKS

• Impact of National Labor Relations Act
  – Protected Consented Activity

• Social Media and Data Privacy
  – No Right of Privacy
  – Proprietary and Confidential Information
  – Compliance with Owner Policies
  – Security
HANDBOOKS

• Effective EEO and Retaliation Policies
• Whistle Blowers
• Fair Labor Standards Act Obligations
  – Overtime
  – Deductions
  – Pay Period
HANDBOOKS

• Disability and Leave Provisions
  – FMLA
  – ADA and Reasonable Accommodations
  – State Specific Obligations
HANDBOOKS

• Smoking and E-Cigarettes
  – Employers have to designate if they will be treated the same or differently.

• Medical / Legal Marijuana Use
  – Federal law remains in place providing marijuana is an illegal substance.
  – Will accommodations include medical use?
  – AZ, DE and MN prohibit termination for positive test with a valid medical marijuana registration card.
Colorado Supreme Court determined that it is not a violation of Colorado’s “lawful activities” statute for an employer to terminate an employee who tests positive for marijuana, even when the employee claims his use was allowed under Colorado law and off duty.
HANDBOOKS

- LGTB Issues
  - *Obergefell v. Hodges* provides all states must issue marriage licenses to same sex couples and recognized validity of lawfully licensed same sex marriages.
  - Employee Benefits
  - Leave Protections – FMLA promulgated rule includes same sex spouses under 20 CFR §825.102
  - Common Law Marriages
  - No direct effect on Title VII, however, cases in all circuits have grown in protections.
HANDBOOKS

- Pregnancy Related Leave
  - Implications *Young v. UPS*
  - Paid parental leave grows momentum
• NLRB continues to scrutinize protected concerted activity in non-union shop employers

• NLRB targets review of social media, confidentiality, professionalism, anti-harassment, trademark use, photography and video, and medial contract policies
RECENT OPINIONS

• Village Freeport v. Barrella – Second Circuit held discrimination based on ethnicity may also constitute race discrimination. (February 16, 2016)

• Robles v. Agre Services, Inc. – Eastern District of California held that foreman’s gunshot in direction of Mexican workers did not create national origin claim. (January 27, 2016)
• Mendillo v. Prudential – District Court of Connecticut held that the employer did not interfere with an employee’s FMLA rights where the employer removed a substantial amount of the employee’s responsibilities after she returned from protected leave because this was typically done for non-producing employees who were not meeting performance goals. (January 12, 2016)
RECENT OPINIONS

• *Bagwe v. Sedgwick Claims* – Seventh Circuit held that insisting on a management style that ensured a smooth operating atmosphere was sufficient where performance history validated this reason for termination. (January 26, 2016)

• *Fleming v. IASIS* – Arizona District Court held that an employee’s overall satisfactory job performance did not show that the employee’s articulated reasons for firing the employee were pretextual. (December 21, 2015)
RECENT OPINIONS

- *Fairchild v. All American Check Cashing* - Fifth Circuit held that while there was temporal proximity between the employer’s learning of an employee’s pregnancy and her termination, it was not sufficient to establish pretext for pregnancy discrimination without more supporting evidence. (January 27, 2016)
QUESTIONS?