

Labor AND Employment Law

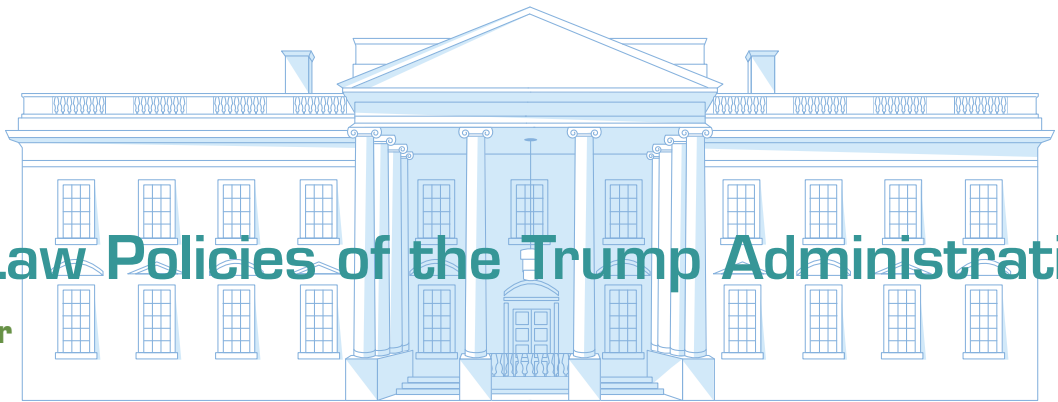
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SECTION OF LABOR AND EMPLOYMENT LAW ■ AMERICAN BAR ASSOCIATION



TWO YEARS IN: Labor and Employment Law Policies of the Trump Administration

By Katherine V.W. Stone and Adrian Butler



Since assuming office, the Trump Administration has pursued changes in labor and employment law regulation, rescinding or reversing numerous Obama Administration policies. This article describes some of the most important developments in that area.

U.S. Supreme Court

The Supreme Court decided two landmark labor law cases in the 2018 Term. In *Janus v. AFSCME Council 31*, 138 S.Ct. 2448 (2018), the Court reversed a 1977 precedent, *Abood v. Board of Education*, which had granted public employee unions the right to charge non-members a fee to cover their fair share of the union's expenses for collective bargaining and contract administration. Challenges to *Abood* had been mounted twice during the Obama Administration, and each time, that Administration supported the *Abood* precedent. When *Janus* came before the Supreme Court, however, the Trump Administration filed an amicus brief supporting the Petitioners' argument that 'fair share' fees violate the First Amendment. In a major blow to public sector unions, this position prevailed.

Similarly, the Trump Administration reversed the Executive branch's previous position on pre-dispute mandatory arbitration when the issue came before the Supreme Court in the consolidated case of *Epic Systems v. Lewis*, 138 S.Ct. 1612 (2018). In one of the three consolidated cases, the employee-petitioners had argued to the National Labor Relations Board (NLRB) that requiring employees to agree to individualized pre-dispute arbitration of employment disputes violated Section 7 of the National Labor Relations Act (NLRA). The NLRB agreed, holding that Section 7 rights cannot be waived by a mandatory arbitration clause. However, when the case was appealed to the Supreme Court, the Trump Administration departed from previous positions. Instead, the Solicitor General filed an amicus brief supporting the employers' argument that the NLRB's decision should be rejected because the Federal Arbitration Act effectively nullifies Section 7 with respect to mandatory class-waiver provisions in employment contracts. The employers' and the Trump Administration's position prevailed.

National Labor Relations Board

The Republican-majority NLRB has reversed, or is attempting to reverse, several Obama-era precedents and regulations. One example is the Board's decision in *Browning-Ferris Industries of California*, issued in August, 2015. In that case, by a 3-2 majority, the Board altered the standard for joint employment, making it easier for employees of staffing agencies and franchisees to obtain NLRA protection. 362 NLRB No. 186. On December 14, 2017, the new Board overturned *Browning-Ferris* and returned to the joint employer standard it previously articulated in *Hy-Brand Industrial Contractors*, 365 NLRB No. 156. The *Hy-Brand* decision was subsequently vacated because of a participating Board member's conflict of interest. In that decision's wake, the Board has proposed to reverse *Browning-Ferris* through administrative rule-making. The proposed new standard would find an employer "to be a joint-employer of another employer's employees only if it possesses and exercises substantial, direct and immediate control over the essential terms and conditions of

employment and has done so in a manner that is not limited and routine." The period for public comment on the proposed rule ended on February 11, 2018.

The Trump Board also is currently revising the rules governing employee use of company email. In *Purple Communications, Inc.*, 361 NLRB 126 (2014), the Obama Board ruled that, absent special circumstances, "employees who have rightful access to their employer's email system . . . have a right to use the email system to engage in Section 7-protected communications on non-working time." This case overruled the previous standard, articulated in *Register Guard*, which held that employers can lawfully prohibit employee use of its email for Section 7 purposes. On August 1, 2018, the Trump Board issued a Notice and Invitation to File Briefs in a pending case to address whether *Purple Communications* should be reversed and whether the Board should revert to the standard in *Register Guard*.

Also under review are the speedy representation election procedures instituted by the

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I am excited to report that one of our long-time Section leaders, Kelly Dermody, has been selected to receive the coveted Margaret Brent Women Lawyers Achievement Award at the ABA Annual Meeting in San Francisco. While it is often challenging to reach consensus in our Section among management, union and employee-side lawyers, all of our Section leaders across constituencies unanimously and enthusiastically supported Kelly's nomination for this well-deserved honor, including defense attorneys who have been opposing counsel to Kelly in litigation.

Kelly is one of the top plaintiffs' employment attorneys in the country, and she has been a tireless advocate for gender equality and LGBTQ rights and a shining role model for young women. Kelly also has been a huge contributor to our Section, having served on our Council for a number of years and as Co-Chair of the Annual Section Conference, the Diversity and Inclusion in the Legal Profession Committee and the Equal Employment Opportunity Committee. She is a nationally recognized diversity and inclusion thought leader who has helped to diversify the Section with respect to its leadership appointments and other opportunities for women attorneys, LGBTQ attorneys, attorneys of color and attorneys with disabilities. On behalf of the Section, I would like to extend a heartfelt congratulations to Kelly!

This will mark the third consecutive year our Section's nominees have received the Margaret Brent Award. Last year, the Award was presented to Cynthia Nance, who serves on our Section Council and is the first African-American female Dean of the University of Arkansas Law School. In 2017, the Award was presented to the Honorable Bernice Donald, the first African-American woman judge on the U.S. Court of Appeals for the 6th Circuit. The Section is truly blessed to count among its leaders these extraordinarily accomplished women, each of whom has been a trailblazer in our field! I hope you can join us in San Francisco on August 11, 2019 to celebrate Kelly's incredible career and contributions at the Margaret Brent Award Luncheon, which is always an inspiring event. The ABA Annual Meeting in San Francisco also will feature labor and employment programming on Friday, August 9.

Shortly after the ABA Annual Meeting, our New Membership Model ("NMM") will go into effect on September 1, 2019. Not only will the NMM radically reduce dues for new lawyers from \$450 to \$75 for the first 5 years, but it will cap dues at \$150 per year for government lawyers, not-for-profit lawyers and small firm lawyers. At the same time, the NMM will offer enhanced benefits for all members, including "curated" digitized content that spans the full range of labor and employment law topics as well as *free* on-demand webinars on the latest developments in our field.

I urge you to spread the word (even forward this column) to your department heads, managing partners, practice group leaders and newer lawyers to let them know about the NMM and the enhanced benefits it soon will offer young lawyers at a fraction of the cost. For more information about the NMM visit the following link: ambar.org/lclnewmembership. There is simply no other organization that provides the same networking opportunities with the full spectrum of government, management, in-house, union and plaintiffs' lawyers, and neutrals across the country. Indeed, we are hopeful that law firms will recognize the enhanced value of registering all of their L&E lawyers to be members of the Section. Under the NMM, the Section will provide the most cost-effective CLE available and so much more!

Finally, I would like to note that there are still a few openings for our second biannual Trial Institute co-sponsored by the National Employment Council (NELC) and Chicago-Kent Law School, which will take place in

Chicago on September 19–22, 2019. Having participated in the Section's inaugural Trial Institute, I can assure you that the quality of the instruction and hands-on experience participants receive is second to none. If you are interested in learning how to try employment cases before juries and honing your trial skills through mock trials in federal court rooms before practicing judges, visit the following link for more information and submit your application as soon as possible as space is limited: https://www.americanbar.org/groups/labor_law/events_cle/lcl-trial-institute/. The deadline for submitting applications is June 28, 2019.

The Section and Bloomberg Law are also in the process of finalizing a new publication, *Trial Techniques for the Labor and Employment Law Practitioner*. This book has been developed as the primary resource for the Trial Institute. It is our hope that this book will be a valuable resource for practitioners, at any level in his or her career, who seek practical advice on handling trials specifically in the area of labor and employment law. ■

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Round 2 for #MeToo: The Movement Embraces Collective Action as State and Federal Responses Diverge

By Patrick J. Walsh

On November 1, 2018, the #MeToo movement entered a new, more aggressive phase, bypassing traditional legal fora to address workplace sexual harassment through collective action and classic First Amendment protest activity, and confronting employers directly with tactics reminiscent of recent teachers' strikes in West Virginia, Oklahoma, California and elsewhere. In a mass action that started in Tokyo and moved in waves across Europe and North America, more than 20,000 Google employees in fifty cities worldwide walked off the job at 11:00 a.m. local time to protest the company's handling of sexual harassment allegations, following a report a week earlier that Google had paid \$90 million in severance to Android creator Andy Rubin after he was accused of sexual harassment. Billed by organizers as a "global walkout for real change," the action drew both contract workers and employees. At Google's California headquarters, protestors wore blue ribbons in support of sexual harassment victims, carried signs reading "Time's Up Tech," and chanted "worker's rights are women's rights."

The walkout had immediate effect. Only days later, Google ended its policy of forced arbitration for sexual harassment and assault claims. Facebook, Airbnb, eBay and Square quickly followed suit. Microsoft, Uber and Lyft already had ended forced arbitration in response to employee pressure. Buoyed by their success, Google employees pressed further, demanding that Google scrap its mandatory arbitration policy altogether. On February 21, 2019, the company announced that it would end all mandatory arbitration for employees. Google employees now are demanding that the company extend the ban to contractors.

This embrace of direct action has not been limited to well-compensated tech employees. On September 19, 2018, hundreds of McDonald's workers in ten different states walked out to protest McDonald's response to workplace sexual harassment. The legal profession has faced its own grassroots rebellion from law students. Last spring, Harvard law students launched "the Pipeline Parity Project" to end harassment and discrimination in the legal profession that push lawyers "out of the pipeline" for professional opportunities. The group boycotted firms that required mandatory arbitration for sexual harassment claims. In response, a number of large firms, including Kirkland, Skadden and Sidley, ended mandatory arbitration policies for summer associates and associates. In additional campaigns against DLA Piper and Venable, launched last Fall and early this year, the Project has asked students to refrain from interviewing for summer associate positions at those firms until they scrap mandatory arbitration. In December 2018, a number of women's law student groups at Yale and elsewhere issued a statement condemning mandatory arbitration policies, and refusing funds from law firms that have them.

The #MeToo movement's adoption of collective action as an extra-judicial remedy for workplace harassment reflects a natural progression as the movement matures in its second year. Initially, the movement focused on raising public consciousness about victims' trauma, and creating safe space for victims to name their harassers. The movement quickly demanded legislative reforms as well. As detailed in the *LEL* Summer 2018 newsletter, State legislatures took the lead in eliminating or extending statutes of limitation and ending

confidentiality agreements and forced arbitration for sexual harassment and abuse cases (#MeToo's Impact on the Law: A Lot Has Happened and a Lot More is Expected, Luther J. Wright, Jr.).

While lawmakers in Statehouses took quick action, Congress has not followed suit. A number of proposed federal bills have stalled in Senate and House committees for

■ **The Arbitration Act of 2018**—would prohibit mandatory arbitration for all employment disputes.

On February 28, 2019, with Google employees joining them at the announcement, House Democrats tried again, introducing the Fair Arbitration Injustice Repeal Act ("FAIR Act"). The bill would

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months, and in some cases, more than a year, including:

■ **The EMPOWER Act**—would expand Title VII's sexual harassment protections to contract and other workers, limit the use of non-disclosure agreements, establish a confidential tip line run by the EEOC, and require public companies to file sexual harassment settlements with the SEC;

■ **The Fair Employment Protection Act**—would restore protections weakened by the Supreme Court's 2013 decision in *Vance v. Ball State University* for employees sexually harassed on the job by supervisors;

■ **The Ending Forced Arbitration of Sexual Harassment Act**—would prohibit mandatory arbitration of sexual harassment claims; and

end forced arbitration for employment, consumer and civil rights actions. While the bill could make progress in the House, prospects in the Senate are doubtful.

In addition, Brett Kavanaugh's confirmation to the Supreme Court, and the Court's May 2018 decision in *Epic Systems v. Lewis*, have stoked #MeToo advocates' doubts as to the ongoing viability of federal courts as a forum to address workplace sexual harassment.

In the meantime, some States and municipalities have expanded sexual harassment protections. The most noteworthy actions taken at Statehouses, recently, have included:

New York State

■ expanded sexual harassment protections to include contract workers, consultants, vendors and other non-employees;

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The Effects of *Hobby Lobby*

By Mark Goldfeder

The five-year anniversary of the Supreme Court's decision in *Burwell v. Hobby Lobby* is fast approaching. With that amount of perspective, it is worth revisiting some of the labor and employment law concerns that were raised pre-decision.

Hobby Lobby addressed the intersection of the Restoring Religious Freedom Act and the Affordable Care Act's contraceptive mandate, which requires employers to provide their employees with health insurance coverage for contraception. This mandate, the Court ruled, could not be applied to closely held for-profit corporations with religious objections to certain types of contraception. Instead, the government would make up the difference.

Both before and right after the decision, there were two main concerns about how this decision might affect employment rights and responsibilities. The first was particular: although in *Hobby Lobby* the company was only objecting to four of the 20 FDA-approved contraceptive methods (*i.e.* those they considered to be abortifacients), another company in the future might object to providing *any* contraception coverage. The second concern was broader: this victory would enable corporations to disobey any civil rights statutes by hiding behind religious objections.

Thankfully, these legitimate concerns have not come to pass. The reasons are twofold. First, the *Hobby Lobby* ruling was actually quite narrow, far narrower than many understood at the time. And second, the law before, during, and after the case already had many built-in safeguards to ensure that employees would not suffer at the hands of their religious employers. *Hobby Lobby* simply highlighted the importance of having a good balancing test.

As to the narrowness of the ruling, despite popular concerns,

Hobby Lobby did not take away any person's healthcare. Nor did it take away any woman's access to any kind of contraception—even those types the company felt were abortifacients. In fact, the Court was clear that it would not allow women or any other potentially vulnerable group to be harmed:

Under RFRA, a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest, and we assume that the HHS regulations satisfy this requirement . . . As this description of our reasoning shows, our holding is very specific. We do not hold . . . that for-profit corporations and other commercial enterprises can “opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.” . . . Nor do we hold . . . that such corporations have free rein to take steps that impose “disadvantages . . . on others” or that require “the general public [to] pick up the tab.” And we certainly do not hold or suggest that “RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on . . . thousands of women employed by Hobby Lobby. The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing . . .

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2782 (2014)

Hobby Lobby was a narrow ruling because it represented the rare case with no losers - under the Court's ruling, the religious rights of the corporate owners were respected, and the employees received everything they were entitled to.

As to the bigger issue—whether the ruling would open the door for all kinds of discrimination—again the opinion spelled out why this result would not and could not happen: because RFRA, as it stands, is a balanced statute. For a company to get a religious exemption, it must first demonstrate a sincerely held religious belief. This requirement likely means that, before we even have a case, a set of shareholders must agree to run the corporation under the same religious belief system. Most companies are not run this way, but for those that are, we would proceed to step two: the law in question would have to substantially burden a religious belief of the company. One could easily imagine a company that *wanted* to discriminate organizing itself in a way that would demonstrate a sincere belief in religiously based discrimination which would be substantially burdened by workplace anti-discrimination laws.

Here is the crux though: that desire would not matter, and the company would still not be able to discriminate.

As the Court made abundantly clear in *Hobby Lobby*, the third and fourth parts of the test ask: (1) whether the government has a compelling interest in the goal it is trying to further with that law; and (2) if there is no other way to further that interest, then the government wins *despite* any religious claims. For example, even if a company had a sincere religious belief in racial discrimination, RFRA would provide it no shield. As Justice Alito explained, “The Government has a compelling

interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.”

Of course, the real worry was never about racial discrimination; RFRA could not be used that way because Title VII already clearly established that the Government “has a **compelling interest** in providing an equal opportunity to participate in the workforce without regard to race.” The real question was about LGBT groups, who are not yet members of a protected class, and whether RFRA, and *Hobby Lobby*, would provide a shield to discriminate against them.

While that is a legitimate concern, it seems more of a criticism of Congress rather than the *Hobby Lobby* decision. Congress is likely not rushing to enshrine an LGBT protected class. However, just last year, the Sixth Circuit Court of Appeals in *EEOC v. R.G. & G.R. Harris Funeral Homes* became the third circuit to rule that Title VII's bans against workplace discrimination also include discrimination against the LGBT community. The Supreme Court is expected to rule on this issue soon but, in the meantime, this result means that these courts actually read *Hobby Lobby* as making it explicitly *harder* to discriminate against LGBT people, not easier.

In short, almost five years later, *Hobby Lobby* continues to do what it did on day one: not much at all. It allows religious people protections when no one else is going to get hurt, and that is how our employment laws are supposed to function. ■

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Joint Employer Standard May Have Nine Lives

By Kate Swarengen

A recent decision by the U.S. Court of Appeals for the District of Columbia Circuit may have thrown a wrench into the National Labor Relations Board's proposed rulemaking on the joint employer standard.

In *Browning-Ferris Industries of California, Inc. v. NLRB, d/b/a BFI Newby Island Recycling*, No. 16-1028 (Dec. 28, 2018), the D.C. Circuit held that the NLRB had acted properly in 2015 when it adopted a more comprehensive test for determining whether companies should be considered joint employers for the purposes of liability and collective bargaining. The underlying NLRB case—decided 3-2 over the dissent of the Board's two Republican appointed members—overruled two Reagan-era Board decisions that had narrowed the joint employer doctrine and made it more difficult for unions to establish joint employer status.

The revised standard announced in the 2015 NLRB decision provided that “two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or co-determine those matters governing the essential terms and conditions of employment.” The Board held that it would “no longer require that a joint employer not only possess the authority to control employees’ terms and conditions of employment, but must also exercise that authority[.]” The Board also eliminated the requirement that a putative joint employer’s control over employment matters be direct and immediate, ruling that “otherwise sufficient control exercised indirectly—such as through an intermediary—may establish joint-employer status.” Finally, the Board eliminated the exception to joint employer status where a company exercises its control in a “limited and routine” manner.

In adopting a test that focuses

on the degree of control a company can exert over another company’s employees, the NLRB explained that the steady increase over the last three decades in contingent employment and in staffing and subcontracting arrangements necessitated the doctrine’s modification. Under the previous standard, the Board had focused on whether the putative joint employer exerted direct (as opposed to indirect) control over the employees in question.

High profile litigation involving McDonald’s (as well as the prospect of litigation involving subcontracted Microsoft workers) ensured that *Browning-Ferris* remained in the public eye. In December 2017, the Board overturned the *Browning-Ferris* decision in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156, and asked the D.C. Circuit to remand *Browning-Ferris* to the agency for further consideration. Two months later, the Board vacated *Hy-Brand* due to questions regarding the participation of Member William Emanuel in the decision, and rescinded its remand request.

In May 2018, the Board announced its intention to undertake rulemaking on the standard for joint employer status. Notwithstanding the pending rulemaking, in June 2018 the Board specifically requested that the D.C. Circuit decide *Browning-Ferris*. On September 14, 2018, the NLRB published a Notice of Proposed Rulemaking regarding the joint employer standard. Under the proposed rule, an employer would be found to be a joint employer of another employer’s employees only if it possesses and exercises substantial, direct, and immediate control over the essential terms and conditions of employment, and does so in a manner that is not limited and routine. Indirect influence and contractual reservations of authority alone would

High profile litigation involving McDonald’s ensured that *Browning-Ferris* remained in the public eye.



not suffice to establish a joint employer relationship.

In its 2-1 opinion, the D.C. Circuit found that that the *Browning-Ferris* Board had appropriately recognized that “indirect control” and “reserved right to control” are “relevant” factors in determining joint employer status. The Court, however, reversed the Board’s application of the indirect control factor, finding that the Board had not adequately distinguished between indirect control that is inherent in third-party contracting relationships, and indirect control over essential terms and conditions of employment. The D.C. Circuit remanded that portion of the case to the Board with instructions that it explain and apply its test in a manner consistent with the common law of agency.

In evaluating the Board’s joint employer test under the *de novo* standard of review urged by *Browning-Ferris* and its amici, the D.C. Circuit’s decision may effectively constrain the agency’s proposed rulemaking to a standard almost identical to the one currently in place. The Court made plain its view of the limits of the agency’s authority in this area, noting that

“Congress has tasked the

courts, and not the Board, with defining the common-law scope of ‘employer’ . . . The Board’s rulemaking, in other words, must color within the common-law lines identified by the judiciary. That presumably is why the Board has thrice asked this court to dispose of the petitions in this case during its rulemaking process. Like the Board, and unlike the dissenting opinion [], we see no point to waiting for the Board to take the first bite of an apple that is outside of its orchard.”

Following issuance of the D.C. Circuit’s decision, the Board extended public comment on its proposed rulemaking to January 28, 2019. Whether the Board will now move forward with its proposed rule remains to be seen. In the meantime, practitioners tasked with advising unions and employers as to the future of *Browning-Ferris* and the case’s implications for union organizing and labor law enforcement have not had that job made easier. ■

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State Developments in Protecting Workers

By M. Patricia Smith & Paul K. Sonn

Progress to expand worker protections at the federal level has stalled over the past decade. Broadly popular legislation such as an increase to the minimum wage and guarantee of paid sick days has been introduced in Congress, again and again, over the last few years but has gone nowhere. Further, the current Administration rolled back key worker protections, many of them adopted by the U.S. Department of Labor (DOL) during the Obama years. Into this environment, states and cities have stepped in to expand worker protections in a range of key areas. This effort has intensified since the November elections, with actions by newly elected governors and state legislatures.

Minimum Wage

At the federal level and in 21 states, the minimum wage has been stuck at \$7.25 since 2009. And while the new House Majority is likely to pass a \$15 federal minimum wage bill this spring, it faces an uphill battle in the Senate. Therefore, growing numbers of states and cities are raising wages on their own. The minimum wage increased in 19 states and 21 cities and counties on January 1, 2019, with many phasing their minimum wages up to levels of \$12 to \$15 an hour. More states appear likely to act in 2019. Since January, Illinois, Maryland, New Jersey, Connecticut and New Mexico have all raised their minimum wages. As a result, more than 20% of the U.S. workforce will be covered by a \$15 per hour wage.

Overtime Pay

In 2016, the DOL released a long-overdue updating of the overtime salary threshold for white-collar workers to about \$48,000 a year. However, a Court in Texas blocked the increase, and the current DOL has proposed replacing

it with a weaker standard of about \$35,000. Growing numbers of states are stepping in to restore overtime pay with higher salary thresholds. California and New York are already raising their thresholds to \$62,400 and \$58,500 respectively. Washington State's labor agency is expected to propose an even higher one. Pennsylvania is proposing a salary threshold that mirrors the Obama era level. Colorado's labor agency is reevaluating its overtime threshold. And Massachusetts and Maine have both introduced legislation to raise their overtime thresholds significantly.

Paid Sick Days

More than 34 million workers in this country don't have a single paid sick day. Legislation to provide that protection has languished in Congress for years despite some support from the current administration. The executive order requiring federal contractors to provide paid sick days is one of the few Obama era worker protection executive orders the current administration did not rescind. Refusing to wait any longer, Connecticut, California, Massachusetts, Oregon, Vermont, Arizona, Washington, Rhode Island, Maryland, New Jersey, the District of Columbia and dozens of cities, have adopted earned paid sick days laws to ensure that all workers have access to this basic protection.

Misclassification of Workers

Employers' use of certain work structures—subcontracting, temp and staffing agencies, and calling workers “franchisees” or “independent contractors”—are key drivers of eroding labor standards. The emergence of the so-called “gig economy,” where most workers are labeled “independent contractors,” has only deepened this problem. In 2016, the DOL issued guidance on independent

contractor misclassification and companion guidance on joint employer under the Fair Labor Standards Act. However, the current Administration withdrew both. States have been stepping up to address these problems.

In April 2018, the California Supreme Court issued a unanimous decision in the *Dynamex* case adopting a strict test for employment that will make it harder for companies, including digital platform companies, to classify their employees as independent contractors. More than half of the states already use some version of this test under their state unemployment insurance laws, and several including Massachusetts and New Jersey have adopted it for use under their wage and hour laws.

Similarly, Oregon's labor agency issued an opinion advising that drivers at transportation network companies qualify as employees who are covered by the state's employment laws. New York has ruled that platform employers are covered under the state's unemployment insurance law. San Francisco extended its minimum wage protections to apply them to independent contractors and employees alike. New York City recently adopted a slate of policies to guarantee a minimum wage of more than \$15 to transportation network company drivers.

Banning Non-Compete and No Poaching Agreements

There is growing recognition that non-compete and no-poaching requirements are abusive, and not necessary, as legitimate employer concerns about trade secrets held by higher-paid employees can more appropriately be addressed through non-disclosure requirements. California, Oklahoma, and North Dakota have prohibited non-compete requirements and other states are proposing to follow them. In

addition, state attorneys general have successfully challenged no poaching requirements for franchisees as antitrust violations.

Banning Employers From Asking About Salary History

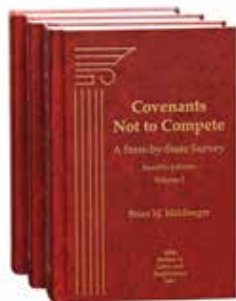
There is growing national recognition that the common practice of employers basing employees' pay in part on their salary history perpetuates unequal pay for women and workers of color. In response, thirteen states and ten cities have banned employers from inquiring about salary history and basing compensation on it.

Fiduciary Requirements

In 2016, the US Labor Department issued a new rule requiring financial professionals, when providing retirement investment advice, to put their customers' interests first. Every year, retirement savers alone lose more than \$17 billion due to financial advisors' conflicts of interest. A court in Texas blocked the rule after it survived challenges in several other courts, and the current administration refused to continue to defend the rule. So far, seven states—Connecticut, Illinois, Maryland, Massachusetts, Nevada, New York and New Jersey—have responded with legislation, and/or regulations to address this problem in some fashion.

Currently, anyone interested in the legal parameters of the employment relationship and actions being taken to expand worker protections must pay attention to the actions that are occurring at the state and local level. ■

M. Patricia Smith (psmith@nelp.org) served as U.S. Solicitor of Labor under President Obama, and as New York State Labor Commissioner; she is currently Senior Counsel at the National Employment Law Project (NELP) and **Paul K. Sonn** (psonn@nelp.org) is State Policy Program Director at NELP in Washington, DC.



Covenants Not to Compete: A State-by-State Survey, Twelfth Edition

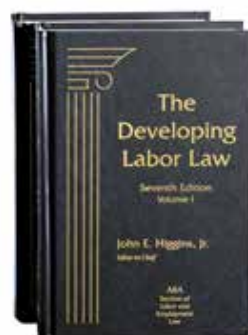
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Brexit: Protecting EU Workers

By Rose Carey

Brexit has caused a lot of concern amongst European Union (EU) workers (including workers from the European Economic Area and Switzerland) and their employers as to what their position is in the UK and what will happen when the UK exits the EU, especially in the event of a “no deal” departure.

Importantly, free movement will continue to apply until the UK formally leaves the EU on October 31, 2019 and, in the event of a deal, until the end of the transitional period. Free movement allows a national of the EU to live and work without restriction in another Member State of the EU without requiring a visa. With UK unemployment at its lowest, UK employers have been able to rely on workers from the EU. Over three million EU nationals who reside in the UK benefit from free movement. This will all come to an end following Brexit.

However, with Brexit fast approaching, we seem no further forward with identifying what the granted outcome will be. The EU granted a delay to Brexit until October 31, 2019, or earlier if there is a deal.

Brexit with a deal

In the event of a deal, under the draft Withdrawal Agreement currently being debated in Parliament, the transitional period would run until December 31, 2020. Immigration control would

only be imposed after this period ends i.e. January 1, 2021. So free movement would continue for EU workers in the UK and British workers in the EU after Brexit until the end of the transitional period. Thereafter, however, reciprocal labor migration rules.

No deal Brexit

If there is no deal, there will be no agreement with the EU and immigration control could begin sooner. However, the UK Government is not ready to introduce a new immigration system for EU workers, and a transitional period on the UK's side will be required. It is not clear when this transitional period would end and what the rights would be of EU workers entering the UK during this period. Also, the EU may not agree to a transitional period on its side in the event of a no deal and could impose immigration control on British nationals entering the EU for work after Brexit. Indeed, each EU country could impose entirely different requirements on British nationals.

Delaying or cancelling Brexit

There has been discussion in the UK about delaying Brexit beyond the new date agreed with the EU. However, this is not as easy as it might seem. The EU treaty clearly states that a country's exit negotiations can only be extended with unanimous agreement of the remaining member states. Further,

with European elections in May 2019, the EU will likely refuse any further extension beyond October 31, 2019. This is because, it would be disruptive for the EU if the UK participates in the EU Parliament.

Can the withdrawal be cancelled? A ruling by the European Court of Justice in December 2018 stated that the UK can unilaterally stop its decision to leave the EU.

What does this situation mean for current EEA employees?

If Brexit proceeds, the UK Government has introduced a new EU Settlement Scheme for EU nationals currently residing in the UK to enable them and their family members to obtain status under the UK's domestic immigration rules. Even in a “no deal” scenario, the government has confirmed that EU nationals residing in the UK before October 31, 2019 will still be able to apply for status under the scheme, as will their family members.

If the Withdrawal Agreement is approved by Parliament, then the scheme will be extended to EU nationals and their family members who are resident in the UK before December 31, 2020.

Irish nationals

The UK and Ireland are part of the Common Travel Area, which pre-dates the UK's membership of the EU. Irish citizens' rights to live and work in the UK are not affected by Brexit in this regard and, therefore, Irish citizens do not need to apply for immigration status in the UK. However, family members who are not British or Irish citizens would need to do so.

The future post-Brexit

On December 19, 2018, the Government released its new White Paper outlining the new Immigration system post-Brexit.

The proposals include bringing EU migration into the current Points Based System used for non-EU workers. This would mean EU workers will need a visa to work in the UK and only the skilled will be eligible. The existing work visa scheme (Tier 2) will undergo some changes, particularly the abolition

of the annual cap and an extension to workers in medium-skilled roles. Some visas, for up to one year, may be available for lower skilled roles. Visitors from the EU will not need a visa for the UK.

Potential issues with the new system

The proposals are controversial and will cause concern for many UK businesses.

The problems with the Points Based System are the time it takes to secure visas, the cost of providing these visas, and the complexities of managing a system which places a lot of emphasis on self-management without support from UK immigration authorities.

Costs may be particularly problematic for smaller businesses. The cost of a Tier 2 visa will be prohibitive, and the lack of low skilled visas will be problematic for certain sectors, such as retail and hospitality. A Tier 2 5-year visa costs over £8,000 GBP. Although small companies have a lower charge, many businesses will still find these fees untenable.

There are also question marks over exactly how many workers will be covered by the new system. A lower skill level will help, but there is a minimum salary level for Tier 2, which will mean many skilled roles will not qualify and employers outside London may struggle to meet the salary requirements. With unemployment at an all-time low in the UK, the new system could result in employers being unable to secure talented workers, and it will be harder for employers to recruit EEA workers following Brexit.

The UK Government is keen to promote the benefits of investing in the UK and how we remain open for business following Brexit, but it will need to do more to ensure that the immigration system reflects that position otherwise businesses may feel the opposite and invest elsewhere. ■

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States and Municipalities Taking Paid Sick Leave into Their Own Hands

By Erin Fowler

Over the last five years, employers, employees, and unions alike have seen an uptick in the number of paid sick leave and paid family leave laws, both being proposed and implemented. Although Connecticut implemented its paid sick leave statute in 2011, it was California's Healthy Workplace, Healthy Families Act of 2014 that ignited the firestorm of state and municipal legislation. Joining Connecticut and California, the following states have also enacted paid sick leave laws: Arizona, Maryland, Massachusetts, Michigan, New Jersey, Oregon, Rhode Island, Vermont, Washington, and Washington D.C.

Among municipalities and other units of local government, approximately 36 units of local government have enacted paid sick leave laws. Many of these local laws have seen legal challenges, or have been subsequently preempted by state law. Most notably, before New Jersey implemented its paid sick leave statute in October of 2018, 13 municipalities in the state had implemented paid sick leave laws. The state law preempted each of these local laws.



Additionally, the paid sick leave laws in Pittsburgh, Pennsylvania and Austin, Texas have both come under fire. In Pennsylvania, the challenge centers around whether Pittsburgh has the right to pass laws like this where the state has not specifically addressed or preempted such a law. In Texas, the question before the court is whether the law improperly impinges on the state's Minimum Wage Act.

Although the result of litigation in both cities remains to be

seen, these ordinances, like those in other states and municipalities, all share a number of common features including: (1) the amount of leave provided; (2) how that leave is to be accrued; (3) whether any unused leave can be carried over in to the next year; and (4) the permissible reasons for leave.

Many states and municipalities require employers to permit employees to use at least 40 hours (5 work days) of paid sick leave for a variety of purposes, such as:

- To care or to seek a medical diagnosis for their own or their family member's mental or physical illness, injury, or health condition;
- To seek preventive medical care for themselves or their family members;
- To comply with a public official's order closing their workplace or their child's care facility due to a public health emergency;
- To care for themselves or their family members when a health care provider has determined that a communicable disease might jeopardize the community; and
- For absences related to domestic or sexual violence, abuse, or stalking.

These laws continue to be proposed and enacted on a state and local level as employers, employees, and legislatures alike realize that a healthy workforce is a productive workforce. ■

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#MeToo

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- added protections for gender identity or expression; and
- established requirements for all employers, regardless of size, to adopt sexual harassment policies and provide annual sexual harassment training.

New York City

- extended gender-based harassment provisions to all employers, regardless of size.

Vermont

- extended gender-based

harassment provisions to all employers regardless of size;

- authorized employees to bring sexual harassment claims to government investigators, even after settling claims with an employer and/or signing a non-disclosure agreement; and
- barred employers from banning complainants from returning to work in settlements.

California

- expanded protections to cover sexual harassment by investors or others who hold themselves out as being able to help someone establish a

business, in response to widespread #MeToo complaints in the tech sector; and

- became the first State to require publicly traded companies to have at least one woman on their boards of directors.

While these State and municipal enactments expand protections, they reflect a quilt work response in which protections in some States far exceed those in others. Given the likelihood that Congress will not act before the next election cycle, the pivot to mass collective action, as an alternative to conventional legal strategies, may

likely gather additional steam.

Indeed, as the #MeToo movement further empowers employees to confront their employers, even as federal protections lag, the day may soon be at hand when employees turn to traditional union organizing, or some other model for collective representation, to demand and engage in bi-lateral bargaining with their employers over #MeToo rules, policies and procedures. ■

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OPINION

No More Shutdowns, Please!

By Jules Bernstein

March, 2020, will commemorate the 50th anniversary of the 1970 strike by a quarter million postal workers. Although hardly remembered because of the passage of time, it is a significant event in American labor history for several reasons. At the time, there was a move in Congress for “postal reform,” with the object of trying to make the then 182-year old, constitutionally established postal service function in a more businesslike manner. Local postmasters (as well as the Postmaster General) were political appointees who had no experience that qualified them for their jobs. Pay and benefits for postal workers were set by congressional enactment, but pay legislation had stalled over political conflicts involving postal reform. At the time, just as today, strikes by federal employees were forbidden and made criminal, subjecting violators to permanent job loss, fines and imprisonment.

Nevertheless, frustrated by Congress’s inaction on postal pay legislation, and chronic low pay, militant letter carriers, postal clerks and mail handlers in New York City began picketing post offices. Fellow postal workers refused to cross the picket lines and withheld their labor. To be sure, the strike was a “wildcat,” not sanctioned by any of the existing postal unions, but news of the New York City walkout spread across the country quickly

(even without the internet), and within a few days, about 250,000 postal workers “hit the bricks” from coast to coast, and the mail was not being delivered, especially to Wall Street.

President Nixon at first urged the postal workers to return to work, and threatened harsh consequences if they did not do so, but to no avail. He dispatched the National Guard to move the mail, but it turned out that the nation’s postal service was a highly skilled operation, requiring an experienced workforce, so this effort floundered as well. While some of Nixon’s aides urged stern measures, then Secretary of Labor George P. Shultz, and his deputy, Willie J. Ussery (later a Secretary of Labor), viewed the situation as a major labor dispute rather than an insurrection, and stepped in with Nixon’s backing. On the workers’ side, George Meany, then President of the AFL-CIO, took the lead, bringing to bear the support of the entire labor movement. In the end, the strike was settled in the White House, with a raise in pay and permanent collective bargaining for postal workers under the National Labor Relations Act, with the NLRB having jurisdiction, and terminal interest arbitration of contract disputes in lieu of the right to strike. So what started as potential criminal activity, resulted in a regime of relatively stable postal labor relations that has lasted over

the next half-century. The strike also must be remembered as an exercise of sheer “worker power,” successfully overcoming legal barriers and impediments, and ultimately leading to a positive labor relations outcome.

To be sure, the postal experience must be contrasted with the discharge by President Reagan of 11,385 striking Air Traffic Controllers in 1981—an act that Alan Greenspan, Chairman of the Federal Reserve Board, said in 2003, was Reagan’s most important domestic initiative because it “gave weight to the legal right of private employers, previously not fully exercised, to use their own discretion to both hire and fire workers.” Despite Greenspan’s pro-employer “spin” on the Reagan firings, most labor advocates see Reagan’s action as the commencement of almost four decades of concentrated national “union busting”.

Fast forward to the “lockouts” of federal workers in 2013 and 2018-19. Here, because of the inability of Congress to agree upon matters unrelated to federal employee rights and interests, Congress declined to enact legislation to fund a number of federal agencies, resulting in hundreds of thousands of federal employees either being furloughed or required to work without pay for more than a month in the 2018-2019 shutdown. The extreme hardships suffered by federal workers and their families as a result of this action have been well-documented and publicized.

All of these events, the “wildcat” postal strike in 1970, the Air Traffic Controller discharges in 1981, and the 2018-2019 lockout and denial of pay to federal employees who

were required to work despite not receiving their regular paychecks, make clear that something is seriously amiss in federal labor relations that requires repair. For one thing, there must be a way to ensure that the federal workforce is no longer the innocent victim of wrangling among political parties and politicians. The government consists in major part of a vital civil service that needs to be respected and supported, and not abused and politically interfered with. Indeed, the rationale for denying Federal employees the right to strike has been based upon the critical nature of their duties. If their duties are so critical, however, they should not be furloughed en masse, or forced to work without being paid.

What we need is legislation that gives to federal workers the assurance that they will never again be victimized by a government shutdown. This could be achieved with a permanent continuing resolution insuring uninterrupted federal pay. Legislation has long existed guaranteeing that judgments against the United States, as well as obligations of the United States, such as bonds, are paid on time, free of congressional interference. Similarly, Federal employees should be guaranteed payment of the wages they have earned, once due. That is the least the federal government should do for a dedicated workforce that keeps our nation’s social, financial and political processes running every day. ■

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Trump Administration

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Obama Board. Those rules, which went into effect in April, 2015, made several changes to the processing of representation petitions in order to expedite elections. For example, two of the changes required, respectively, that most elections must be held within 21 days of the filing of a

representation petition, and that consideration of certain “blocking charges” be deferred until after an election is conducted. In December, 2017, the Trump Board issued a Request for Information seeking input on whether those new election procedures should be rescinded. The period for comment ended in April 2018.

In January, 2019, the Trump Board reversed the Obama

Board’s 2014 precedent concerning the definition of “independent contractor” under the Act. In 2014, in *FedEx Home Delivery*, the Obama Board restated its multi-factor test and rejected the employer’s argument that the potential for entrepreneurial opportunity should be the decisive factor in determining independent contractor status. Instead, the Obama Board stated:

First, we make clear what the Board understands by entrepreneurial opportunity: an actual, not merely theoretical, opportunity for gain or loss. Second, in restating and refining our approach, we explain the place of entrepreneurial opportunity in the Board’s analysis, as part of a broader factor that—in the context of

weighing all relevant, traditional common-law factors identified in the Restatement—asks whether the evidence tends to show that the putative independent contractor is, in fact, rendering services as part of an independent business.

In *SuperShuttle DFW*, the Trump Board rejected the *FedEx* test, and reverted to what it termed the “traditional common law test” for employee status. It held that the shuttle drivers at issue were independent contractors because their “leasing or ownership of their work vans, their method of compensation, and their nearly unfettered control over their daily work schedules and working conditions provided the franchisees with significant entrepreneurial opportunity for economic gain.” NLRB Office of Public Affairs, Press Release, January 25, 2019, available at <https://www.nlr.gov/news-outreach/news-story/nlr-returns-long-standing-independent-contractor-standard>.

In addition, by an internal Board Directive issued September 14, 2018, the NLRB’s General Counsel altered the standard for union violations of the Duty of Fair Representation (DFR). Under the new standard, unions can be charged for acts such as losing track of a grievance or failing to promptly return a member’s phone calls about it. Previously, such acts would have been treated as “mere negligence,” not subject to DFR liability.

U.S. Department of Labor

The White House has proposed cuts of up to 21% to the budget of the Department of Labor (DOL). It has also made or proposed changes to several substantive rules, positions, and components of the DOL.

Oversight of Federal Contractors

President Trump signed an Executive Order and a Congressional Resolution rescinding President Obama’s Fair Pay and Safe Workplaces Executive Order, under which federal contractors were

required to monitor and report on their compliance with labor and civil rights laws. The Obama Executive Order imposed reporting requirements designed to provide paycheck transparency and eliminate wage theft. It also required large contractors to assess and report compliance with labor laws, and prohibited the use of pre-dispute arbitration agreements for discrimination disputes.

The Trump DOL also has rescinded a 2016 Obama DOL rule that required large companies to report to the government employee wage and salary data broken down by race and gender. The Obama rule was aimed at shrinking the gender and racial gap, but the current DOL concluded that was that the rule was too burdensome for employers. On March 4, 2019, however, the U.S. District Court for the District of Columbia blocked the new order and reinstated the previous 2016 rule, finding that the Trump DOL failed to provide an adequate basis for its decision to stay the data collection. The deadline for compliance with the requirement is currently set for May 31, 2019.

Union Regulation

In June, 2017, the Trump DOL rescinded the Persuader Rule, which the Department had adopted in March, 2016 after five years of active consideration. The Persuader Rule required companies to disclose contacts with outside consultants in response to employee unionization efforts. According to Obama’s Secretary of Labor Tom Perez.

Workers should know who is behind an anti-union message. It’s a matter of basic fairness. This new rule will allow workers to know whether the messages they’re hearing are coming directly from their employer or from a paid, third-party consultant. Full disclosure of persuader agreements gives workers the information they need to make informed choices about how they pursue their rights to organize and bargain collectively. As in all elections, more information means better decisions.

Overtime Rules

On March 7, 2019, the Trump DOL unveiled a long-awaited proposal to make more workers eligible for overtime pay. Under its proposal, workers who earn up to \$35,000 per year would be automatically eligible for time-and-a-half pay for all hours worked beyond 40 in a week. If adopted, this change would represent an increase over the current annual threshold of \$23,600, established in 2004. In May, 2016, the Obama DOL issued regulations that would have raised the annual threshold to \$47,500, but they were never implemented because a federal judge in Texas blocked them in November, 2016, just before they were to take effect. The Trump DOL’s proposal is considerably lower than the one the Obama DOL promulgated. And, unlike the Obama rule, it does not require automatic cost-of living adjustments to the salary threshold. The March 7 announcement invites public comments and initiates a notice and comment rule-making proceeding before the new proposal can take effect. Until then, the 15-year old threshold of \$23,600 remains in effect.

Occupational Safety and Health Administration (OSHA) Rules

The Trump Administration has removed numerous proposed items from OSHA’s rulemaking pipeline. The proposed rules covered various areas, such as noise in construction; welding; injury and illness prevention programs; and chemical management, including updated permissible exposure limits. Additionally, OSHA no longer supports an Obama-era rule requiring companies with at least 250 workers to submit detailed reports on workplace injuries. It has also curtailed Obama-era rules which sought to provide enhanced protection for workers against retaliation for reporting injuries or illnesses. By an internal memorandum, Trump DOL officials also have rescinded an OSHA policy allowing representatives of an outside union to tour a nonunion shop with an OSHA inspector.

National Mediation Board

Under the Trump Administration, the National Mediation Board (NMB), which oversees labor relations in the airline and railroad industries, has proposed a rule change aimed at simplifying its union decertification process, which would make it easier for such decertification petitions to succeed

Merit Systems Protection Board

The Merit Systems Protection Board (MSPB) is the agency charged with adjudicating federal workers’ claims of discrimination, unfair labor practices, and other personnel matters. Designed to be an independent agency and outside of partisan politics, the three-member Board hears appeals of decisions issued by administrative law judges in those cases. Under the Trump Administration, the MSPB has been severely understaffed. Moreover, since the Trump Administration took office, the MSPB has had only one member and, thus, no quorum to decide any cases. As of September, 2018, more than 1500 cases have awaited Board decision. On February 13, 2019, just before the only remaining Board member was scheduled to depart, the Senate approved two Trump Administration appointees. However, until the President nominates one more member to the Board, none of the nominees can be confirmed. Thus, as of March 1, the MSPB has no members.

Conclusion

In sum, the Trump administration has reversed or is seeking to reverse many Obama-era rules and policies. The impact of these changes is likely to make the administration of the labor laws less burdensome for employers and less protective of employees and unions. ■

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