PIERCE ATWOOD LLP

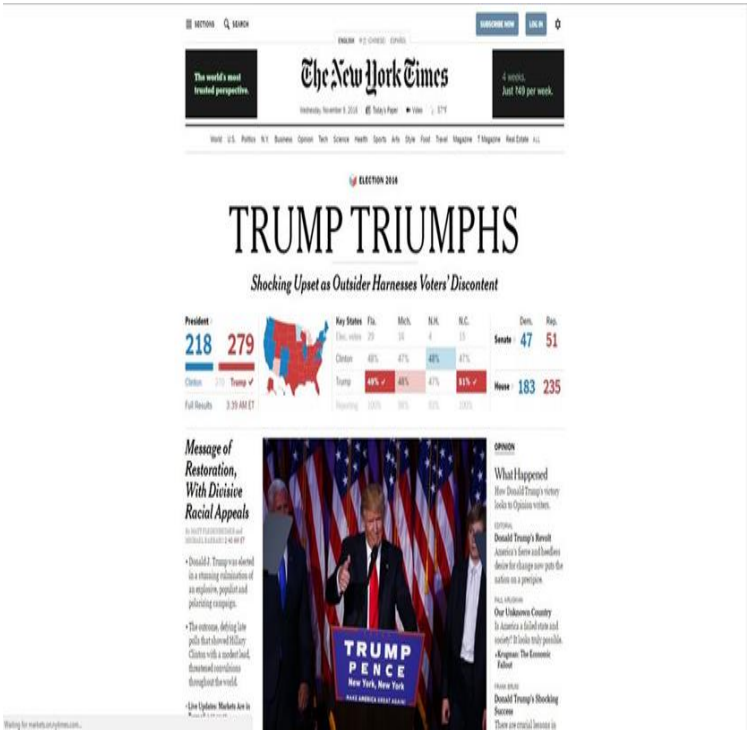
Annual Employment Law Wrap-Up:

What Happened in 2016 and What It Means for 2017

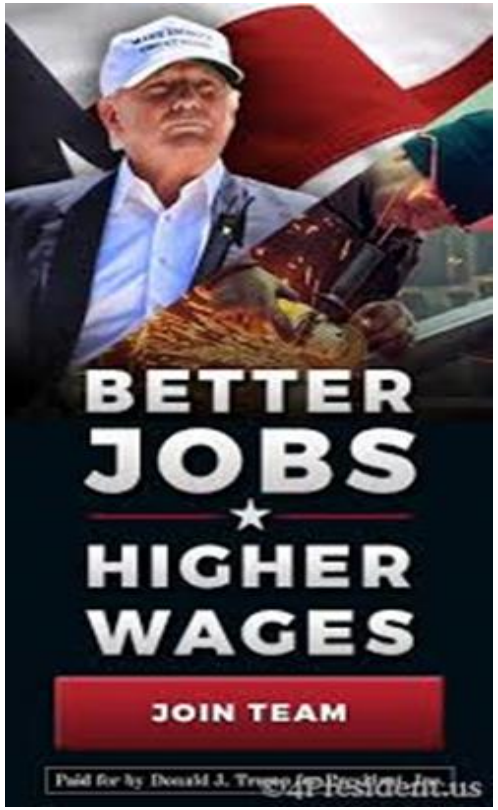
What Happened in 2016

- The Election!
- A Big Year for the Department of Labor
- EEOC
- NLRB/OSHA/DOJ
- Defend Trade Secrets Act
- State Law Developments

Historic Election



Historic Election



- Overtime regulations
- ACA – eliminate or modify
- Federal contractor requirements
- Immigration
- Paid family leave

Historic Election

- Supreme Court
  - One or more vacancies
  - Key cases this term
    - Enforceability of class action waivers
    - Pre-suit obligations of the EEOC in discrimination claims
    - Issue of transgender rights

Department of Labor

Core Changes under the New Rule

- Under the new rule, the salary required for "white collar" overtime exemption will increase from $455 per week ($23,660 for a full-year worker) to $913 per week ($47,476 for a full-year worker).
- The minimum salary threshold will update automatically every 3 years to reflect the 40th percentile of earnings in the lowest-wage region of the country.
- The "highly compensated employee" threshold will increase from $100,000 to $134,004.
- Qualifying non-discretionary bonuses and commissions can count for up to 10% of salary.

Overtime Regulations: What Now?

- 21 states sued DOL in Texas federal court
- Coalition of business groups led by US Chamber of Commerce also sued DOL in Texas
- Suits consolidated
- On Nov. 22, 2016, Texas court issued nationwide injunction, delaying implementation of the new regulations at least until the decision is reviewed by 5th Circuit

Joint Employment: DOL Guidance

- Administrator's Interpretation (*not* regulation)
- Joint employment "defined expansively"
- Horizontal joint employment
  - E.g., operations are intermingled; overlapping officers, directors, executives or managers; share clients or customers; agreements between the entities
- Vertical joint employment
  - Intermediary employer economically dependent on another employer (e.g., intermediary employer usually provides some employment function such as payroll or hiring)

Updated Posters

- Employers required to post revised posters as of August 1, 2016
  - Fair Labor Standards Act
    - Now includes information regarding rights of nursing mothers
  - Employee Polygraph Protection Act
- Posters no longer show civil monetary penalties that may be assessed for violations

Department of Labor

- Fiduciary Rule
  - Rule issued April 8, 2016
  - Expands retirement plan advisors subject to fiduciary standards of ERISA and prohibited transactions of Section 4975 of the Code
  - Significant impact on financial services industry
- Persuader Rule
  - Reportable persuader activities expanded by rule issued on March 24, 2016
  - Federal judge in Texas granted preliminary injunction, blocking enforcement of the Rule throughout the country

Equal Employment Opportunity Commission

EEOC Guidance re: National Origin Discrimination

- Dated November 18, 2016
- Defines "national origin" discrimination
  - "Discrimination because an individual (or his or her ancestors) is from a certain place or has the physical, cultural, or linguistic characteristics of a particular national origin group"
- Good discussion of language issues
  - Accent discrimination
  - Fluency requirements
  - English-only rules

EEOC Developments

- EEO-1 Report
  - Applies to federal contractors with 50 or more employees and private employers with 100 or more employees
  - Significant changes to reporting obligation
    - Employers must include W-2 pay and hours worked data for entire workforce
    - Goal is to identify pay disparities causing the wage gap between men and women
- Revised proposal:
  - EEO-1 filing deadline moved to align with W-2 reporting
  - Deadline for 2016 = 9/30/16 (without pay data)
  - Deadline for 2017 = 3/31/18
  - Subsequent deadline = March 31

Wellness Programs and the Final EEOC Rules

- ADA Final Rules
  - ADA generally prohibits employers from making disability-related inquiries or requiring medical examinations
    - If no disability related inquiries or required medical examinations, must be available to all employees and provide reasonable accommodations for employees with disabilities
  - There is an exception for "voluntary" wellness programs
    - Employer doesn't require participation or impose penalties for nonparticipation

Wellness Programs and the Final EEOC Rules (cont'd)

- To be "voluntary"
  - An employer may not require employees to participate in the program;
  - An employer may not deny coverage under any group health plan to employees for non-participation or limit the extent of benefits (except for permitted incentives – see next slide);
  - An employer may not take any adverse action, retaliate against, or coerce employees who choose not to participate; and

Wellness Programs and the Final EEOC Rules (cont'd)

- An employer must satisfy a specific notice requirement:
  - Written in language reasonably likely to be understood by the employee from whom the medical information is being obtained and that clearly explains what medical information will be obtained, how the medical information will be used, who will receive the medical information, the restrictions on its disclosure, and the methods the covered entity uses to prevent improper disclosure of medical information.
  - Applies to all wellness programs that ask employees to respond to disability-related inquiries and/or undergo medical examinations
  - Sample notice available on EEOC website

Wellness Programs and the Final EEOC Rules (cont'd)

- Employee Health Program Must Be "Reasonably Designed to Promote Health or Prevent Disease."
  - Has a reasonable chance of improving the health of, or preventing disease in, participating employees;
  - Is not overly burdensome;
  - Is not a mechanism for violating the ADA or other laws prohibiting employment discrimination; and
  - Is not highly suspect in the method chosen to promote health or prevent disease.

Wellness Programs and the Final EEOC Rules (cont'd)

- Programs consisting of a measurement, test, screening, or collection of health-related information without providing results, follow-up information, or advice designed to improve the health of participating employees are not reasonably designed to promote health or prevent disease
  - Unless the information is used to design a program that addresses at least a subset of conditions identified
- Applies to health-contingent programs and participatory-only programs.

Wellness Programs and the Final EEOC Rules (cont'd)

- Employee Health Programs Must Limit Incentives to be Voluntary
  - Limits the use of incentives with respect to the employee to no more than 30% of the total cost of self-only coverage
  - The final rule does not govern the financial incentives for a spouse, but many wellness programs applicable to spouses provide an incentive for the spouse to complete an HRA or participate in biometric screening.
  - The new GINA final rule will apply to the spouse; per EEOC, only allows for financial incentives up to 30% of the total cost of self-only coverage

Wellness Programs and the Final EEOC Rules (cont'd)

- Employee Health Programs Must Limit Incentives to be Voluntary (cont'd)
  - Limit applies to stand-alone wellness programs and wellness programs that are part of group health plan.
  - A smoking cessation program that asks employees about tobacco use is not an employee health program that includes disability-related inquiries or medical examinations - the 30% incentive limit does not apply
  - BUT any screening/procedure that tests for the presence of nicotine or tobacco would be subject to the 30% incentive limit.

Wellness Programs and the Final EEOC Rules (cont'd)

GINA Final Rule

- Employer may offer incentive to employee for employee's spouse to provide information about spouse's manifestation of disease or disorder as part of health risk assessment/biometric screening
- Rule applies to standalone wellness programs as well as programs offered through group health plan
- Must satisfy the "reasonably designed" test and limit maximum incentive to 30% of self only coverage

Wellness Programs and the Final EEOC Rules (cont'd)

- Prohibits incentives for information related to children (whether minor or adult)
- Tobacco use information is not genetic information
- Employer must get written authorization

Wellness Programs – ERISA Considerations

- If part of ERISA group health plan, then ERISA applies to wellness program
- If standalone program, then perform ERISA analysis
  - ERISA definition of "employee welfare benefit plan"
    - Plan, fund or program
    - Established or maintained by an employer
    - For the purpose of providing certain benefits through insurance or otherwise
    - To participants ad beneficiaries
  - If provides medical benefits (e.g., biometrics, health risk assessments that provide advice/counseling) then group health plan

Wellness Programs – ERISA Considerations (cont'd)

- ERISA requires, for example
  - Comply with Form 5500 filing requirements
  - Plan documents/SPD
  - Claims procedure

NLRB/OSHA/DOJ

National Labor Relations Board

- NLRB
  - "Hot button" issues: 24 types of cases that must be submitted to General Counsel's office for review, including:
    - Application of *Purple Rain* to electronic systems other than email
    - *Weingarten* rights in non-unionized settings
    - English-only policies violate the NLRA
  - Severance Agreements
    - Check confidentiality clause, company property return clause, and non-solicitation of employee clause
  - Social Media policies continue to attract NLRB attention

OSHA

- Electronic recordkeeping rule
  - By August 10, 2016 (not enforced until 11/1/16): Employers must inform employees that they have a right to report work-related injuries and illnesses and that employers are prohibited from retaliating against employees who report
  - Automatic post-accident drug/alcohol testing and safety incentive programs will likely be considered retaliatory (*see* 10/19/16 guidance)
  - By January 1,2017, certain employers must begin electronically filing injury and illness reports to OSHA (these reports will then be made public)
- OSHA Guidance regarding settlement agreements
  - Cannot ask employee to affirm that no report has been made to governmental agency; cannot require employee to waive right to receive monetary award

OSHA

- Workplace violence
  - Under the OSH Act, employers have a general duty to provide a safe working environment, free from recognized hazards that are likely to cause death or serious physical harm
  - Recent case: OSHA imposed $98,000 fine against home health care organization after employee was sexually assaulted by a home care client
    - Employer had received past reports of verbal, physical, and sexual assaults on other employees

Department of Justice

- Antitrust law and HR practices . . . really??
  - October 20, 2016 Antitrust Guidance for HR Professionals issued by FTC and DOJ
  - Agencies will pursue criminal sanctions in cases involving wage fixing or no-poaching agreements between competitors
  - Industry exchange of compensation and benefit data may also be prohibited unless:
    - Neutral third party is managing the exchange
    - Share only dated (not current) data
    - Ensure 5 or more employers reporting
    - All responses should be aggregated before reporting
  - Significant enforcement action in medical and high-tech fields
  - Generally applies to all employers
  - Open question – how are non-solicitation agreements treated under this guidance?

Defend Trade Secrets Act

Defend Trade Secrets Act

1. Federal civil cause of action
   - Adds civil action for trade secret misappropriation to EEA's existing criminal provisions
   - Largely tracks the UTSA
   - Parallel jurisdiction in state and federal courts
2. *Ex parte* seizure
   - Can obtain *ex parte* order providing seizure of property
   - When necessary to prevent *propagation or dissemination* of the trade secret
3. Whistleblower protections
   - Employer cannot obtain exemplary damages unless notice of immunity provided in employee agreements

Remedies - Injunctions

- Court may grant an injunction to prevent actual or threatened misappropriation
- Cannot prevent a person from entering into an employment relationship ***and*** conditions placed on employment must be based on evidence of threatened misappropriation
- Cannot otherwise conflict with State laws prohibiting restraints on practice of lawful profession, trade, or business

Remedies - Damages

- Actual damages – lost profits
- Unjust enrichment separate from actual damages
- OR a reasonable royalty
- Treble damages and attorney's fees available for willful and malicious misappropriation
- Attorney's fees also available for misappropriation claims brought in bad faith (which can be proven circumstantially) or motion to terminate injunction brought or opposed in bad faith

Whistleblower Immunity

- Immunity from civil and criminal liability under the EEA for employee's disclosing trade secret to government or an attorney solely for the purpose of reporting a suspected violation of law
- An employer shall provide notice of the immunity set forth in this subsection in any contract or agreement with an employee that governs the use of a trade secret or other confidential information.
  - Employee includes contractors and consultants
  - Consequence of noncompliance is inability to recover treble damages or attorney's fees

Now What?
Best Practices Under DTSA

Protect Trade Secrets

Adopt Policies

Use Non-Disclosure Agreements

Provide Required Notice of Whistleblower Immunity

Enforce: Protections, Policies, and Agreements

Protect Trade Secrets

- Definition of "trade secret" requires that the owner of the information "has taken reasonable measures to keep such information secret"
- To establish "reasonable measures":
  - Identify trade secrets
  - Adopt technological protections (passwords, limiting system access based on position, encryption, protection for personal devices, etc.)
  - Adopt physical protections (locked cabinets, file rooms, limit access to information, etc.)

Adopt Policies

Confidentiality Policy

- Define trade secrets
- Specify obligation to maintain secrecy of trade secrets during and following employment
- Identify consequences for improper use or disclosure
- Prohibit use of third-party (e.g., former employer) trade secrets
- Include whistleblower immunity language

Electronic Communications Policy

- Require strict adherence to all technological controls
- Address personal devices
- Address (prohibit?) use of personal email for work purposes
- Address (prohibit?) personal cloud storage for work purposes
- Prohibit sharing passwords

Return of Employer Property

- Include all forms of property, including electronic
- Insist on return no later than last day of employment
- For employer-provided portable devices, state that device will be remotely wiped

Use Non-Disclosure Agreements

- All employees subject to NDA
  - Note: not all employees are properly subject to non-compete/non-solicitation agreements, may need different agreements for different groups of employees
- Require as condition of employment
  - Identify this requirement in offer letter
- Define trade secret
- Prohibit disclosure during and after employment
- Include immunity language

Provide Required Notice of Whistleblower Immunity

- DTSA permits disclosure of trade secrets to the government or an attorney solely for the purpose of reporting a suspected violation of law
- Employer *must* provide notice of this immunity
  - "In any contract or agreement with an employee that governs the use of a trade secret or other confidential information"
  - Alternative: "provide a cross-reference to a policy document provided to the employee that sets forth the employer's reporting policy for a suspected violation of the law"
  - Recommend revising agreements *and* revising whistleblower policy
  - Notice must be given to employees, contractors, and consultants

Enforcement

- Ensure:
  - All employees receive policies (obtain signed acknowledgement)
  - All employees sign NDA
- Take disciplinary action for policy violations
- Upon termination:
  - Cut off all electronic access immediately
  - Insist on return of employer property
  - Remind employee about ongoing obligations under NDA

Notable DTSA Cases

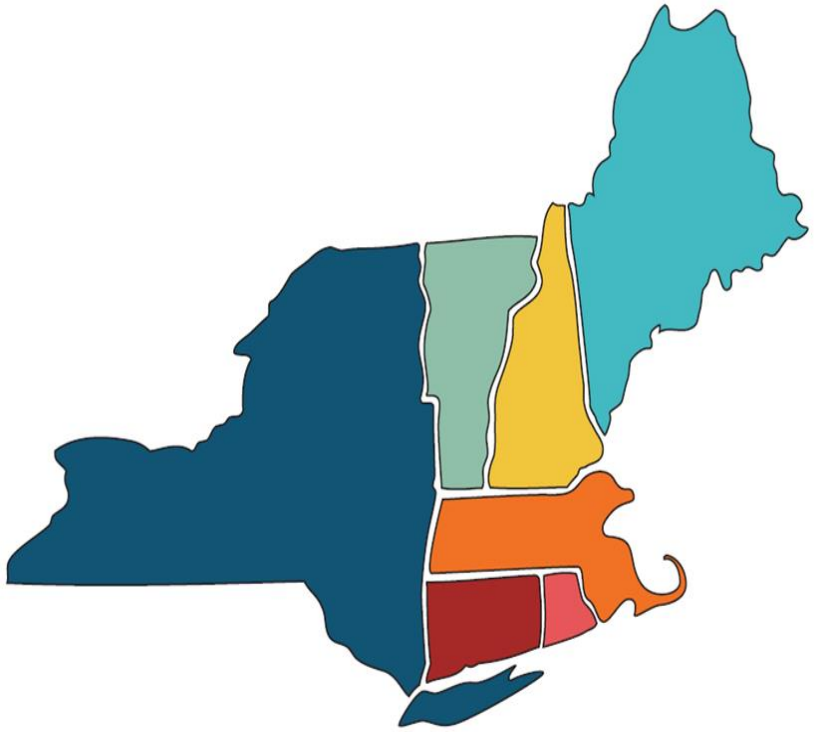
US v. Nosal

- Nosal and colleagues, who left employer to start up competing business, used a proprietary database to access confidential information after their user accounts had been terminated
  - $60,000 fine; one year prison sentence; $828,000 in restitution to employer

Earthbound v. Mitek

- Employees denied having any trade secrets; never signed any form of confidentiality agreement or non-disclosure agreement
- Forensic analysis produced extensive evidence that trade secrets had been misappropriated
- Preliminary injunction granted

State Law Developments



Maine

- Minimum Wage
  - Increase to $9/hr. in 2017 and then additional $1/hour each year until 2020
  - For servers, eliminate tip credit over 4 years
- Severance pay due to closing, substantial shutdown, or relocation of a covered establishment
  - Revisions effective July 19, 2016
  - Adds "mass layoff" as condition triggering severance pay liability
  - Defines eligible employee (must have been continuously employed at the covered establishment for at least 3 years)

Maine

- First Circuit whistleblower decisions:
  - *Harrison v. Granite Bay Care, Inc.*
  - *Pippin / Parker v. Boulevard Motel Corp.*
- Rolling back the "job duties" exception to the MWPA.
- To establish protected activity, plaintiff must show that report was intended to shed light on and "oppose" unlawful activity.
- Opposition may be demonstrated through words or conduct.

What It All Means for 2017

Internal review:

- Stay tuned to development regarding overtime regulations
- Carefully evaluate all relationships for joint employer exposure
- Update federal posters
- Analyze pay data to detect and address pay issues that will be reflected on EEO-1 report (and MA pay equity law, if applicable)
- Revise NDAs for trade secret issues
- Evaluate risk related to antitrust issues

What It All Means for 2017

Update your Employee Handbook

- Confirm appropriate language for injury and illness reporting, and include anti-retaliation language
- NLRB issues
  - Confidentiality policy
  - Return of company property
- Confirm compliance with new OSHA anti-retaliation guidance (safety incentives, etc.)
- Revise trade secret language, electronic communications policy

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