TRUMP-ERA EMPLOYMENT LAW DEVELOPMENTS

OVERVIEW

- New EEO-1 Form
- New Form I-9
- Status of the Overtime Rules
- Independent Contractor Developments
- Sexual Orientation Discrimination Under Title VII

NEW EEO-1 FORM

- **What is the EEO-1?**
  - The EEO-1 Report is a form that certain employers are required to submit annually to the EEOC and the Department of Labor, Office of Federal Contract Compliance (OFCCP). Historically, the EEO-1 form required covered employers to provide data about the job titles, ethnicity/race and gender of their employees.

- **Which employers must file the EEO-1 Report?**
  - Employers with 100 or more employees (or that are owned by or corporately affiliated with another company and the entire enterprise has over 100 employees).
  - Employers that have 50 or more employees AND have prime contracts or first-tier subcontracts with the federal government that exceed $50,000.

NEW EEO-1 FORM – CONTINUED

- **Why are we talking about this now?**
  - Last year, before the Obama Administration came to an end, the EEOC decided to expand the EEO-1 to require covered employers with more than 100 employees to start providing employee pay data beginning in March 2018.
  - With the new Administration and the EEOC short two Commissioners, it was unclear whether the new requirements were going to be pulled or changed
  - Just last night, the EEOC announced that **that OMB has initiated a review of the new pay data requirements and that the new requirements will be indefinitely stayed pending that review – meaning employers will only need to file the old EEO-1 this year.**

FORM I-9

- **What is it?**
  - The form that employers are required to use to verify the identity and work authorization of all employees in the U.S.

- **Why are we talking about this?**
  - There is a new version of the I-9 that employers must start using by September 18, 2017.

- **Is this the same new form that we were required to start using in January 2017?**
  - No - this is a newer version.

FORM I-9 – CONTINUED

- **What is different between this new version and the prior version of the Form I-9?**
  - Change 1 – The instructions update the name of the office that was formerly the "Office of Special Counsel for Immigration-Related Unfair Employment Practices" to its new name the "Immigrant and Employee Rights Section."
  - Change 2 - The instructions were changed to remove the pre-existing reference to the "end of" the "first day of employment." Now the instructions simply state that "[n]ewly hired employees must complete and sign Section 1 [of the Form I-9] no later than the first day of employment" without any reference to when during the first day of employment this must occur.
  - Change 3 - The I-9 adds the Form FS-240 (Consular Report of Birth Abroad Form) to the list of acceptable documents in List C on the Form and consolidates the various forms of "Certification of report of birth issued by the Department of State" into a single item on that list, thereby renumbering the other items on the list.

FORM I-9 – CONTINUED

- **What if an employer uses the wrong form?**
  - This is a legal violation that can result in fines, criminal prosecution and debarment from federal contracts.

- The new form and instructions are available on the U.S. Citizenship and Immigration Services' website.

- You can identify the latest version of the form by the "07/17/2017" issue date that appears in the bottom left-hand corner of the form.
  - The form effective January 22, 2017 is stamped with a "11/14/2016" issue date
  - The form that preceded that is stamped with a "03/08/13" issue date

STATUS OF OVERTIME RULES – BACKGROUND

- Under the federal Fair Labor Standards Act (FLSA), the default assumption is that all employees are subject to the law's minimum wage and overtime rules.

- In order to be exempt from the FLSA wage and overtime rules an employee must have certain duties (as defined by the FLSA and related regulations) AND be paid a guaranteed minimum salary.
  - The most commonly used exemptions are known as the "white collar" exemptions for certain executive, professional, administrative and computer employees.
  - There is also an exemption for "highly compensated" employees

- In March 2014, President Obama issued a Memorandum instructing the Secretary of Labor to update the regulations.

STATUS OF OVERTIME RULES – NEW RULES

- In May 2016 the DOL issued final rules to change the overtime exemptions for white collar and highly compensated employees. These new rules would:
  - Increase the required salary for the white collar exemption from the current $455 per week (or $23,660 annually) to $913 per week (or $47,476 annually).
  - Increase the required salary for the highly compensated employees from $100,000 annually to $134,004 annually.
  - Provide for the required salary levels to be adjusted every 3 years starting in 2020.
- The new rules were set to go into effect on December 1, 2016.

STATUS OF OVERTIME RULES – TIMELINE

- May 2016 – DOL issues final rules set to go into effect on December 1, 2016.
- November 23, 2016 – A federal district court judge in Texas issues a nationwide temporary injunction preventing the new rules from going into effect.
- Obama DOL appealed the injunction to Fifth Circuit Court of Appeals but the Administration changed between appeal and the DOL's next brief. Trump DOL got multiple extensions for the brief.
- June 30, 2017 – Trump DOL finally filed a brief. In the brief, the DOL does not defend the new overtime rule but argues that the DOL did have the authority to set the salary amounts.
- July 26, 2017 – DOL issues Request for Information seeking comments on the rules by Sep. 25.

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STATUS OF OVERTIME RULES – WHERE DO WE SEE THIS GOING

- The Obama-Era new overtime rules will likely never go into effect.
- The Trump DOL will engage in the rulemaking process (which can be difficult and slow moving) to issue its own new rules.
- The salary thresholds will increase (Secretary of Labor Acosta has said he supports this) but not as much as they were set to do under the Obama rules.

INDEPENDENT CONTRACTOR DEVELOPMENTS – WHY CLASSIFICATION MATTERS

- **Whether a worker is classified as an employee or an independent contractor matters for a number of different purposes, including:**
  - Federal and state wage and hour laws
  - Eligibility for leave and employee benefits
  - Workers' compensation insurance
  - Eligibility for unemployment compensation
  - Federal and state taxes
  - Anti-Discrimination laws
  - The National Labor Relations Act
  - The Employee Retirement Income Security Act (ERISA)
  - Tort and contract liability

INDEPENDENT CONTRACTOR DEVELOPMENTS – HOW CLASSIFICATION IS ASSESSED

- Each branch of government (inc. IRS, DOL and state authorities) that handle an area where the employee v. contractor distinction is relevant uses its own different test to determine whether someone can properly be classified as an independent contractor.

- However, there are a few common themes and emphases that are common across all of the tests:
  - Control of the worker
  - The workers' independence – financial and otherwise
  - The company's core business

INDEPENDENT CONTRACTOR DEVELOPMENTS – ADMINISTRATIVE/REGULATORY DEVELOPMENTS

- During the Obama Administration the Department of Labor (DOL) increased its emphasis on worker misclassification and took steps to clarify the economic realities test that it uses to assess classifications.

- In June, the Trump DOL withdrew its Obama-Era Administrator's Interpretation on independent contractors

- Potential for states or private litigation to try to fill the gap if the DOL and other federal agencies back off independent contractor focus

INDEPENDENT CONTRACTOR DEVELOPMENTS – LEGISLATIVE DEVELOPMENTS

- On July 25, 2017, Congressman Erik Paulsen (R-MN) introduced H.R.3396 to "change the classification of employees for service providers."

- In short, under the bill, if certain requirements are met – a service provider will not be treated as an employee and the business that hires them will not be treated as an employer for the purposes of the Internal Revenue Code

INDEPENDENT CONTRACTOR DEVELOPMENTS – LEGISLATIVE DEVELOPMENTS - CONTINUED

- For a service provider to qualify as a contractor under H.R.3396 –
  - The arrangements between the parties must meet certain requirements as to who bears the expenses and how the service provider is compensated;
  - The service provider must have their own principal place of business or provide services using their own equipment (or equipment they are financially responsible for); AND
  - There must be a written contract between the parties that meets certain requirements.

SEXUAL ORIENTATION DISCRIMINATION UNDER TITLE VII – OVERVIEW

- **What's the issue here?**
  - Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, and national origin.
  - The Supreme Court has recognized that Title VII's prohibition against sex discrimination extends to prohibit sex stereotyping or discrimination against a person who does not fit traditional gender roles.
  - There is an open question as to whether Title VII's prohibition against sex discrimination also extends to prohibit discrimination based on a person's sexual orientation.
  - The EEOC, after a long history of not viewing sexual orientation as covered by Title VII, reversed its position in 2015.

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SEXUAL ORIENTATION DISCRIMINATION UNDER TITLE VII – IN THE COURTS

- **The federal appeals courts that have considered this issue are split -**
  - In March 2017, the Eleventh Circuit Court of Appeals (which covers AL, GA and FL) ruled that Title VII does not prohibit discrimination based on sexual orientation (Evans v. Georgia Regional Hospital).
  - In April 2017, the Seventh Circuit Court of Appeals (which covers WI, IL and IN) concluded the opposite, that Title VII does prohibit discrimination based on sexual orientation (Hivey v. Ivy Tech Community College of Indiana, II)
  - The Second Circuit Court of Appeals (which covers NY, NH and CT) is also in the process of reviewing this issue.

SEXUAL ORIENTATION DISCRIMINATION UNDER TITLE VII – IN THE ADMINISTRATION

- **The federal agencies are now also split on this issue -**
  - The EEOC was asked by the Second Circuit to file an amicus brief in its pending case. On June 23, 2017, the EEOC filed a brief in which it maintained its prior position that sexual orientation discrimination is a form of sex discrimination.
  - Then on July 26, 2017, the Department of Justice filed a separate brief without invitation from the Court or either party in the case. In it's brief the DOJ, strongly disagreed with the EEOC, arguing that there are no federal protections against sexual orientation discrimination in the workplace and stating that "the EEOC is not speaking for the United States."

SEXUAL ORIENTATION DISCRIMINATION UNDER TITLE VII – WHERE IS THIS GOING AND WHAT SHOULD WE DO?

- Because of the split in the courts, this issue is almost certainly going to come up for consideration by the Supreme Court in the next few years.

- It is important to note that many states and localities expressly prohibit employment discrimination based on sexual orientation.

CONCLUSIONS

- The advent of the new Administration has created uncertainty in a number of employment law areas (and beyond!).

- In the context of employment law, businesses should also be aware of efforts by state and local governments to take action on items that the federal government has been unable or unwilling to.

QUESTIONS?

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