

Labor and Employment Law Developments in Higher Education

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Overtime

- In September, a Final Version of the Overtime Rule issued:
 - White Collar exemptions threshold raised to \$35,568 per year (\$684 per week)
 - Increases threshold for “highly compensated employees” to \$107,432 per year
 - Permits certain nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of a worker’s salary level

Overtime

- Approximately 1.3 million more workers will be overtime eligible
- Effective January 1, 2020
- Although the rule may be subject to legal challenges similar to the Obama-era rule, employers should prepare for the rule to take effect

FMLA

- Opinion Letters issued on whether an employer can “force” an employee to utilize FMLA leave
 - WHD advised that once an employee communicates a need for FMLA leave, an employer may not delay the designation of such leave
 - Opinion letter clarifies that employers have a legal obligation to designate FMLA-qualifying leave as protected
 - Conflicts with Ninth Circuit decision



FMLA Forms

- DOL has proposed revisions to the optional FMLA forms
 - Certification of need for leave
 - Notice of Eligibility of Rights
 - Designation Notice
- Public comment closed on October 4, 2019



National Labor Relations Board



National Labor Relations Board

- The NLRB has shifted towards more employer-friendly workplace standards, reversing many of the precedents set by the Obama Board
- Regulatory agenda for 2019:
 - Representation-case procedures
 - Blocking Charges, Voluntary Recognition, Construction Industry
 - Students as “employees”
 - Access to employer’s private property

Student Organizing

- NLRB's proposed rule would block graduate and undergraduate students who perform work for pay in conjunction with their academic studies from forming unions
 - Obama Board's 2016 decision in Columbia University
 - Proposed Rule is now subject to comment period; a final rule is expected in the Spring/Summer of 2020



Elections

- In August, the NLRB issued a Proposed Rule addressing three specific areas of representation procedures:
 - “Blocking charge” rule
 - “Voluntary Recognition Bar”
 - Recognition procedures in construction industry
- Comment period will run until December 10



Unilateral Changes

- In MV Transportation, Inc., majority changed the legal standard applicable to unilateral change cases
 - “Contract coverage” standard
 - Provides employers with greater flexibility to take action under “reservation of rights” language
 - Unions may still challenge unilateral changes through grievance and arbitration process



Union Access

- In UPMC Presbyterian Shadyside, the NLRB ruled that employers can ban union activity by non-employees on the employer’s property open to the public
 - Two non-employee union organizers held meetings in hospital's public cafeteria
 - In 2-1 decision, Board rejected “public space” exception
 - As long as employer does not treat union representatives differently than other non-workers, businesses may prohibit solicitation



United States Supreme Court



LGBT Bias Cases

- Three cases before the Supreme Court on whether Title VII's prohibition on discrimination "on the basis of . . . sex" includes sexual orientation and gender identity
 - R.G & G.R. Harris Funeral Homes v. EEOC
 - Bostock v. Clayton County
 - Altitude Express Inc. v. Zarda

LGBT Bias Cases

- Argued on October 8, 2019
- Outcome of this case may be significant as less than half of states currently bar discrimination based on sexual orientation or gender identity
 - Depending on the outcome, employers should expect state and local legislative actions



Charge Filing Requirements

- SCOTUS held that the requirement to file a charge of discrimination with the EEOC is not a jurisdictional requirement under Title VII.
 - Rather, it is non-jurisdictional mandatory claim-processing rule
 - As a result, employers must now timely raise any defense of failure to exhaust administrative remedies or face the risk that defense will be waived



State and Local Issues



Athletics

- New California law that would allow college athletes in the state to sign endorsement deals, despite NCAA rules
 - On October 15, 2019, two Pennsylvania lawmakers introduced the “Fair Pay to Play Act”
 - A similar bill has also been introduced in New York; lawmakers in South Carolina and Florida have announced that they plan to do the same



Nondisclosure Agreements Relating to Claims of Sexual Harassment

- Several states and municipalities have begun passing legislation preventing employers from requiring confidentiality provisions in Settlement Agreements
 - New Jersey
 - New York
 - Pending legislation in Pennsylvania