PRESENTATION

2015 Labor and Employment Wrap-Up

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Today's Agenda

10 of the biggest labor and employment stories from 2015…

EXPANDED LGBT PROTECTIONS

- Following the *Windsor* decision (striking down Section 3 of the Defense of Marriage Act) and the U.S. Supreme Court decision in *Obergefell v. Hodges* (striking down state statutes banning same-sex marriage), there has been pressure on Congress to amend Title VII to include “gender identify” and “sexual orientation” as protected categories.
  - Those efforts have stalled in Congress, however the Obama administration, through executive agencies, has acted.
- The Family and Medical Leave Act (FMLA), administered through the DOL, entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons. The FMLA also includes certain military family leave provisions.
- The Department of Labor issued a Final Rule on February 25, 2015 revising the regulatory definition of **spouse** under the FMLA.

EXPANDED LGBT PROTECTIONS

- The Final Rule amends the regulatory definition of spouse under the FMLA so that eligible employees in legal same-sex marriages will be able to take FMLA leave to care for their spouse or family member, regardless of where they live. This will ensure that the FMLA will give spouses in same-sex marriages the same ability as all spouses to fully exercise their FMLA rights.

- The effective date for the final rule was March 27, 2015.

EXPANDED LGBT PROTECTIONS (continued)

- **Major features of the Final Rule**
- The Department has moved from a “state of residence” rule to a “place of celebration” rule for the definition of spouse under the FMLA regulations. The Final Rule changes the regulatory definition of spouse in 29 CFR §§ 825.102 and 825.122(b) to look to the law of the place in which the marriage was entered into, as opposed to the law of the state in which the employee resides. A place of celebration rule allows all legally married couples, whether opposite-sex or same-sex, or married under common law, to have consistent federal family leave rights regardless of where they live.

EXPANDED LGBT PROTECTIONS (continued)

- For example, under the old definition of spouse, if a couple was married in California, a State that legally recognizes same sex-unions, but the couple relocated to Tennessee, a State that does not recognize same-sex unions, and both worked for companies where FMLA benefits were offered and they otherwise qualified, a same-sex couple under the "State of residence" rule would not have been entitled to spousal FMLA benefits by virtue of living in Tennessee.
- Under the revised Final Rule, and its "place of celebration" rule, that same couple will be entitled to spousal benefits under the FMLA, regardless of the fact they reside in Tennessee, because their same-sex union was performed in a State, California, that recognizes the marriage.

EXPANDED LGBT PROTECTIONS (continued)

- The Final Rule's definition of spouse expressly includes individuals in lawfully recognized same-sex and common law marriages and marriages that were validly entered into outside of the United States if they could have been entered into in at least one state.
- **What impact does this definitional change have on FMLA leave usage?**
- This definitional change means that eligible employees, regardless of where they live, will be able to
  - take FMLA leave to care for their lawfully married same-sex spouse with a serious health condition,
  - take qualifying exigency leave due to their lawfully married same-sex spouse's covered military service, or
  - take military caregiver leave for their lawfully married same-sex spouse.

EXPANDED LGBT PROTECTIONS (continued)

- This change entitles eligible employees to take FMLA leave to care for their stepchild (child of employee's same-sex spouse) regardless of whether the *in loco parentis* requirement of providing day-to-day care or financial support for the child is met.
- This change also entitles eligible employees to take FMLA leave to care for a stepparent who is a same-sex spouse of the employee's parent, regardless of whether the stepparent ever stood *in loco parentis* to the employee.

- For employers in States that do not recognize same-sex unions, as of March 27, 2015, all FMLA rights previously only afforded to heterosexual married couples must be afforded to same-sex married couples. For employers that operate in multiple States, the Final Rule brings consistency and definitiveness as to how to treat same-sex employees under the FMLA- exactly the same as heterosexual married couples who celebrated legal marriages.

- The full text of the Final Rule can be found at http://www.dol.gov/whd/fmla/spouse/.

NLRB- Browning Ferris- Joint Employer Expansion

- One of the biggest agency decisions of President Obama's tenure
- Handed down August 27, 2015
- Could have broad repercussions in the business world- particularly for franchise companies and those that use staffing agencies to supply temporary workers or contract with other companies to complete tasks.

- So what was it all about? . . . . .

NLRB- Browning Ferris- Joint Employer Expansion (continued)

- Most employment related statutes only apply to “employers.” Whether a company is an employer under federal law thus depends on the statute being applied and the test that is used.
- President Obama’s administration is actively seeking to expand the definition of “employer” through a variety of regulatory actions in order to use federal regulation and executive orders to fundamentally change the nature of the American workplace.
- In the Browning Ferris matter, the NLRB reconsidered the meaning of “joint employers” under the NLRA.
  - The NLRA was enacted in 1935 to guarantee to employees the right to organize, form unions and bargain collectively with employers.

NLRB- Browning Ferris- Joint Employer Expansion (continued)

- In a 3-2 decision involving Browning-Ferris Industries of California, the NLRB refined its standard for determining joint-employer status.
  - The case overturned 30 years of precedent.
- Joint employer liability under the NLRA is no longer limited to companies that "directly and immediately" exercise control over the terms and conditions of another company's employees' employment.
- The NEW joint employment standard, instead, imposes joint employer liability where a company retains the authority to *directly or indirectly* control employees' terms and conditions of employment – even if such authority is not exercised.

- According to the NLRB, the revised standard is designed "to better effectuate the purposes of the Act in the current economic landscape."

NLRB- Browning Ferris- Joint Employer Expansion (continued)

- With more than 2.87 million of the nation's workers employed through temporary agencies in August 2014, the Board held that its previous joint employer standard has failed to keep pace with changes in the workplace and economic circumstances.
- In the decision, the Board found that two or more entities are joint employers of a single workforce if:
  - (1) they are both employers within the meaning of the common law; and
  - (2) they share or codetermine those matters governing the essential terms and conditions of employment.

NLRB- Browning Ferris- Joint Employer Expansion (continued)

- In evaluating whether an employer possesses sufficient control over employees to qualify as a joint employer, the Board will – among other factors -- consider whether an employer has exercised control over terms and conditions of employment indirectly through an intermediary, or whether it has reserved the authority to do so.
- The Board will now consider “indirect control” to be a factor in whether a joint employment relationship exists under the NLRA
- According to the Board, the definition of “employer” should encompass as many employment relationships as possible to foster collective bargaining.

NLRB- Browning Ferris- Joint Employer Expansion (continued)

- Browning Ferris signals to employers that executive agencies will be looking at their respective joint employer standards.
  - For instance, the FLSA, Title VII, the ADA and the ADEA all have been interpreted as recognizing joint-employer liability, although all currently require actual exercise of direct control (as opposed to unexercised indirect control) over employee's day-to-day activities.
  - The DOL, EEOC and OSHA have all indicted that they will be looking at the definition of joint employer with an eye towards an expansive reading

Ford Decision- Telecommuting as a Reasonable Accommodation

- On April 10, 2015, in an eagerly awaited decision interpreting the reasonable accommodation provisions of the Americans with Disabilities Act ("ADA"), the United States Court of Appeals for the Sixth Circuit ruled, *en banc*, in favor of Ford Motor Co., rejecting the EEOC's claim that Ford violated the ADA by not allowing a disabled employee to telecommute as a reasonable accommodation. *EEOC v. Ford Motor Co.*, No. 12-2484.
- Eight judges on the Sixth Circuit ruled in favor of Ford, while five dissented. The decision highlights many of the thorny issues concerning telecommuting as a potential reasonable accommodation under the ADA. It also underscores the importance of engaging in a good faith "interactive process" with a disabled employee requesting accommodation.

Ford Decision- Telecommuting as a Reasonable Accommodation (continued)

- Facts:
  - Harris was employed by Ford as a steel resale buyer. She acted an intermediary between Ford's steel suppliers and its parts manufacturers. Ford claimed this position was highly interactive, requiring face-to-face interactions as the manufacturing sites.
  - Harris had IBS. As an accommodation she asked to work from home as needed up to 4 days a week. Ford denied the request, after several meetings, because it said the telecommuting request would prevent her from performing an essential function of her job. It offered alterative accommodations that were rejected.
  - Harris filed an EEOC charge and the EEOC sued Ford on her behalf.

Ford Decision- Telecommuting as a Reasonable Accommodation (continued)

- Facts (cont):
  - The district court agreed with Ford that working from home 4 days a week was not a reasoanble accomodation under the ADA.
  - The EEOC appealed and a divided panel of 3 Sixth Circuit judges reversed, concluding that there was an issue of fact as to whether Harris's telecommuting proposal was reasonable.
  - The full Sixth Circuit vacated the 3 judge panel and reheard the appeal *en banc.* It affirmed the grant of summary judgment to Ford.
  - The court concluded that "regular and predictable on-site attendance was an essential function (and a prerequisite to perform other essential functions) of Harris's resale- buyer job."

Ford Decision- Telecommuting as a Reasonable Accommodation (continued)

- Importantly, the court went further and stated "in most jobs, especially those involving teamwork and a high level of interaction, the employer will require regular and predictable on-site attendance from all employees," and "most jobs would be *fundamentally altered* if regular and predictable on-site attendance is removed."

- It is important to note that the Court did *not* rule out telecommuting as a reasonable accommodation in all cases. Rather, based on the facts of this case and her job in particular, the Court determined telecommuting would not allow her to perform her essential job functions.

Ford Decision- Telecommuting as a Reasonable Accommodation (continued)

- Take Aways:
  - The Sixth Circuit concluded “most jobs” require regular and predictable on-site attendance.
  - Spell out regular and predictable job attendance as an essential function in job descriptions (when it is)
  - Be able to distinguish granted telecommuting arrangements from those that are denied based on actual job duties.
  - Engage in the interactive process and document the engagement.
  - An employees request for a telecommuting accommodation should be the starting point for a discussion between the employer and the employee. Understand there is no one-size-fits all formula to address a request.

Abercrombie- Religious Accommodations

- The case arose when Elauf, then a teenager who wore a headscarf or hijab as part of her Muslim faith, applied for a job at an Abercrombie & Fitch store in her hometown of Tulsa, Okla.
- She was denied hire for failing to conform to the company's "look policy," which Abercrombie claimed banned head coverings.
- Elauf then filed a charge with the EEOC, alleging religious discrimination, and the EEOC filed suit against Abercrombie, charging that the company refused to hire Elauf due to her religion, and that it failed to accommodate her religious beliefs by making an exception to its "look policy" prohibiting head coverings.

Abercrombie- Religious Accommodations (continued)

- EEOC won on summary judgment in the District Court.
- Tenth Circuit reversed and held that an employer cannot be held liable under Title VII for failing to accommodate a religious practice until the job applicant provides the employer with actual knowledge of the need for an accommodation.
- The Supreme Court reversed the Tenth Circuit.

Abercrombie- Religious Accommodations (continued)

- In its June 1, 2015 decision, the Supreme Court held (8-1) that an employer may not refuse to hire an applicant if the employer was motivated by avoiding the need to accommodate a religious practice. Such behavior violates the prohibition on religious discrimination contained in Title VII of the Civil Rights Act of 1964.

- The Court held that "an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision."
  - The court said unlike the ADA, Title VII did not have a knowledge requirement; rather Title VII prohibits certain *motives*
  - "The rule for disparate treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."

Abercrombie- Religious Accommodations (continued)

- Following the Supreme Court's decision, the company paid $25,670 in damages to the woman and $18,983 in court costs, according to the Equal Employment Opportunity Commission (EEOC), which brought the complaint against Abercrombie.
- According to the EEOC, this represents the final resolution of EEOC v. Abercrombie & Fitch, which was first filed in 2009.

- To assist employees and employers in understanding their rights and obligations about accommodations for religious observances, the EEOC has a fact sheet on Religious Garb and Grooming in the Workplace.

Abercrombie- Religious Accommodations (continued)

- Train hiring managers and interviewers. The need for a religious accommodation – whether known or suspected, is irrelevant (absent an undue hardship) in the hiring process- much like race or gender.
- During the interview do not ask about religion. However an interviewer can ask whether or not an applicant can meet key positional requirements (working Sundays for example). If the applicant says no- you can ask "why not" and then engage in a reasonable accommodation discussion.
- Document outcome of accommodation requests.

Ban the Box

- Asking an applicant to disclose criminal history.
- Movement started in 2004 and picked up steam recently.
- Seeks to delay or prohibit the disclosure of criminal history.

Reasons to Ask

- Reduce Exposure to Litigation
  - Respondeat Superior (let the master answer) - Plaintiff must show that employee acted within the course and scope of employment.
  - Independent Employer Negligence Claims – negligent hiring, supervision and retention.

Reasons to Ask

- Reduce Risk of Workplace Violence

- Reduce Risk of Dishonesty and Fraud
  - Inventory theft
  - Theft from fellow employees
  - Embezzlement
  - Fraud

EEOC's View

- Rejecting applicants with a criminal conviction disproportionately discriminates against minorities.
  - White males – 2.6% chance of incarceration
  - Hispanic males – 7.7%
  - African American males – 16.6%

EEOC

- If employer uses a targeted screening process, it must individually consider the rejected applicants to determine if the screen is job related and consistent with job necessity.
- Employer should consider:
  - nature and gravity of the offense
  - how much time has passed since the offense.
  - nature of the job sought

Ban the Box

- 18 states and over a hundred municipalities have passed Ban the Box legislation.
  - The legislation is not uniform.
  - For example in Nashville, the Metro Civil Service Commission unanimously voted to no longer ask applicants if they have been convicted.
  - Some statutes prohibit inquiry until after an interview or a conditional offer of employment has been made.
  - Some statutes prohibit any inquiry.

Executive Order 13658: Minimum Wage for Federal Contractors

- Applies to four contract categories:
  - Procurement contracts for construction covered by the Davis-Bacon Act (Prime contracts that exceed $2000);
  - Service contracts covered by the Service Contract Act (Prime contracts that exceed $2500);
  - Concessions contracts
  - Contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

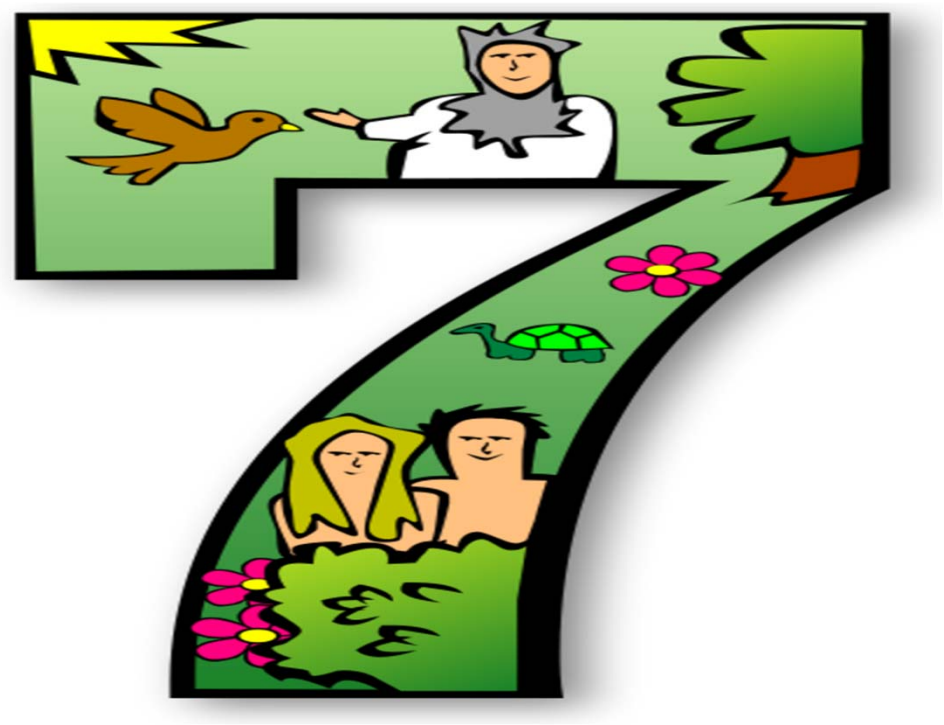
Executive Order 13658: Minimum Wage for Federal Contractors

- For procurement contracts where workers' wages are governed by the FLSA, the Order specifies that it applies only to contracts that exceed $3,000.
- There is no value threshold requirement for subcontracts awarded under such prime contracts.
- The Executive Order minimum wage generally applies to workers performing on or in connection with the above types of contracts if the wages of such workers are governed by the DBA, the SCA, or the FLSA.
- Every year, the Secretary of Labor will review it based upon the consumer priced index and will round to the nearest $.05.
- The Secretary of Labor cannot reduce it.

Executive Order 13658: Minimum Wage for Federal Contractors

- Effective January 1, 2015, the minimum wage was raised to $10.10 per hours

- Effective January 1, 2016, it will increase to $10.15 per hour.



NLRB's Guidance on Handbooks and Rules

- Employers may not prohibit employees from engaging in protected concerted activities and/or union activities protected by Section 7 of the National Labor Relations Act.

- Employees' comments and conduct about **terms and conditions** of employment are protected when they are made with or on behalf of other employees or where they discuss or seek to induce group action by employees.

NLRB's Guidance on Handbooks and Rules

- Employees are engaged in protected concerted activity when they are expressing a concern regarding terms and conditions of employment (including actions of supervisors) on behalf of co-workers, in concert with co-workers, or on a matter of common concern to co-workers.

NLRB's Guidance on Handbooks and Rules

- NLRB takes the position that merely having a rule that has a chilling effect on employees engaging in protected concerted activity under Section 7 of the NLRA is unlawful.
- Remember the NLRA applies to union and non-union work environments.
- Primary recommendation is that handbook or other employee conduct policies include clear and specific language, precise examples, and explanatory context so that employees will not reasonably construe the policies to violate their Section 7 rights.

NLRB's Guidance on Handbooks and Rules

- Confidentiality Policies
- Employee Conduct Policies
- Contact with Media
- Intellectual Property
- Audio, Video, and Photographs
- Strikes and Walkouts
- Non-Disclosure of Employee Handbook
- Social Media Policies

NLRB's Guidance on Handbooks and Rules

- Be specific and not overbroad
- Include examples
- Provide context
- Seek legal advice

NLRB’s Guidance on Handbooks and Rules

Wage and Hour

March 13, 2014 Presidential Memorandum to the Secretary of Labor, Tom Perez

- The “white collar” exemption regulations are outdated.
- Millions of Americans should be paid overtime and are not because the regulations are outdated.

*“Therefore, I hereby direct you to propose revisions to **modernize and streamline** the existing overtime regulations... and **simplify** the regulations to make them easier for both workers and businesses to understand and apply.”*

Wage and Hour

Exemption depends on three things:

1. ***How*** employees are paid **SALARY BASIS**
   - Employee must be paid a pre-determined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed
   - No partial day deductions
2. ***How much*** they are paid **SALARY LEVEL**
   - Currently this is $455/week or $23,660 per year
3. **What *kind of work*** do they do **JOB DUTIES TEST**
   - Each category of exemption – Executive, Administrative and Professional – has different required job duties as set forth in the regulations (ex. regularly supervises two or more employees)

What Changes Did The DOL Propose?

Exemption depends on three things:

1. **How** employ…
   - …s
2. H…
   - …
3. W…
   - …JOB DUTIES TEST
   - E… exemption – Executive, Administrative and Professional – has different required job duties as set forth in the regulations (ex. regularly supervises two or more employees)

Must satisfy ALL THREE of these tests to be exempt from overtime.

Paying salary alone is not enough!

Salaried employee is not the same as "exempt" employee.

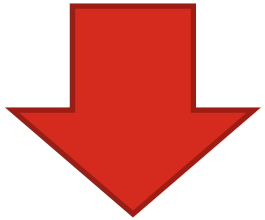
What Changes Did The DOL Propose?

Exemption depends on three things:

1. ***How*** employees are paid → **SALARY BASIS**
   - Employee must be paid a pre-determined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed
   - No partial day deductions
2. ***How much*** they are paid → **SALARY LEVEL**
   - Currently this is $455/week or $23,660 per year
3. ***What kind of work*** do they do → **JOB DUTIES TEST**
   - Each category of exemption – Executive, Administrative and Professional – has different required job duties as set forth in the regulations (ex. regularly supervises two or more employees)

What Changes Did The DOL Propose?

To currently qualify for exemption, employees be paid on a **salary basis** at not less than **$455 per week ($23,660.00 annually).**



The new proposed salary threshold for exemption is $50,440 ($970 per week)!

- More than two times the current salary basis
- 40th percentile of weekly earnings for full-time salaried workers nationwide
  - Compared to 2004 – looked at 20th percentile of salaried employees in South and retail industry

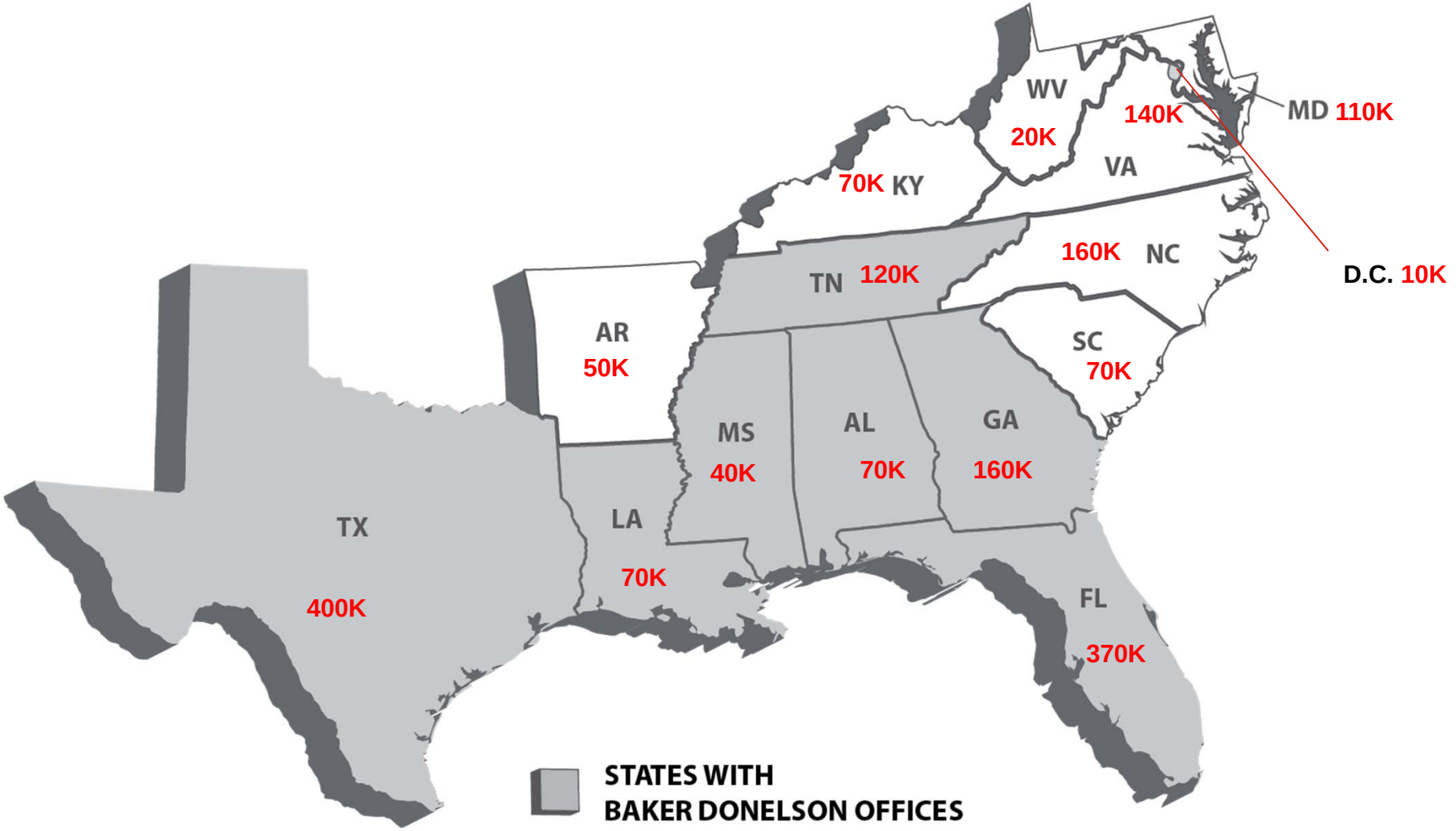
- DOL is also proposing to include a mechanism to **automatically update** the salary and compensation thresholds *annually* using a fixed percentile of wages or the Consumer Price Index.

Wage and Hour

Any of your salaried "exempt" employees (i.e., currently ineligible for overtime pay) who make less than $970 per week or $50,440 annually will **be re-classified as non-exempt and entitled to overtime when the final rule goes into effect.**

- Also required to comply with the DOL's **record keeping** requirements for non-exempt employees:
  - hours worked each day
  - total hours worked each week
  - daily/weekly straight time earnings for the workweek
  - overtime earnings for the workweek

WORKERS AFFECTED BY DEPARTMENT OF LABOR'S PROPOSED OVERTIME REGULATIONS



What Do We Do Now?

- Increase pay of every exempt employee to $50,440 per year.
- Hire more employees.
- Restructure job assignments.
- Determine hourly pay scale for employees making less than $50,440 per year.
- Implement the fluctuating work week method.
- Train supervisors and employees.

Young v. UPS, Inc.

- Pursuant to its collective bargaining agreement UPS only allowed light duty in the following circumstances:
  1. Employees with limitations arising from on the job injuries;
  2. Employees considered “disabled” under the ADA; and
  3. Employees who temporarily lost DOT certification.

The Facts . . .

- Ms. Young gives her supervisor a doctor's note stating she should not lift more than twenty pounds for the first twenty weeks of her pregnancy and not more than ten pounds thereafter.
- The supervisor gives the note to HR.
- HR informs Ms. Young that she is not among the categories of employees that are entitled to light duty.
- Ms. Young takes unpaid leave for the duration of her pregnancy losing income as well as her medical coverage months before the birth of her child.
- Ms. Young sues UPS for pregnancy discrimination under Title VII of the 1964 Civil Rights Act.

And loses

Twice

Remember

The PDA states, “women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes as other persons not so affected **but similar in their ability or inability to work**.”

Ms. Young argued

- When employers give a benefit to some employees who are similar to a pregnant employee in their limitations on working, employers must give that same benefit to the pregnant employee.
- So if UPS gives light duty assignments to an employee injured on the job who has temporary lifting restrictions, they should also give light duty assignments to pregnant employees who have temporary lifting restrictions.

UPS argued

- The policy is a pregnancy-blind policy and that to win her case Young needed to prove she was denied the accommodation because of bias against her as a pregnant woman.

UPS Argued

- Many non-pregnant employees were also denied light duty.
- In other words, UPS argued that its policy is not biased against pregnant workers, it's just that pregnant workers don't fit into any of its categories of workers entitled to accommodations.

The Supreme Court Weighs In

- The case was decided March 25, 2015.
- The Court held, “In our view, the [Pregnancy Discrimination Act] requires courts to consider the extent to which an employer’s policy treats pregnant workers less favorably than it treats non-pregnant workers similar in their ability or inability to work. . . Ultimately the court must determine whether the nature of the employer’s policy and the way in which it burdens pregnant woman shows the employer has engaged in intentional discrimination.”
- The Court noted that the PDA does NOT give pregnant employees “an unconditional most favored-nation status” and declined to rely significantly on the EEOC’s July 2014 guidance.

The Supreme Court Weighs In

- In the Court's determination, Young had created a genuine issue of material fact on the issue of whether she was disparately treated and therefore remanded the case back for further factual development. (The case has already been pending 9 years!)
- What does this mean for employers?
  - Court declined to interpret the PDA as creating an obligation on the employer to accommodate a pregnant employee if it accommodates any employee. Instead, it posed the inquiry- "Why, when the employer accommodates so many, could it not accommodate a pregnant woman as well."
  - If you are accommodating a large number of employees but not pregnant workers (and you can't articulate a reason for this discrepancy) it may be time to revise policies.

NLRB's Ambush Election Rule

- On December 15, 2014, the National Labor Relations Board ("NLRB") issued a Final Rule amending 29 C.F.R. Parts 101, 102, and 103 with regard to Case Procedures for Representation Elections. The Rule went into effect **April 14, 2015.**
- **This rule implements sweeping changes to union elections and reflects the NLRB's pro-labor leanings.**

NLRB Representation Case-Procedures Fact Sheet

(Prepared by the NLRB)

The National Labor Relations Board's (NLRB) Final Rule governing representation-case procedures is designed to remove unnecessary barriers to the fair and expeditious resolution of representation questions. The Final Rule will streamline Board procedures, increase transparency and uniformity across regions, eliminate or reduce unnecessary litigation, duplication and delay, and update the Board's rules on documents and communications in light of modem communications technology. The amendments provide targeted solutions to discrete, specifically identified problems to enable the Board to better fulfill its duty to protect employees' rights by fairly, accurately and expeditiously resolving questions of representation

- Full Fact Sheet available at www.nlrb.gov

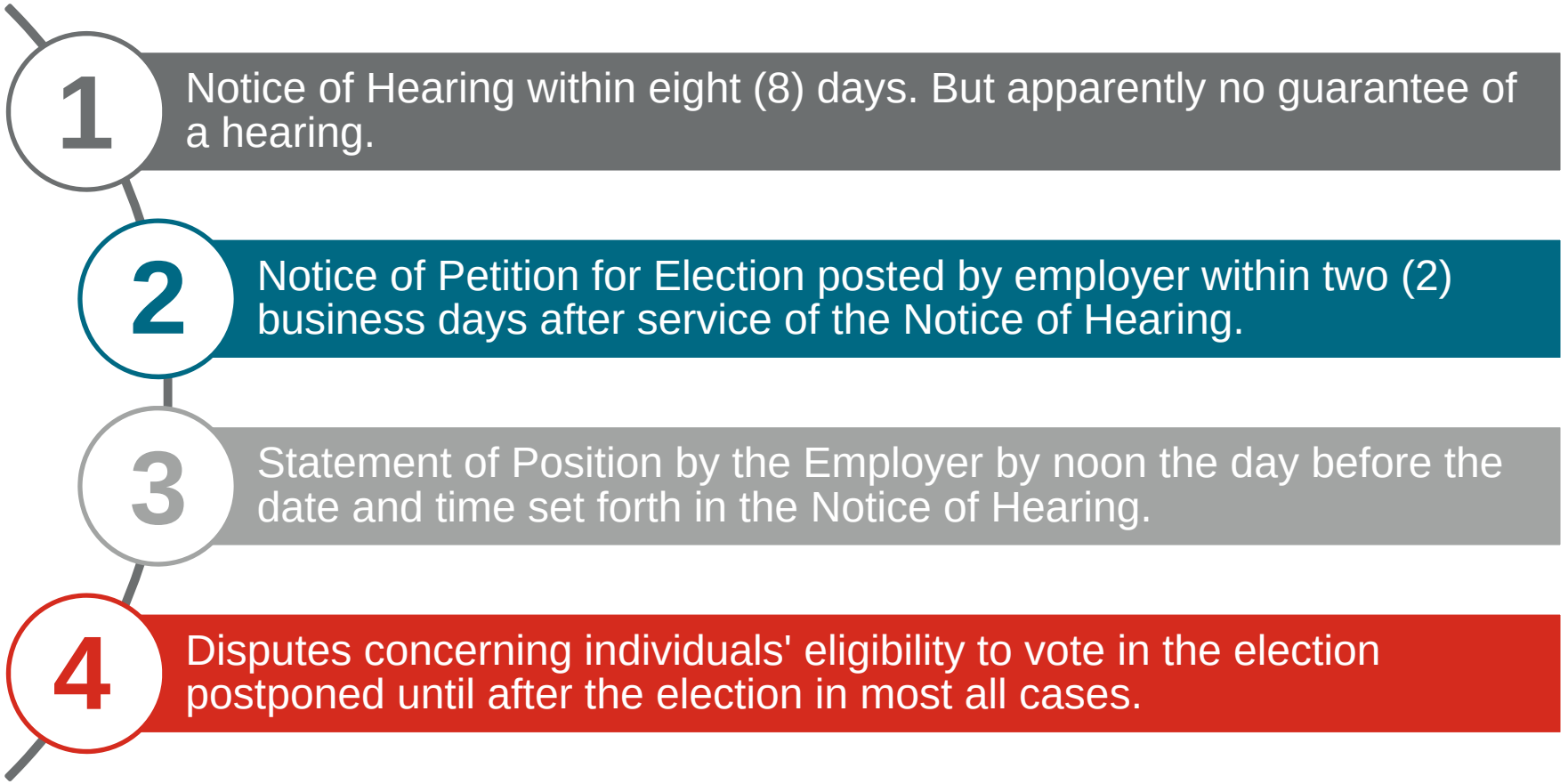
“Free Speech” Under the NLRA

Section 8(c) of the Act provides:

- The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

This language authorizes “employer campaigning,” such as dissemination of information to employees and “captive audience” meetings with employees.

Overview



Overview (continued)

5. The election shall be scheduled for the earliest date practicable.

6. Employer required to post the Board's Notice of Election at least three (3) full working days prior to 12:01 a.m. of the day of election.

7. Within two (2) business days after issuance of the direction for election, the employer shall provide a voter list.

8. Time for filing objections to the conduct of the election or conduct affecting the results of the election and offers of proof must be made within seven (7) days after the tally of ballots.

Overview (continued)

9 Post-election hearing will be set for twenty-one days after the tally of ballots or as soon as practicable thereafter.

10 The Board has discretion whether to grant a request for review of the post-election hearing.

Overview (continued)

11 Provides for increased amount of electronic transmission of documents.

12 Blocking charge must be backed at the time of filing by a written offer of proof.

NLRB's Ambush Election Rule

OLD PROCEDURE	NEW PROCEDURE
Parties cannot electronically file election petitions. Parties and NLRB regional offices do not electronically transmit certain representation case documents.	Election petitions, election notices and voter lists can be transmitted electronically. NLRB regional offices can deliver notices and documents electronically, rather than by mail.
The parties and prospective voters receive limited information.	Parties will receive a more detailed description of the Agency's representation case procedures, as well as a Statement of Position form, when served with the petition. The Statement of Position will help parties identify the issues they may want to raise at the pre-election hearing. A Notice of Petition for Election, which will be served with the Notice of Hearing, will provide employees and the employer with information about the petition and their rights and obligations. The Notice of Election will provide prospective voters with more detailed information about the voting process.

NLRB's Ambush Election Rule (continued)

OLD PROCEDURE The parties cannot predict when a pre- or post-election hearing will be held because practices vary by Region.	NEW PROCEDURE The Regional Director will generally set a pre-election hearing to begin 8 days after a hearing notice is served and a post-election hearing 21 days after the tally of ballots.
There is no mechanism for requiring parties to identify issues in dispute.	Non petitioning parties are required to identify any issues they have with the petition, in their Statements of Positions, generally one business day before the pre-election hearing opens. The petitioner will be required to respond to any issue raised by the non petitioning parties in their Statements of Positions at the beginning of the hearing. Litigation inconsistent with these positions will generally not be allowed.
The employer is not required to share a list of prospective voters with the NLRB's regional office or the other parties until after the regional director directs an election or approves an election agreement.	As part of its Statement of Position, the employer must provide a list of prospective voters with their job classifications, shifts and work locations, to the NLRB's regional office and the other parties, generally one business day before the pre-election hearing opens. This will help the parties narrow the issues in dispute at the hearing or enter into an election agreement.

NLRB's Ambush Election Rule (continued)

OLD PROCEDURE	NEW PROCEDURE
Parties may insist on litigating voter eligibility and inclusion issues that do not have to be resolved in order to determine whether an election should be held.	The purpose of the pre-election hearing is clearly defined and parties will generally litigate only those issues that are necessary to determine whether it is appropriate to conduct an election. Litigation of a small number of eligibility and inclusion issues that do not have to be decided before the election may be deferred to the post-election stage. Those issues will often be mooted by the election results.
Parties may file a brief within 7 days of the closing of the pre-election hearing, with permissive extensions of 14 days or more.	Parties will be provided with an opportunity to argue orally before the close of the hearing and written briefs will be allowed only if the regional director determines they are necessary.
Parties waive their right to challenge the regional director's pre-election decision if they do not file a request for review before the election. This requires parties to appeal issues that may be rendered moot by the election results.	Parties may wait to see whether the election results have made the need to file a request for review of the regional director's pre-election decision unnecessary and they do not waive their right to seek review of that decision if they decide to file their request after the election.
Elections are delayed 25-30 days to allow the Board to consider any request for review of the regional director's decision that may be filed. This is so even though such requests are rarely filed, even more rarely granted and almost never result in a stay of the election.	There will be no automatic stay of an

NLRB's Ambush Election Rule (continued)

OLD PROCEDURE	NEW PROCEDURE
The Board is required to review every aspect of most post-election disputes, regardless of whether any party has objected to it.	The Board is not required to review aspects of post-election regional decisions as to which no party has raised an issue, and may deny review consistent with the discretion it has long exercised in reviewing pre-election rulings.
The voter list provided to non-employer parties to enable them to communicate with voters about the election includes only names and home addresses. The employer must submit the list within 7 days of the approval of an election agreement or the regional director's decision directing an election.	The voter list will also include personal phone numbers and email addresses (if available to the employer). The employer must submit the list within 2 business days of the regional director's approval of an election agreement or decision directing an election.

Questions