

## 2014 IN REVIEW AND 2015 PREDICTIONS

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# Agenda

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- 2014: A Review of What Happened in the Legislature
- 2014: A Review of What Happened in the Executive Branch
- 2014: A Review of What Happened in the Judiciary
- Gazing into the Crystal Ball: What to Expect in 2015

# U.S. Legislature

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- Mid-Term Elections
- Republicans now lead both Senate and House

# Mississippi Legislature

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- Mississippi is a Right to Work state. What does that mean?
- Per the U.S. Bureau of Labor Statistics, only 4.2% of Mississippi's 1,040,000 workers (43,680 total) are represented by unions.
- Mississippi enacted three laws, effective July 1, 2014, in an effort to keep these numbers low.

## Mississippi Legislature (Cont.)

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- Specifically, SB 2473, known as the "Prohibition Against Employer Intimidation Act," prohibits any "person, organization, corporation, union, agency or other entity thereof" from damaging, harming, injuring, threatening to injure, coercing a business or its employees "with the intent to unlawfully intimidate the business or its employees from exercising their rights, which are protected by state and federal law, in an effort to obtain something of value" for a union. SB 2473, Section 3(1)(a).
- "Something of value" includes "a neutrality agreement, card check agreement, recognition or any other objective that is motivating such activities." *Id.* at Section 3(2).

## Mississippi Legislature (Cont.)

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- SB 2653 prohibits a "union, labor union or agency thereof" from mass picketing and demonstrations that "obstruct or unreasonably interfere with free ingress or egress" to or from the entrances of any place of business, including "business entry ways, streets, sidewalks, rights-of-ways adjacent or contiguous to a business.
- "It also prohibits a union from mass picketing and demonstrations that obstruct or unreasonably interfere with the entrances of private residences.
- Additionally, SB 2653 prohibits the use of equipment or other objects to obstruct the entrances of business and private residences.
- Violation of this statute is a misdemeanor, and violators, upon conviction, are subject to a fine of \$500.00, six months in prison, or both.

## Mississippi Legislature (Cont.)

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- SB 2797, known as the "Mississippi Employment Fairness Act," gives the State of Mississippi the exclusive authority to regulate labor peace agreements and project labor agreements.
- A "labor peace agreement" is "an arrangement between a union and employer under which one (1) or both entities agree to waive certain rights under federal law with regard to union organizing and related activity," and a "project labor agreement" is "a collective bargaining agreement with one (1) or more labor unions that establishes the terms and conditions of employment for a specific construction project, before employees are hired to work on such project."
- Specifically, only the State can require an employer to enter into a labor peace agreement or project labor agreement.

# Mississippi's Religious Freedom Restoration Act

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- Adds “In God We Trust” to the state seal.
- “State action shall not substantially burden a person’s right to the exercise of religion.”
  - Supporters say it protects religious freedoms.
  - Opponents believe it will be used to discriminate against LGBT.



# Executive Branch

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- NLRB
- Executive Action by the President
- Department of Labor
- EEOC

# NLRB

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- On December 11, 2014, the National Labor Relations Board ("NLRB"), through a divided panel, held that employees may use employer-provided email systems for union organizing.
- Specifically, the NLRB held, "employee use of email for statutorily protected communications on nonworking time must be presumptively be permitted by employers who have chosen to give employees access to their email systems." *Purple Communications, Inc., et al.*; No. 21-CA-095151.
- In so doing, the Obama NLRB overturned the Bush NLRB's 2007 decision in *Register Guard*, calling the prior ruling "clearly incorrect."

# NLRB's Ambush Election Rule

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- Final Rule amending 29 C.F.R. Parts 101, 102, and 103 with regard to Case Procedures for Representation Elections.
- Effective April 14, 2015 unless challenged.
- Likely to be challenged by U.S. Chamber of Commerce and/or National Association of Manufacturers.

# Overview

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1

Notice of Hearing within eight (8) days. But apparently no guarantee of a hearing.

2

Notice of Petition for Election posted by employer within two (2) business days after service of the Notice of Hearing.

3

Statement of Position by the Employer by noon the day before the date and time set forth in the Notice of Hearing.

4

Disputes concerning individuals' eligibility to vote in the election postponed until after the election in most all cases.

## Overview (continued)

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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)

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

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

## Overview (continued)

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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.

## Executive Action

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- Executive Order No. 13658 - Requires a minimum wage of \$10.10 for federal contractors.
- Executive Order No. 11478 Amended - Bars LGBT discrimination by federal contractors.
- Executive Orders on Immigration
  - Parents of U.S. Citizens and Permanent Residents living in U.S. for at least 5 years
  - Expands 2012 Deferred Action for Childhood Arrivals – Older than 30 now qualify and live in U.S. since 2010 (not 2007)

# Department of Labor

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- Notice of Proposed Rule Making – Definition of Spouse for FMLA Purposes. Comment period ended Aug. 11, 2014.
- The Wage and Hour Division of the Department of Labor issued the final rule to establish the \$10.10 minimum wage rules for federal contractors.
- In October, the Department of Labor also announced that it would delay enforcement of its final rule providing minimum wage and overtime protections for most home care workers from January 1, 2015 to June 30, 2015; however, the final rule's effective date was January 1, 2015.

# EEOC

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- 88,778 private sector charges in FY 2014, 5,000 fewer than FY2013
- 87,442 charges were resolved in FY 2014, 9,810 fewer than FY2013
- 7,846 successful mediations out of 10,221 conducted. Obtained \$144.6 million in benefits for individuals through mediations.
- Filed 133 merits lawsuits during FY 2014. Resolved 136 merits lawsuits for a total recovery of \$22.5 million.
- Completed 260 systemic investigations, resulting in 78 settlements and conciliation agreements. \$13 million in monetary relief.

# Strategic Enforcement Plan

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The SEP identifies six national priorities as the focus of this integrated enforcement effort. These are:

- Enforcing equal pay laws;
- Eliminating barriers in recruitment and hiring;
- Protecting immigrant, migrant and other vulnerable workers;
- Addressing emerging and developing employment discrimination issues;
- Preserving access to the legal system; and
- Preventing harassment through systemic enforcement and targeted outreach.

# EEOC's Pregnancy Guidance

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- “Despite much progress, we continue to see a significant number of charges alleging pregnancy discrimination, and our investigations have revealed the persistence of overt pregnancy discrimination, as well as the emergence of more subtle discriminatory practices.”  
EEOC Chairwoman Jacqueline A. Berrien.

EEOC GUIDANCE JULY 14, 2014

[http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm)

# EEOC's Pregnancy Guidance

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- Part One of the Guidance's four parts discusses the prohibitions under Title VII of the Civil Rights Act, as clarified by the Pregnancy Discrimination Act of 1978 (PDA).
- Part Two discusses the application of the ADAAA's accommodation and non-discrimination requirements and the definition of disability to pregnancy-related impairments.
- Part Three discusses other legal requirements affecting pregnant workers, including the FMLA.
- Part Four describes "Best Practices" for employers.

## EEOC's Position re LGBT Discrimination

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- The EEOC published “What You Should Know about EEOC and the Enforcement Protections for LGBT Workers” and “Fact Sheet on Recent EEOC Litigation-Related Developments Regarding Coverage of LGBT-Related Discrimination under Title VII.”
- “The Commission has instructed our investigators and attorneys that discrimination against an individual because that person is transgender is a violation of Title VII’s prohibition of sex discrimination in employment.”
- “In addition, investigators and attorneys were instructed that lesbian, gay, and bisexual individuals may also bring valid Title VII sex discrimination claims, and the EEOC should accept charges alleging sexual-orientation-related discrimination.

# U.S. Supreme Court Cases

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- Hobby Lobby
- Noel Canning
- Quinn
- Busk

## ***Burwell v. Hobby Lobby Stores, Inc., Case No. 13-354***

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- Dropped coverage for “morning after” pills and IUDs
- Closely held for-profit corporations may be exempt from a law its owners religiously object if there is a less restrictive means of furthering the law’s interest.
- The Court's majority directly struck down the contraceptive mandate, of the Affordable Care Act (ACA) requiring employers to cover certain contraceptives for their female employees, by a 5-4 vote.

## ***NLRB v. Noel Canning*, Case Number 12-1281**

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- Noel Canning had an adverse decision from NLRB – failed to execute CBA with union.
- Noel Canning appealed to D.C. Circuit – 3 of the 5 NLRB members invalidly appointed; as such, no quorum.
- Court unanimously ruled that the President can only use his authority under the Recess Appointment Clause of the Constitution when the Senate is in recess and not able to transact Senate business.

## ***Harris v. Quinn, Governor of Illinois, No. 11-681.***

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- Illinois Public Labor Relations Act allowed unions to collect fees from non-union members on the ground that the non-union members would still benefit through the union's collective bargaining with the State.
- 8 state workers objected.
- 5-4 – PLRA which provided union security agreements violated the First Amendment.

# ***Integrity Staffing Solutions, Inc. v. Busk, et al., No. 13-433***

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- Integrity Staffing Solutions is a staffing company that provides warehouse workers to Amazon.com.
- As part of their job duties, the warehouse workers "retrieved products from the shelves and packaged those products for delivery to Amazon customers."
- At the end of each day, in an effort to prevent theft, Integrity required the employees to go through a security screening before allowing the employees to leave the warehouse. As part of the screening, "employees removed items such as wallets, keys, and belts from their persons and passed through metal detectors."

## ***Integrity Staffing Solutions v. Busk (Cont.)***

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- The Court's analysis focused on three arguments. First, security screenings are not integral and indispensable activities of the position of a warehouse worker.
- The Court rejected the Ninth Circuit's focus on the fact that the security screenings were required by Integrity Staffing.
- The Court dismissed the argument that the time waiting for the security screening should be compensable because Integrity Staffing could have, but failed to, reduced the wait-time to a *de minimus* amount.
- What does this case mean for employers? It highlights the case-by-case nature of FLSA issues. Specifically, the focus is on the actual activities needed to accomplish the nature of the work.
- The Supreme Court did NOT adopt a carte blanche rule that post-shift security screenings are not compensable under the FLSA.

## U.S. Supreme Court Cases

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- The U.S. Supreme Court declined to hear same-sex marriage appeals, effectively making same-sex marriage legal in an additional five states - Virginia, Utah, Oklahoma, Indiana, and Wisconsin.

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# **Glazing into the Crystal Ball: 2015 Predictions**

## U.S. Supreme Court Cases to Watch

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- The U.S. Supreme Court will hear the EEOC's challenge to Abercrombie's "Look Policy." Per the EEOC, the policy unlawfully prevents religious accommodations for sincerely held religious beliefs. *EEOC v. Abercrombie & Fitch Stores Inc.*, Case Number 14-86 (U.S.)
- On October 24, 2014, UPS filed its brief with the U.S. Supreme Court, telling the Court the company did not violate the Pregnancy Discrimination Act by denying a pregnant worker's request for light duty in 2006. However, UPS did tell the Court that, effective January 2015, the Company will make light duty available for pregnant employees with physical restrictions. *Young v. UPS*, No. 12-1226.

## U.S. Supreme Court Cases to Watch (Cont.)

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- On January 13, 2015, the Supreme Court heard oral arguments as to whether the EEOC's pre-suit conciliation efforts should be subject to judicial review. *Mach Mining LLC v. EEOC*, Case Number 13-1019.
  - "I am very troubled by the idea that the government can do something and we can't even look at whether they've complied with the law," Chief Justice Roberts said.
  - "I think, as the other side points out, there is considerable incentive on the EEOC to fail in conciliation so that it can bring a big-deal lawsuit and get a lot of press and put a lot of pressure on this employer and on other employers. There are real incentives to have conciliation fail," Justice Scalia said.

## Same-Sex Marriage Bans/LGBT Protections

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- *De Leon et al. v. Perry et al.*, case number 14-50196; *Robicheaux et al. v. Caldwell et al.*, case number 14-31037; and *Campaign for Southern Equality et al. v. Bryant et al.*, case number 14-60837, in the U.S. Court of Appeals for the Fifth Circuit.
- Fifth Circuit heard oral argument on January 9, 2015 for Texas appeal.
- U.S. Supreme Court declined to hear Louisiana case pending Fifth Circuit resolution.



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