



Virginia Ready-Mixed Concrete Association

# Labor and Employment Law in the Era of Donald Trump

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# Labor and Employment under the Trump Administration

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- Immediate changes
- Cases pending before the Supreme Court
- Department of Labor priorities
- Changes with National Labor Relations Board
- Changes in other agencies
- Pending legislation



# Immediate Changes

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- March 27, 2017, President Trump signed the Congressional Review Act (invalidating the regulations that implemented President Obama's Fair Pay and Safe Workplaces Executive Order (EO 13673)
  - Also known as the “contractor blacklisting” regulations, the rules would have required government contractors and subcontractors to report alleged, unproven violations of 14 federal labor and employment laws for consideration by government contracting officers in awarding federal contracts

# Immediate Changes

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- On April 28, 2017, Alex Acosta, a conservative former U.S. attorney and member of the Bush administration, was sworn in as Secretary of the Department of Labor
  
- Victoria A. Lipnic, a former EEOC Commissioner, named Acting Chair of the U.S. Equal Employment Opportunity Commission on January 25, 2017
  
- Neil Gorsuch appointed to U.S. Supreme Court
  - Employers can expect relatively favorable decisions from the conservative justice

# Supreme Court

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- Are class action waivers legal?
  - Court will address whether the NLRB is correct in its interpretation that arbitration agreements are illegal under federal labor law if they contain class action waivers
  - DOJ reversed its position over the summer
  - Court heard arguments on October 2
    - Court's decision could affect up to 25 million employment contracts
    - Protected concerted activity

# Supreme Court

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- Can public-sector workers be forced to join or pay fees to a union as a condition of employment?
  - Plaintiffs argue that it violates the First Amendment for a government labor contract to require workers to give money to a private organization
  - Court recently heard similar case and split 4-4 after Justice Scalia's death
  - Widely expected that Justice Gorsuch will break tie and side with plaintiffs

# Supreme Court

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- Does Title VII of the Civil Rights Act bar employers from discriminating against employees because of their sexual orientation?
  - Courts long held that Title VII contains no protections based on sexual orientation
  - Seventh Circuit recently held that Indiana's Ivy Tech Community College violated Title VII by passing up a gay professor for promotions because of her sexual orientation
  - Circuit split that will soon make its way to the Supreme Court



## Federal Overtime Rule and the Current State

- The DOL's final federal overtime rule was to take effect on 12/1/2016
  - It was supposed to increase the salary threshold to \$913/week or \$47,476/year
- To respond, employers could have:
  - Raised salaries or
  - Reclassified position as non-exempt
- Texas injunction
  - Justice Department officially ended any effort to appeal the District Court's decision
  - Rules no longer have any potential legal effect



# Department of Labor Wage & Hour Activity

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- DOL undertook aggressive enforcement activities in 2016 particularly in the hotel, restaurant, and retail industries. Much of WHD's enforcement and other activities took place in industries with high usage of franchising, sub-contracting, and independent contractors. The WHD continued to increase its use of civil money penalties, liquidated damages, and enhanced compliance agreements.



# Department of Labor

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- President Trump insisted on 2-for-1 rule
  - Signed an executive order that would require agencies to revoke two regulations for every new rule they want to issue
  - Revoked the Fair Pay and Safe Workplaces Executive Order that required government agencies to consider federal contractors' records on how they treat their workers in deciding whether or not to award federal contract

# EEOC's Strategic Enforcement Plan

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- The EEOC has had the same strategic enforcement plan in place from 2013-2016.
  
- The EEOC's main priorities have been:
  - **Eliminating Barriers in Recruitment and Hiring.**
    - The EEOC will target class-based recruitment and hiring practices that discriminate against racial, ethnic and religious groups, older workers, women, and people with disabilities.
  
  - **Protecting Immigrant, Migrant and Other Vulnerable Workers.**
    - The EEOC will target disparate pay, job segregation, harassment, trafficking and discriminatory policies affecting vulnerable workers who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them.

# EEOC's Strategic Enforcement Plan continued

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➤ The EEOC's main priorities have been:

- **Addressing Emerging and Developing Issues.**
  - The EEOC will target emerging issues in equal employment law, including issues associated with significant events, demographic changes, developing theories, new legislation, judicial decisions and administrative interpretations.
- **Enforcing Equal Pay Laws.**
  - The EEOC will target compensation systems and practices that discriminate based on gender.
- **Preserving Access to the Legal System.**
  - The EEOC will target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or that impede the EEOC's investigative or enforcement efforts.
- **Preventing Harassment Through Systemic Enforcement and Targeted Outreach.**
  - The EEOC will pursue systemic investigations and litigation and conduct a targeted outreach campaign to deter harassment in the workplace.



- Non-Retaliation Final Rule May 2016 (OSHA's Drug Testing and Incentive Programs)
- OSHA Settlement Agreement Interim Guidance
- Largely will depend on DOL regarding enforcement
- OSHA Rule-making different than EO
- Trump's stance unclear on whistleblower protection-may focus on guidance vs. penalties

# Immigration Policy

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- Trump has proposed nationwide mandatory E-Verify.
- Critical of H visas, particularly HB-1 (Obama allowed H visas for spouses)
- In 2015, US issued over 6,000 H classification visas to citizens of Muslim-majority nations. Small proportion but India has a Muslim population of over 170 million.
- Employers who depend on H visas to obtain certain laborers may be dramatically impacted.

# National Labor Relations Board

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- First time since 2015 with full 5 members
- With recent confirmations of Marvin Kaplan and William Emmanuel, Board now has Republican majority
- Chairman Miscimarra's term expires in December
- Board expected to role back many changes made during the Obama Administration

# National Labor Relations Board

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## ➤ Browning-Ferris

- Board changed long-standing standard determining who qualifies as a joint contractor
  - Held that company shares unfair labor practice liability and bargaining obligations with contractors
  - Currently on appeal at the DC Circuit



# National Labor Relations Board

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## ➤ Lutheran Heritage

- NLRB rendered work rules and handbook provisions unlawful if employees “would reasonably construe” them to prohibit protected activities under Section 7 of the NLRA
- Has resulted in many innocuous employer’s rules being found to violate the NLRA because they “chill employees’ right to engage in protected, concerted activity”

# National Labor Relations Board

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## ➤ Specialty Healthcare

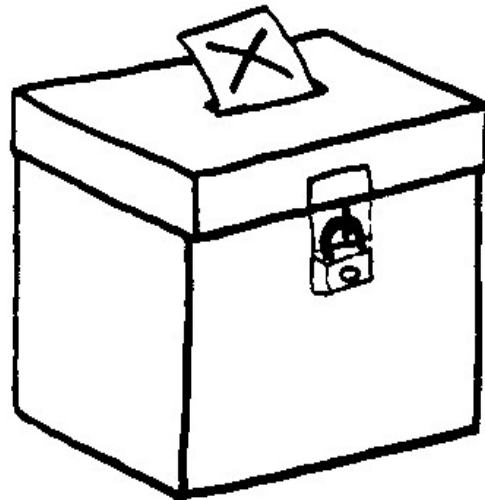
- Creates “microunits”
- If an employer fights a proposed bargaining unit on the basis that it improperly excludes certain employees, has to prove that the excluded workers share “an overwhelming community of interest” with those included in the proposed unit
- Issue arises frequently

# National Labor Relations Board

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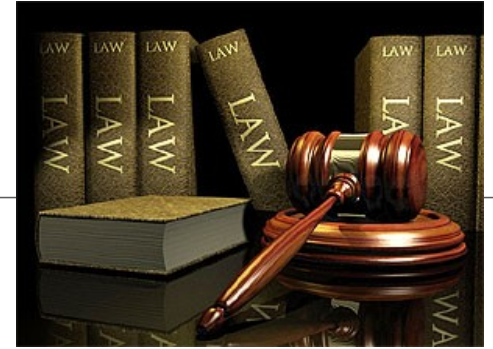
## ➤ Union Election Rules

- New rules took effect in April 2015 that made changes to the NLRB procedures for union elections
- Known as the “ambush election rule”
  - Shortened time between union petition and election



# Proposed Legislation

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## Workforce Democracy and Fairness Act

- Introduced in July by Rep. Tim Walberg (R-Mich.)
- Would undo the “ambush election rule” and the Specialty Healthcare ruling
  - No union election will be held in less than 35 days
  - Board must determine the appropriate group of employees to include in the union before the union is certified, as well as address any questions of voter eligibility
  - Reinstates the traditional standard for determining which employees will vote in the union election

# Proposed Legislation

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## **Save Local Business Act**

- Introduced in July by Rep. Bradley Byrne (R-Ala.)
- Aimed solely at NLRB's expanded take on joint employer responsibility under the Browning Ferris decision
- Would codify the direct control standard

# Proposed Legislation

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## **National Right-to-Work Act**

- Introduced in February by Rep. Steve King (R-Iowa)
- Would block employers and unions from including mandatory dues provisions in collective bargaining agreements in the 22 states where right-to-work is not already the law

# Proposed Legislation

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## Raise the Wage Act



- Introduced in both Senate and House
- Would establish \$15 minimum wage nationwide
  - Current federal level \$7.25
- Unlikely to pass but could lead to increase of current law
- Many states and major cities have raised minimum wage to \$15
  - California, DC, New York
  - Los Angeles, New York City, San Francisco, Seattle



Questions? Thank you for your time.

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