Labor and Employment Law Update

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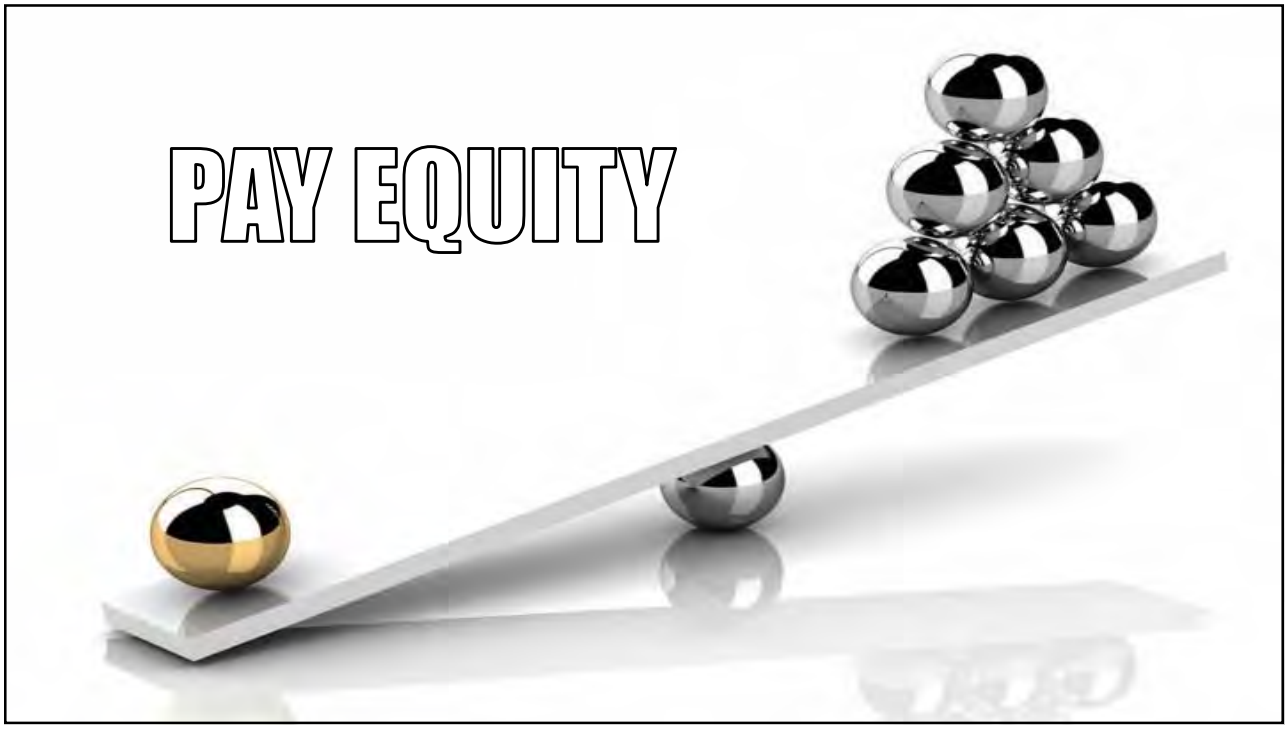
#MeToo movement isn't slowing down


Up-to-date policies
Dissemination
Training for managers
Prompt investigation
Enforcement


PAY EQUITY

Dodging A Bullet: New EEO-1 Form Scrapped

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Trends At State And Local Level

- **Equal pay** laws prevent unequal pay for comparable work
  - *Focus is on what is "comparable"*
  - *Can't lower wage rates to even up salaries*
- **Wage transparency** laws prevent employers from barring talk about salaries among workers
  - *Apply to supervisors*
  - *Permit civil lawsuits*

- **Previous pay history** often can't be used to determine salary
  - *Sometimes even bar inquiries during application period*

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RECENT LEGAL DEVELOPMENTS

- **January 2018: National class action lawsuit refiled against Google**
- **January 2018: $300 million national class action lawsuit filed against employment law firm**
- **October 2017: $4 million settlement in NY pay equity claim against pharmaceutical company**
- **October 2017: $5 million settlement in MA pay equity claim against financial services company**

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What Should You Do?

1. **Revise application to remove salary history questions**
   - *Ask about **salary expectations** instead*
2. **Adjust hiring materials (interview templates, etc.)**
3. **Train managers on hiring and interviewing**
4. **Conduct privileged pay audit**
   - *Some laws create a safe harbor for employers who conduct an internal audit and make adjustments*
   - *Getting counsel involved early could be important*

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JOB APPLICATION

☐ Have you ever been convicted of a criminal offense?

Ban the BOX

MAJOR U.S. CITIES AND COUNTIES ADOPT FAIR HIRING POLICIES TO REMOVE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS:

Ban-the-Box Laws On the Rise

- There are a total of 29 states representing nearly every region of the country that have adopted some form of the policies – California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, and Wisconsin.

Ban-the-Box Laws On the Rise

- 10 states have removed the conviction history question on job applications for private ERs, which is the next step in the evolution of these policies – California, Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont.

Ban-the-Box Laws On the Rise

- More jurisdictions are also adopting policies in addition to ban-the-box, such as incorporating the best practices of the 2012 EEOC guidance on the use of arrest and conviction records in employment decisions and adopting innovative strategies such as targeted hiring.

Ban-the-Box Laws On the Rise

- 9 states, the District of Columbia, and 29 cities and counties now extend fair chance initiatives to government contractors.
- Of those, all 9 states and 15 localities extend fair chance laws to private ERs within their jurisdictions – Austin, Baltimore, Buffalo, Chicago, Columbia (MO), D.C, Los Angeles, Montgomery County (MD), New York City, Philadelphia, Portland (OR), Prince George's County (MD), Rochester, San Francisco, and Seattle.

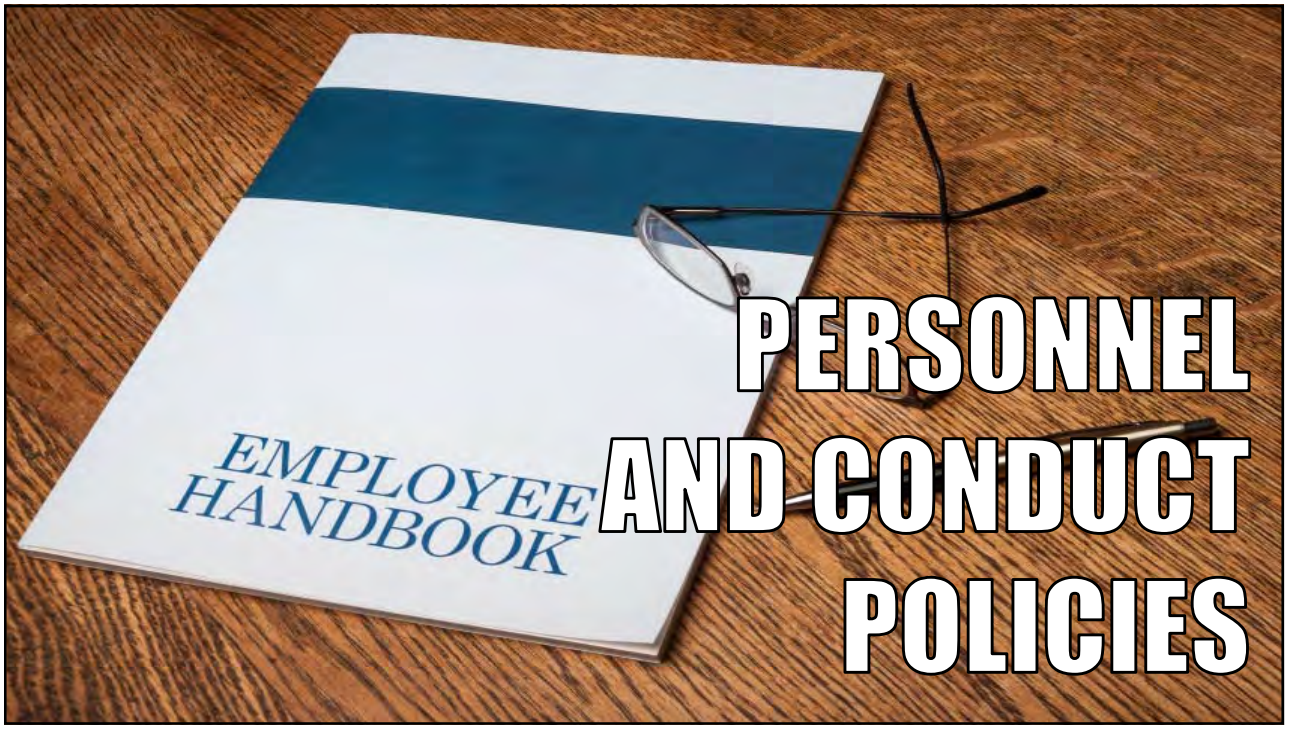
Ban-the-Box Laws On the Rise

- Delay criminal backgrounds until later in the hiring process (i.e., after a conditional offer has been made)
- Impose a strict process that employers must follow when an applicant or employee has a criminal conviction in their background
  - Usually require an individualized assessment

Ban-the-Box: Case Study, Los Angeles Fair Chance Initiative

*Strictest in the country

- Step 1 – employment application (and interview if necessary)
- Step 2 – conditional offer
- Step 3 – criminal background check
- Step 4 – individualized assessment if background check reveals criminal history
- Step 5 – fair chance process (notice, copy of assessment, other supporting docs, hold job open 5 days)
- Step 6 – reassessment if EE provides more info
- Step 7 – notice re: decision



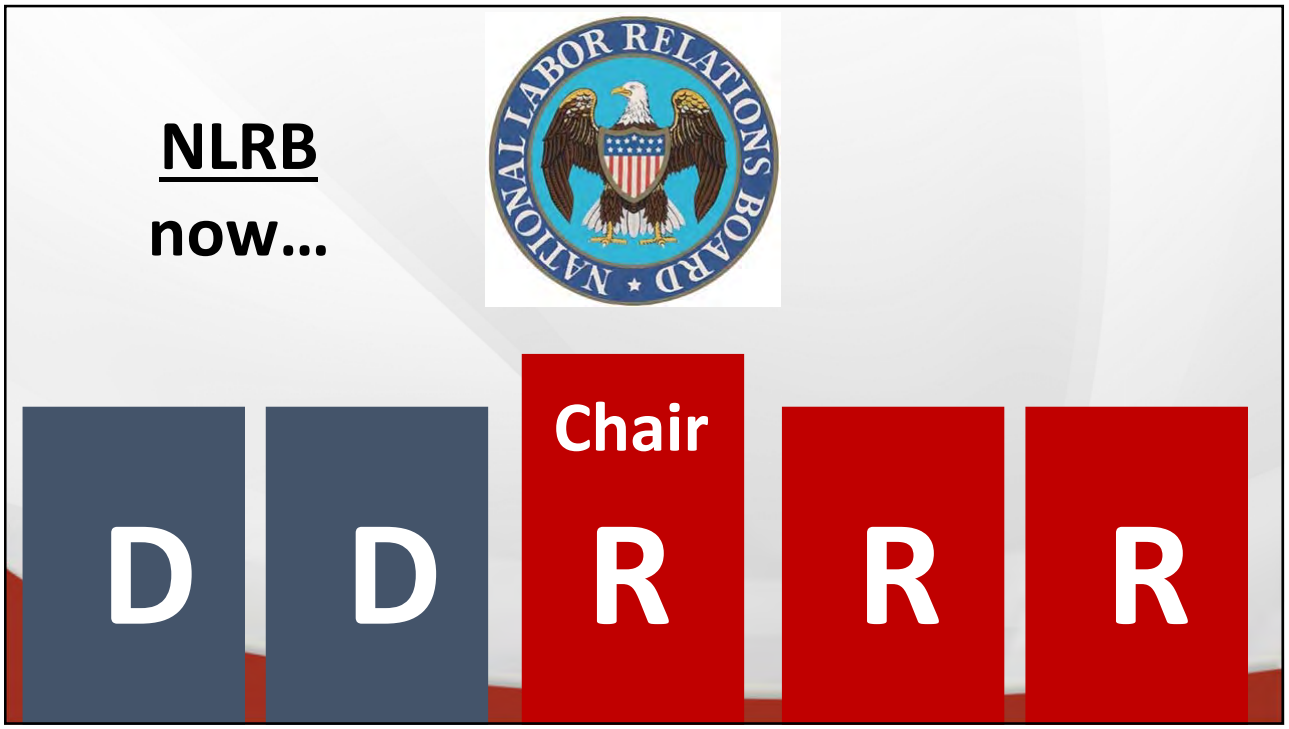
NLRB

2013 - 2017

R	R	Chair D	D	D

NLRB

now…



Lutheran Heritage (2004)

A seemingly neutral work rule was nevertheless unlawful if employees would "reasonably construe" the rule to prevent them from exercising their rights to engage in union or protected concerted activity.

- ✓ *Civility*
- ✓ *Confidentiality*
- ✓ *Use of logos*
- ✓ *Interactions with third parties*
- ✓ *Recordings and photos in workplace*

Boeing Co. (Dec. 14, 2017)

When examining a neutral workplace rule, look to (1) the nature and extent of the potential impact of NLRA rights, and (2) legitimate justifications of the rule.

"This test will ensure a meaningful balancing of employee rights and employer interests"

- **Work with counsel to review and revise current handbook**
- **Recognize there is still uncertainty, and not all rules will be automatically upheld**

Company Email

Purple Communications (NLRB 2014)
Employers – whether unionized or not – generally must allow employees to use corporate email systems during non-work time to engage in concerted and protected activity

Vulgarity

Bob is such a NASTY MOTHERF___ER don't know how to talk to people!!!!!! F__k his mother and his entire f__king family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!

Vulgarity

NLRB v. Pier Sixty (2nd Cir. 2017)

- Was obscene statement about workplace conditions?
- Does employer consistently tolerate foul language?
- Where was location of obscenity (i.e., in presence of customers, guests, vendors, the public, etc.)?

What Happened?

Trump administration has impacted flow of immigrants into the U.S.

- Southern border crossings have decreased
- H1-B visa annual cap case filings declined, 1st time in 5 years
  199,000 received in 2017, 15.7% decrease from 2016
- Confusion over several travel bans; country-specific travel ban in place (for now)

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Where Are We Now?

- New I-9 form required as of **September 18, 2017**
- Increased chances of ICE raid or I-9 scrutiny as evidenced by **7-11 raids** on January 10, 2018
- Ramped-up enforcement activity

***Takeaway*: Self-audit of immigration forms and processes now more important than ever**

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What's Next?

- **Mandatory E-Verify on the horizon in the near future?**
- **"Extreme Vetting" of certain visa applicants coming to the U.S.**
- **RAISE Act could see drastic reduction in immigration**
- **Travel ban litigation at SCOTUS**
- **DACA resolution uncertain?**

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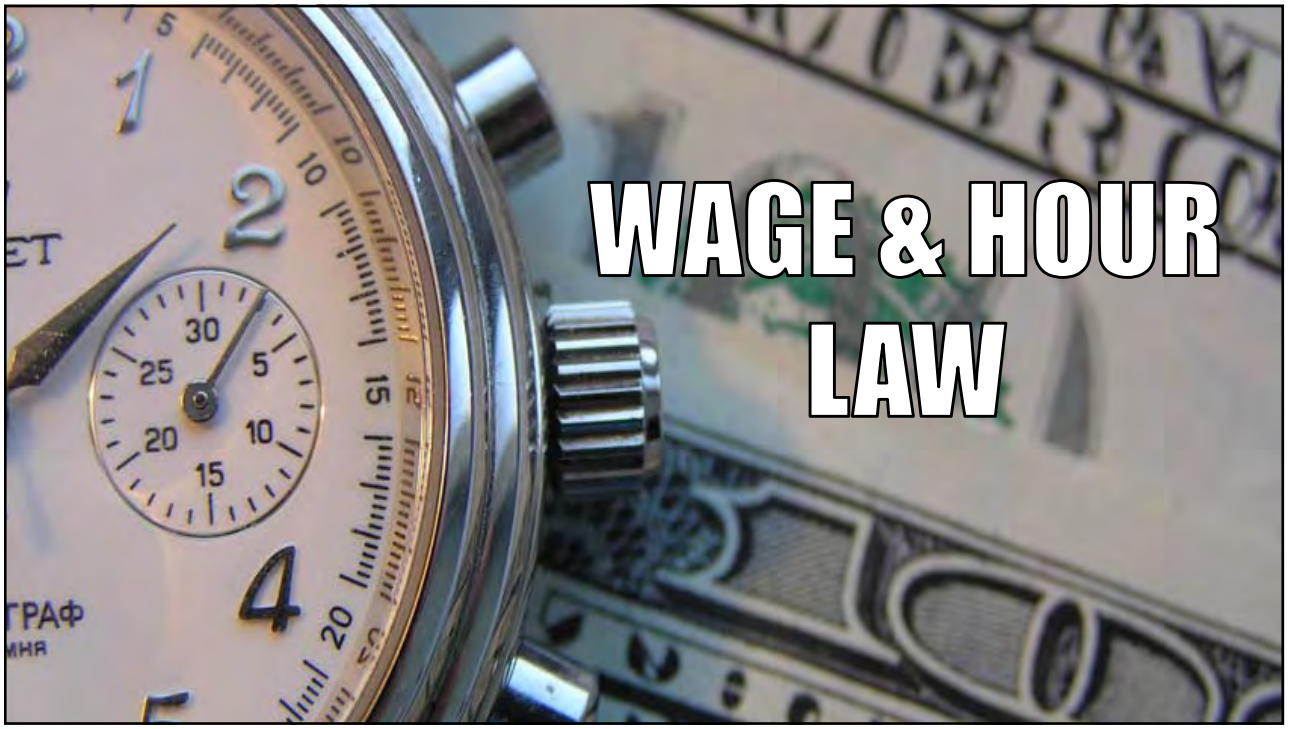

What Happened?

May 2016: Exemption regulations released (known as "**the overtime rule**") slated to be effective December 1, 2016

- Minimum threshold was to be **raised** from $455/week to $913/week (annualizes from $23,660/year to $47,476/year)
- Amount would be **"updated"** every three years

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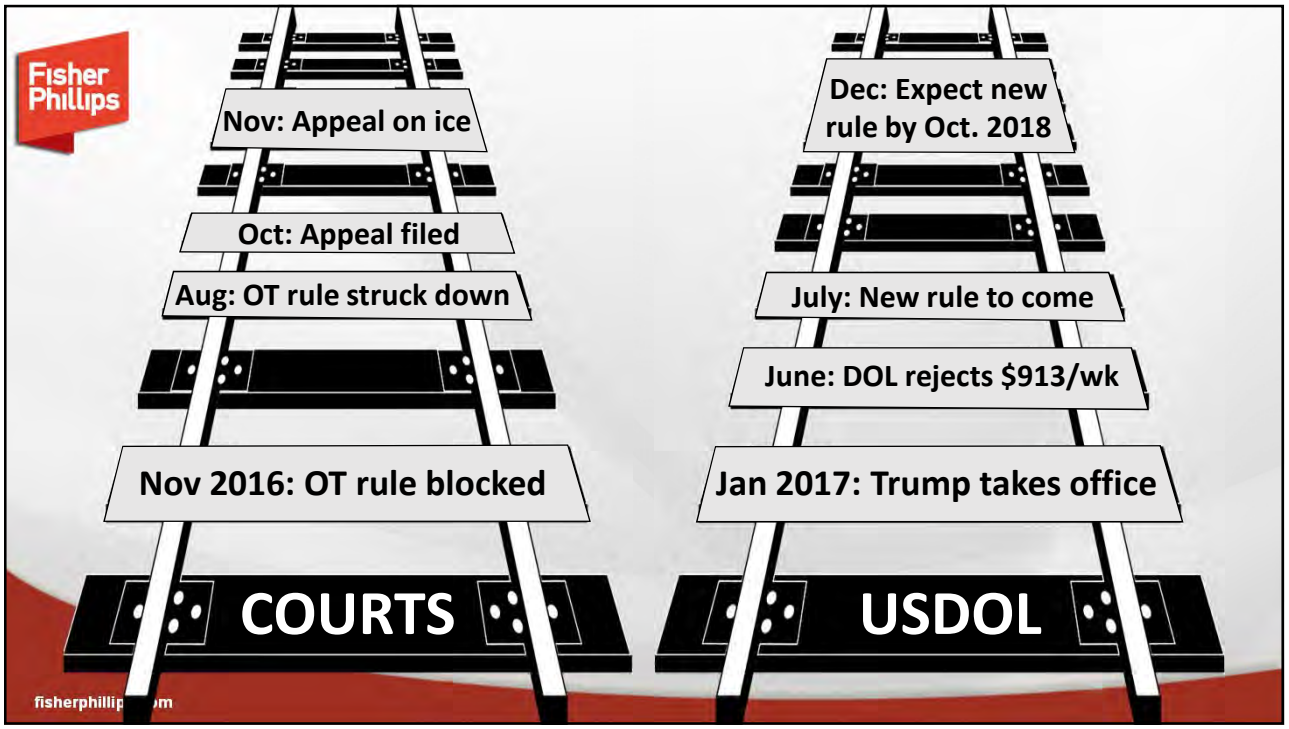

What's Next?

Expect new regulatory proposals to include an increased salary threshold somewhere in the mid-$600 per week range (annualizing to around $32,000 to $35,000 per year)

A welcome return to wage-and-hour opinion letters from the Department of Labor

A possible increase in the federal minimum wage? ($15 doubtful; moderate increase possible)

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What Happened?

May 2016: OSHA released broad new rules

- Mandatory electronic filing of injury and illness data
- Anti-retaliation provisions that targeted:
  - *Mandatory post-accident drug testing policies*
  - *"Immediate" injury reporting policies*
  - *Safety incentive programs*

OSHA®

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Where Are We Now?

Electronic reporting requirements took effect on 12/31/17

- Only **300A forms** currently required (annual summary of 300 logs numbers)
- **300 logs** (which include log of recordable injuries and illnesses with employee names and some detail) and **301 logs** (incident reports) not yet required to be reported

Anti-retaliation provisions in effect as of December 1, 2016

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Mandatory post-accident drug testing

- OSHA says blanket policies are illegal, as they deter accident and injury reporting
- Now need "reasonable basis" to believe incident likely caused by drug or alcohol impairment, and that a drug test will determine whether the employee was impaired at the time of the incident

Takeaway: **Implement and enforce reasonable suspicion testing policy and train your managers**

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Immediate reporting of injuries

- OSHA does not permit "immediate" reporting requirements in your policy
- ***Takeaway:*** Revise policy to provide a reasonable amount of time (end of shift, 8 hours, etc.)

Safety incentive programs

- No incentive programs based on number of injuries reported; might deter reports
- ***Takeaway:*** Encourage and incentivize workers to take part in safety-related causes (safety committees, reporting near-misses, etc.)

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What's Next?

- Detailed electronic reporting requirements are still being considered; stay tuned
- Anti-retaliation provisions might survive; proceed as if they will remain in effect for the time being

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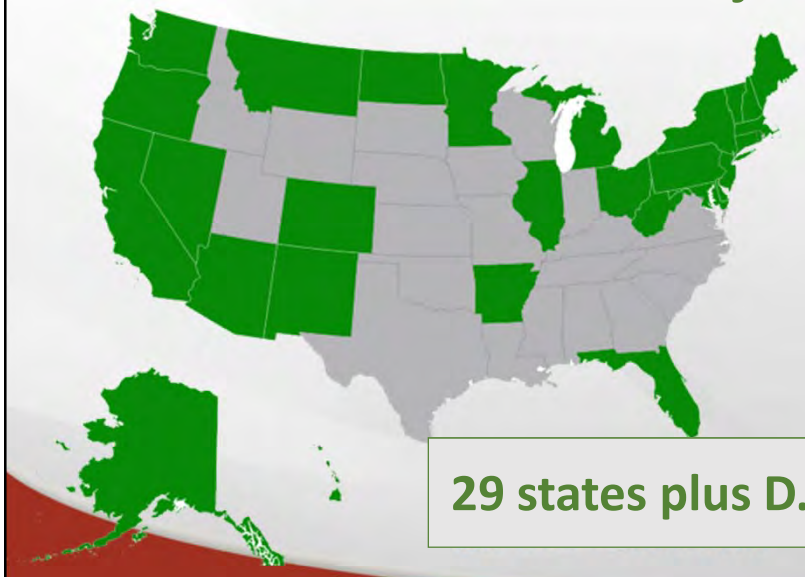
Medical Marijuana



Each state law varies regarding employer obligations and worker rights

29 states plus D.C. – and growing

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Marijuana In The Workplace

- Employers do not need to allow use or possession at work
- But what about offsite use and positive drug tests?
- Employers won decisions in California (2008), Oregon (2010), Washington (2011), Montana (2012), Colorado (2015), and New Mexico (2016) –*do not have to accommodate medical marijuana use*

!! ***Barbuto v. Advantage Sales & Marketing***
(Massachusetts July 27, 2017)

- ***Employees might be entitled to accommodations***
- ***Employers must engage in interactive process***

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Recreational Marijuana

- 7 states and D.C. now permit recreational marijuana (Colorado, Washington, Oregon, Alaska, California, Massachusetts, and Nevada)
- Zero-tolerance policies and practices may still be permitted
- How to handle inquiries from employees?
- What if you want to have a more relaxed standard?
  - *Consider safety-sensitive positions and federal obligations before acting*

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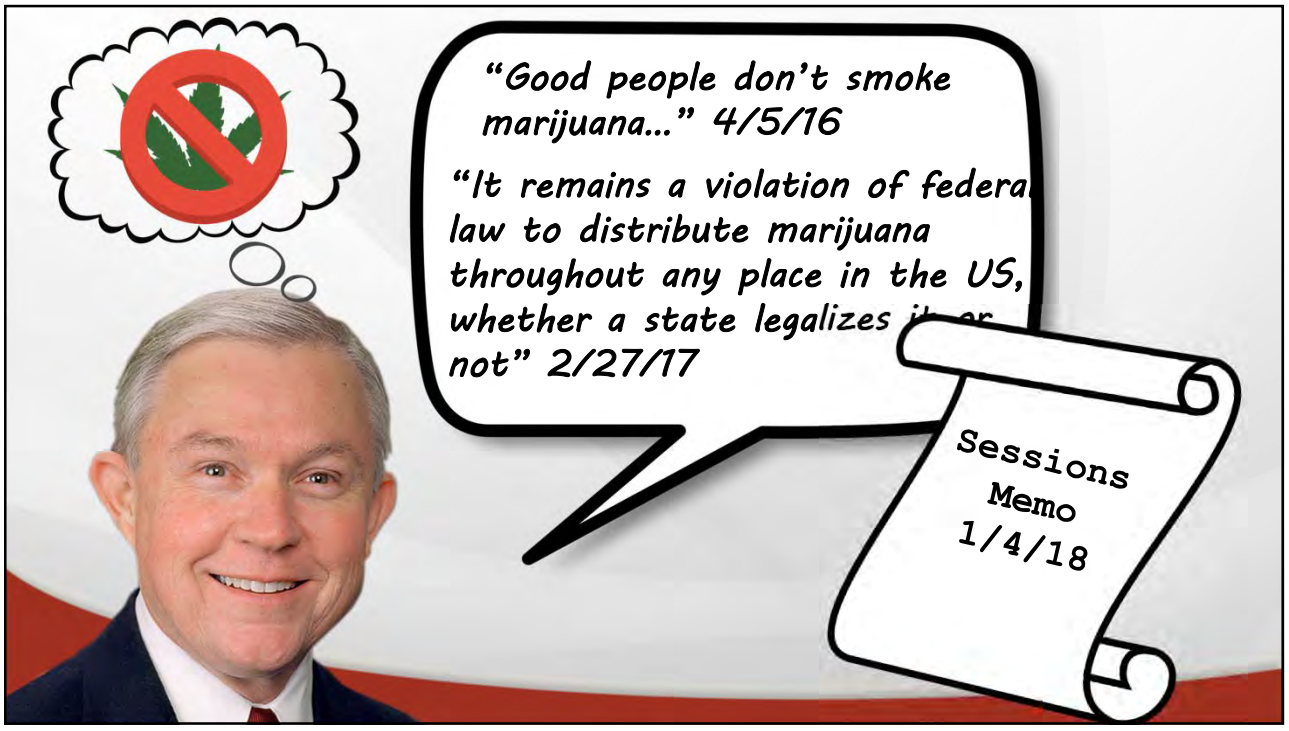
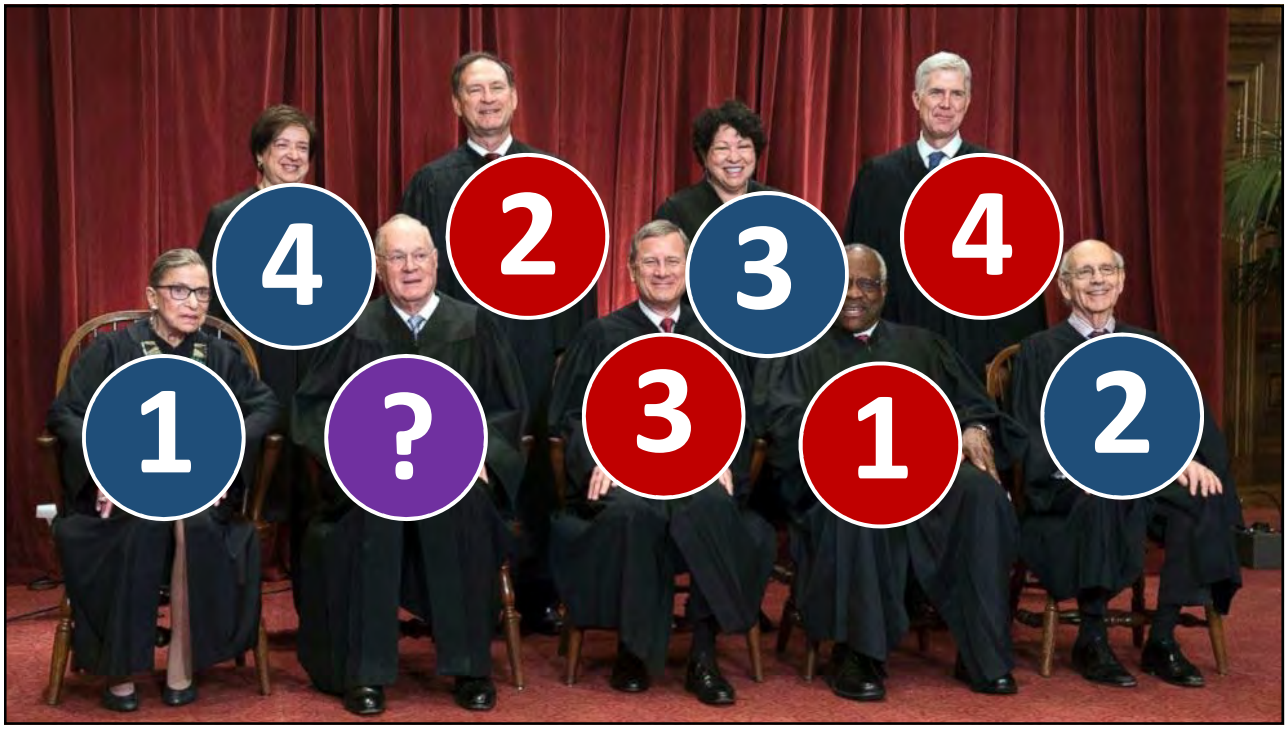

"Good people don't smoke marijuana..." 4/5/16
"It remains a violation of federal law to distribute marijuana throughout any place in the US, whether a state legalizes it or not" 2/27/17
Sessions Memo 1/4/18


SUPREME COURT UPDATE



What's On Tap For 2017-2018 Term

- **Class Action Waivers** – Argued on October 2, 2017
- **Can states force union members to pay agency shop fees?**
- **Same-Sex Wedding Cake**
- **President's Travel Ban** – Version 3.0 to be decided soon

stay tuned…?

- **Does Title VII cover sexual orientation?**

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Why The Confusion?

- Different tests applied in different situations
  IRS, state taxing authorities, NLRB, state employment departments, workers' comp boards, state & federal courts
- Generally, tests boil down to one factor: **CONTROL**
  Some parts of analysis could be subjective in interpretation
- 20th-century laws governing 21st-century issues

What Happened?

- **September 2011:** USDOL announces "Misclassification Initiative" to target companies and ICs
- **July 2015:** USDOL issues interpretive guidance, labels misclassification as a "problematic trend"
- **Result:** Government would more likely than not conclude your worker is an employee and not an IC

Where Are We Now?

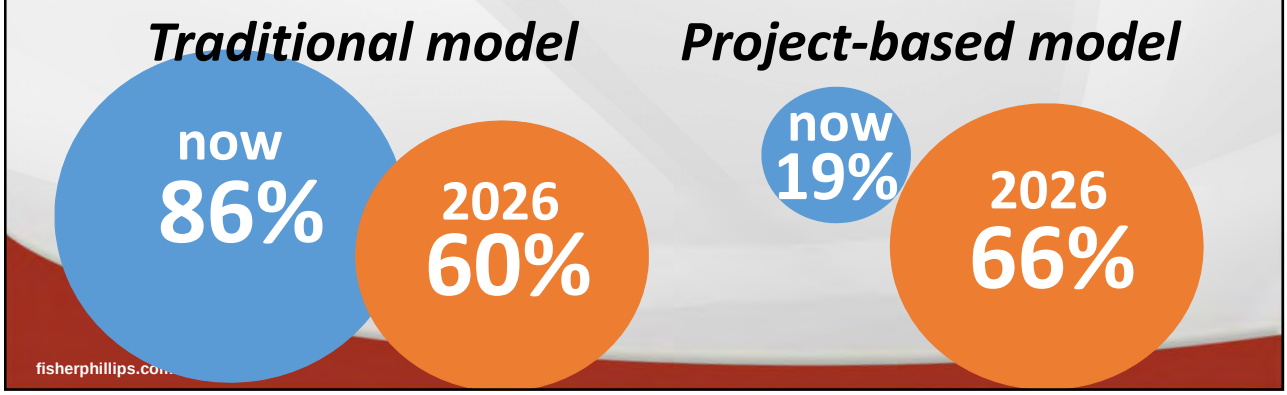
June 2017: Trump administration withdraws IC Guidance

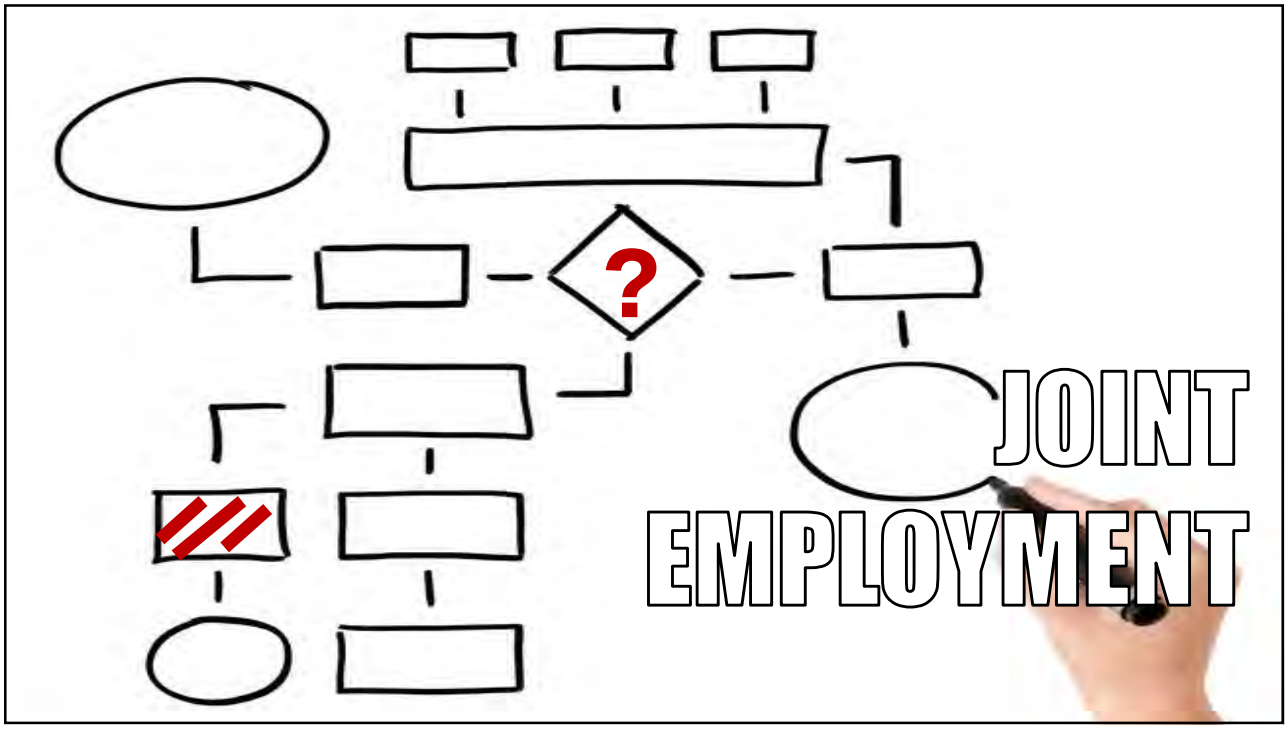
- USDOL will focus fewer resources on IC misclassification
- Courts/attys/investigators can no longer look to Guidance

- States and private attorneys can still proceed with claims
- Inherent confusion and uncertainty still exists

What's Next?

- Possible legislation to further clarify distinction
- Development of hybrid third category?
- Continued growth of "gig" economy, and increased use of freelancers and independent contractors





What Happened?

August 2015: NLRB creates broad new standard

*Joint employment exists even where one company only has the **right** to exert **indirect or potential control** over the terms and conditions of another company's employees **(Browning-Ferris Industries of California, Inc.).***

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What Happened?

January 2016: USDOL issues Joint Employment Guidance

Expansive interpretation of the principles governing joint employment standards for wage and hour matters, along with a new and aggressive agency enforcement posture.

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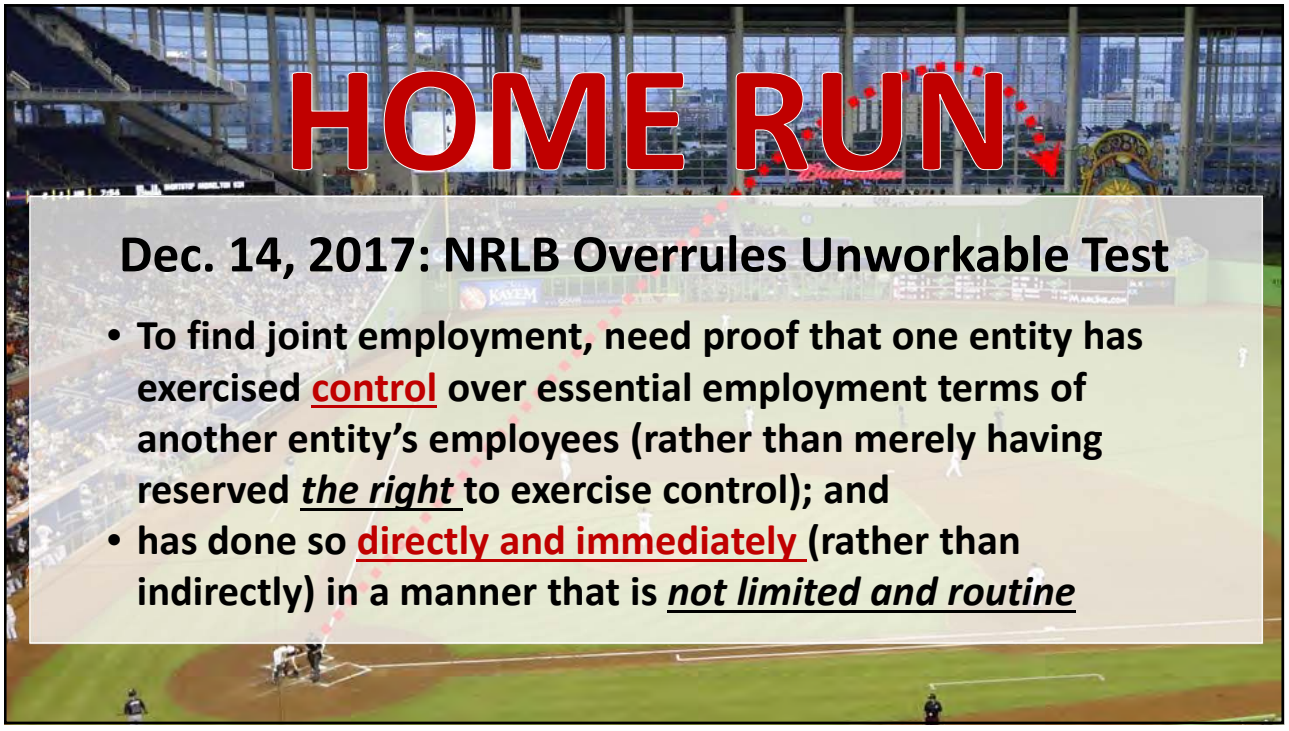
✓ **June 2017: Trump administration withdraws Joint Employment Guidance**

✓ **July 2017: Bill introduced in Congress to narrow joint employment definition**

- *Would apply to NLRA and FLSA*
- *Only if business "directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over essential terms and conditions of employment" of a worker*



Dec. 14, 2017: NRLB Overrules Unworkable Test

- **To find joint employment, need proof that one entity has exercised control over essential employment terms of another entity's employees (rather than merely having reserved *the right* to exercise control); and**
- **has done so directly and immediately (rather than indirectly) in a manner that is *not limited and routine***


BEST OF THE REST


CALIFORNIA REPUBLIC
NEW CALIFORNIA LAWS

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California New Parent Leave Act

- Applies to employers with 20-49 employees
- Qualified employees entitled to 12 weeks of job-protected parental leave for baby bonding (qualify same as FMLA/CFRA)
- Maintain benefits
- Does not apply if FMLA/CFRA applies
- Effective January 1, 2018

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California Minimum Wage Increase

- Effective January 1, 2018
- From $10.50 per hour to $11.00 per hour for California employers with 26+ employees
- From $10.00 to $10.50 for employers with 25 employees or less

Commission Employees

- Over the years, case law has interpreted California law more rigidly to fix new rules for properly compensating employees receiving incentive pay, or combinations of hourly pay and incentive pay.
- The crux: such employees must be compensated fully for each hour worked for productive and non-productive time at least at the applicable minimum wage.
- One category of non-productive time: Rest Periods

Compensation for Non-Productive Time

No state court has specifically ruled whether salespersons paid by commissions must be separately compensated for "other non-productive (non-sales) activity," but one federal court interpreting California law ruled "Yes" on that issue.

(*Balasanyan v. Nordstrom* (S.D. CA, Aug. 12, 2013).)

Compensation for Non-Productive Time

Last year, one state court opinion ruled that commission-paid sales employees must receive paid rest periods separate from their incentive-based pay. (*Vaquero v. Stoneledge Furniture LLC* (February 28, 2017).

- Draws? -- The court ruled that draws paid against those commissions could not be credited as compensation for the rest periods because they represented compensation only for commissions.
- 100% commission pay plans are now invalid.

Compensation for Non-Productive Time

- The *Vaquero* court did not address whether commission-paid employees should be paid separately for other non-productive time, but such a ruling may be inevitable.

Zones of Risk

- For employees paid by commission (or piece rate), there are three potential zones of accountability for timekeeping and minimum wage compliance.

- Productive Time (PT)
- Rest and Recovery Period Time (RRP) and
- Other Non-Productive Time (NPT).

Solution?

- Hybrid pay: commissions for sales activity and separate pay for rest-recovery periods and "other non-productive time": All three zones must be monitored.

California Fair Pay Act

- Effective January 1, 2018
- Now expands to public employers!

Employer To Do List

1. **Handbook update (harassment, leave, arbitration, background checks, drug policies)**
2. Harassment training
3. Pay equity audit
4. Pre-employment practices audit for ban-the-box/salary history ban issues (update pre-employment paperwork, training)
5. Wage-and-hour audit (classification issues, minimum wage, commission employees)

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Final Questions

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