Looking Ahead to 2017

Legal Changes Impacting Employers

Charles B. Baldwin

Brian D. Burbrink

On November 8, 2016, Americans voted to determine their 45th President and the balance of power in Congress. The results of this election will significantly impact workplace law for the next four years.

Minimum wage, immigration reform and paid family leave are just a few of the employment law issues subject to massive potential changes. Given systemic restraints, however, those changes are not likely to take shape until 2018.

In the interim, the regulatory agenda of the Obama administration is alive and well, with several changes to workplace law on the immediate horizon. Below we examine a few of those changes affecting employers in 2017.

Aggressive expansion of retaliation claims

In August 2016, the Equal Employment Opportunity Commission (EEOC) issued new and wide-reaching guidance on retaliation. That guidance set forth the EEOC's expansive analysis of retaliation, already the most frequently asserted claim.

According to the guidance, protected activity includes making a charge or complaint, testifying, assisting or participating in any manner in an investigation, even where the underlying allegation is not meritorious or was not timely filed and "regardless of whether an individual has a reasonable, good faith belief that the underlying allegations are, or could become, unlawful conduct."

An employer that disciplines or otherwise takes an adverse action against an employee for providing false or bad faith testimony in an internal investigation or for bringing a spurious complaint of discrimination is therefore at risk of a potential retaliation finding by the EEOC.

The EEOC takes a similarly broad approach to its analysis of retaliation for activity in opposition to any practice made unlawful under the EEO laws it enforces. The guidance explains that protected actively includes when an individual explicitly communicates his or her belief that the matter complained of is or could become harassment or discrimination. An employee need not use any formal language (e.g., the words "harassment" or "discrimination") so long as the circumstances show that the individual is conveying opposition or resistance to a perceived potential EEO violation.

The guidance also sets forth so-called "promising practices" for employers to minimize liability, including: (1) maintaining stand-alone plain language anti-retaliation policies; (2) providing anti-retaliation counseling as part of an employer's response to an investigation involving EEO allegations; (3) and designating an individual to scrutinize for legitimacy any employment actions taken in the wake of a concern or complaint being raised. While these practices would not establish a legal defense for employers, they may prove helpful for minimizing the risk of such claims.

In light of the EEOC's revised guidance, employers can expect the number of retaliation claims to increase and should consider taking action now to review and revise policies, practices and agreements to ensure that they are not inadvertently systematizing retaliation and are implementing sensible best practices to help prevent such conflicts from arising in the first place.

Burdensome EEO-1 reporting requirements

In September 2016, the EEOC announced it will collect employee pay information from employers with 100 or more employees. The new data will be collected on the annual Employer Information Report (EEO-1), and employers will be required to provide two types of new information: (1) summary pay data for employees in 12 separate pay bands, 10 job categories and 14 gender, race and ethnicity categories; and (2) aggregate hours worked data, which includes the total hours worked by all employees accounted for in each pay band.

The Ledbetter Fair Pay Act of 2009 was the first bill signed into law by President Obama, and this new reporting requirement reinforces the focus on pay disparities based on gender, race and ethnicity. Employer advocates have questioned the cost and reliability of the new requirements. Those advocates suggest that the broad, aggregated pay data collection will be burdensome to employers while not accurately

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Nominations and applications are open for the 2017 Ogletree Deakins Human Resources Professional of the Year award, presented by the Indiana Chamber of Commerce. The winner will be honored at the 53rd Annual Human Resources Conference on April 26.

The award is open to all full-time human resources practitioners in Indiana. Individuals who have made significant contributions to their company/organization over the past year through implementation of best practices, organization design and effectiveness, and alignment and accomplishment of the strategic direction of their company are encouraged to apply. The deadline to apply is March 3.

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- 2012: Melissa Greenwell, The Finish Line

AUTHORS: Charles B. Baldwin is managing director and Brian D. Burbrink an associate at the Indianapolis office of Ogletree Deakins. They can be contacted at (317) 916-1300 or www.ogletreedeakins.com

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or completely accounting for all of an employee's compensation. Moreover, the data does not account for employees' varying levels of education, experience, performance or seniority.

Though the new reporting requirements are not required until March 31, 2018, employers should consider the following preparations in 2017: (1) assess HR and payroll systems to ensure they will generate the necessary data; (2) meet with vendors to coordinate compliance efforts; (3) design systems to retrieve data regarding benefits elections, which impact W-2 income; (4) update job descriptions to ensure accuracy and support for pay decisions that reflect different responsibilities; and (5) determine how to report hours worked for exempt employees.

Sexual orientation discrimination

In July 2016, the Seventh Circuit Court of Appeals reaffirmed that Title VII does not redress sexual orientation. However, in doing so, the Seventh Circuit openly invited Congress and/or the Supreme Court to address what it called a "paradoxical legal landscape" – one that allows same sex marriage but does not prohibit employers from discriminating against employees from entering into same sex marriages.

While federal Title VII case law continues to develop, employers need to be aware of applicable state and local laws affecting LGBT employees. In Indiana, 20 cities and towns extend some form of anti-discrimination protections for sexual orientation and/or gender identity.