Federal Bar Association
Labor and Employment Law Section
Spring 2016

The Labouring Oar

Message from the Chair

By Donna Currault

The L&E Section continues its efforts to provide great benefits to our members through timely publications addressing hot topics as well as CLEs focusing on our specialized practice area. On Feb. 26, we kicked off our first traveling L&E in a Nutshell CLE program with a 3-hour CLE in New Orleans, Louisiana. Special thanks to Brett Strand (3M Office of General Counsel), Betsy Chestney (Cornell Smith Mierl & Brutocao) and Steven Griffith Jr. (Baker Donelson Bearman Caldwell & Berkowitz) for their presentations. They addressed EEO and FLSA matters as well as Louisiana non-competition agreements and timely wage payment obligations. The lawyers who attended the program gave rave reviews. In the words of one attendee: "Wow! Insanely smart panel!" This evaluation confirms that we are accomplishing our goal of providing our members with topical discussions by great speakers. The L&E Section will continue to partner with other chapters throughout the country to bring our L&E Nutshell program to different locations, with Boston, Minneapolis, D.C., Phoenix, and other stops on the horizon. If your chapter is interested in partnering with our L&E Section to have our speakers present this program in your city, contact ctarara@seatonlaw.com.

Keep an eye out for our upcoming FLSA MyLaw CLE later this year. This video webinar will run shortly after the Department of Labor issues its new regulations, so the program should be of great interest to practitioners. We also continue to plan for our 7th Biennial Conference in 2017. This conference will be held in San Antonio, Texas, on March 9-10, 2017. As always, our Biennial Conference is designed to address more advanced and developing issues faced by L&E practitioners, and it assumes a knowledge of the fundamentals of an L&E practice. If you have any suggestions for speakers or topics that you believe will be of interest to our membership, please send that information to ctarara@seatonlaw.com. And by all means, mark this date on your calendar now so that you can join us in San Antonio.

I hope you continue to enjoy our regular publications in *The Federal Lawyer, The Labouring Oar* newsletter, and Monthly Circuit Updates. This quarter's *Labouring Oar* includes the first in a series of articles from our Legislative and Congressional Committee discussing the shift in policymaking from the Legislative to Executive Branch as a result of Congressional inaction, and we thank that Committee's Chair Steve Griffith for this first installment. We also include David Jones' article addressing legal ramifications and risks faced by employers who attempt to recover legal fees as "business expenses" from H-1B visa holders. With the EEOC's recent filings in Pennsylvania and Maryland alleging

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A Look at What's Inside

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Traveling CLE Visits New Orleans

On Feb. 26, the FBA Labor & Employment Section's Traveling CLE, entitled "Employment Law in a Nutshell," arrived in New Orleans. The three-hour CLE program focused on the most frequently occurring (and reoccurring) employment issues, including equal employment opportunity issues and the Fair Labor Standards Act, along with unique issues in Louisiana law. Speakers included Brett Strand, Labor and Employment Counsel with 3M in St. Paul, Minnesota; Betsy Chestney, with Cornell Smith Mierl & Brutocao in Austin, Texas; and Steven F. Griffith Jr., with Baker Donelson Bearman Caldwell & Berkowitz, PC, in New Orleans. The event was well attended by practitioners and in-house counsel, and future stops for the Traveling CLE will be publicized and posted on the Section's webpage (www.fedbar.org/sections/labor-employment-law-section.aspx) as dates and locations are finalized. ■

From left: Mr. Griffith, Mr. Strand, and Ms. Chestney

REQUEST FOR PROPOSALS

The Labor & Employment Section is seeking written proposals for presentations at the FBA's 2017 Labor & Employment Section Biennial Conference, to be held on March 9-10, 2017 in San Antonio, Texas.

The purpose of the presentation should be to educate conference attendees and stimulate discussion on current and practical topics in Labor & Employment law. If you are interested in submitting a speaker proposal for this conference, please provide the following:

- Proposed speaker(s)—include brief background (including whether you have spoken at previous FBA events) and contact information;
- Proposed title of presentation;
- Summary of the presentation—include purpose and content; and
- Target audience for the presentation (Plaintiff or Defense Bar; professionals providing advice and counsel for employers, such as attorneys, human resources professionals, and/or employers; or all of the foregoing).

If you submitted a proposal for the 2016 national convention and it was not selected, submission of those materials in response to this request will be sufficient—but please indicate if that is the case. All proposals must be submitted by July 15, 2016 to the CLE & Programming Committee at 2017FBALEConf@PCLifeguard.com.

Please contact Corie Tarara, Chair of the L&E CLE & Programming Committee, at ctarara@seatonlaw.com or 952-921-4615, with any questions regarding the conference or proposal.

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sex discrimination under Title VII based on sexual orientation, Kate Bruce and Joel Schroeder's "Steps and Leaps for Sexual Orientation and Gender Identity Protection under Title VII" should be of particular interest to practitioners. On behalf of the entire Section, I thank all of our authors, Steve Griffith of Baker Donelson and David Jones of Jackson Lewis, as well as Kate Bruce and Joel Schroeder of Faegre Baker Daniels, for their contributions to this issue and for sharing their insight and views on these topics.

It's not too late for you to get involved in the L&E Section. If you are interested in writing for one of our publications, contact Kathryn Knight at kknight@stonepigman.com. And feel free to contact me at dcurrault@gordonarata.com if you would like to explore other opportunities within the FBA and our L&E Section. ■

Steps and Leaps for Sexual Orientation and Gender Identity Protections under Title VII

By Kate Bruce and Joel Schroeder

As noted in the Winter 2016 issue of *The Labouring Oar,* "practitioners must pay close attention" to governmental action "to plan for and predict future trends in employment law." "EEOC—Trailblazers or Enforcers? A New Age of Advocacy by the Commission," *The Labouring Oar* Winter 2016, Dena H. Sokolow. One such government action—the Equal Employment Opportunity Commission's recent filing of two lawsuits—has signaled yet another step forward in the EEOC's continued purposeful and serious focus on addressing discrimination based on sexual orientation and gender identity, which are separate concepts,[1] through Title VII of the Civil Rights Act of 1964.

To date, no federal circuit court has expressly ruled that Title VII covers sexual orientation. But, federal district courts and the EEOC have acknowledged that discrimination based on sexual orientation and gender identity can violate Title VII, even though it is still the case that the plain language of Title VII does not include either sexual orientation or gender identity as protected classes. Thus, efforts to apply Title VII protections to sexual orientation and gender identity discrimination have been somewhat inconsistent and have moved through a number of different avenues discussed below. Results have differed when interpreting the applicability of Title VII's sex discrimination provision to allegations involving sexual orientation versus allegations involving gender identity.

With respect to gender identity, the EEOC and federal courts have been acknowledging claims asserting discrimination based on gender identity and transgender status for quite some time. For example, in *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012), the EEOC concluded that intentional discrimination against a transgender individual based on that person's gender identity is, by definition, discrimination based on sex and therefore violates Title VII. Similarly, the Sixth Circuit Court of Appeals affirmed a trial verdict in favor of a transgender police officer for a claim of sex discrimination under Title VII. The verdict was based on evidence that the police officer was not promoted for failure to conform to sex stereotypes as a male-to-female transsexual who was living as a male while on duty but who often lived as a woman off duty. *See, e.g., Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Lewis v. High Point Regional Health Sys.*, 2015 WL 221615 (E.D.N.C. Jan. 15, 2015) (denying defendant's motion to dismiss a Title VII sex discrimination claim for plaintiff's allegations relating to her transgender status where the plaintiff, a certified nursing assistant, alleged she was not hired for several positions based on her transgender status because Title VII's sex discrimination provision prohibits discrimination related to transgender status).

Thus far, many of these gender identity-related cases have been largely grounded in the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In *Price Waterhouse*, the Court stated that "sex stereotyping," including gender stereotyping based on a belief that an employee is or is not acting according to expectations defined by gender, could be the basis for an unlawful discrimination claim. As explained in *Glenn v. Brumby*, a person is considered transgender "precisely because of the perception that his or her behavior transgresses gender stereotypes ... Thus, there is congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms." 663 F.3d 1312, 1316 (11th Cir. 2011)

Courts are acknowledging gender identity discrimination claims in other ways, too. For example, in a recent case in the U.S. District of Minnesota, the EEOC and an employer entered a comprehensive consent decree in a case involving claims alleging a hostile work environment and disparate treatment because of sex, specifically alleging discrimination "because of [plaintiff's] transition from male to female during her employment . . .; because [plaintiff] did not conform to Defendant's sex or gender-based preferences, expectations, or stereotypes of women; and/or because of Defendant's sex or gender-based expectations or stereotypes related to individuals assigned the male sex at birth." *EEOC v. Deluxe Fin. Servs., Inc.*, Civ. No. 15-2646 (D. Minn. Jan. 20, 2016).

With respect to both sexual orientation and gender identity, protections for LGBT individuals have moved forward outside of federal courts. The EEOC has been actively accepting and investigating charges alleging sexual orientation and gender identity discrimination as a form of unlawful gender bias under Title VII. Federal contractors have also been explicitly prohibited from engaging in sexual orientation and/or gender identity discrimination by executive order. *See* Executive Order 13672 and its implementing regulations. Additionally, a number of state laws directly prohibit discrimination based on sexual orientation and/or gender identity in the employment context. For example, under California's Fair Employment and Housing Act, discrimination based on sexual orientation is illegal.[2]

With respect to sexual orientation, fewer cases have recognized sexual orientation as a form of sex discrimination under Title VII—and no circuit court has expressly recognized sexual orientation as a protected class. In fact, even while recognizing "the futility of treating sexual orientation discrimination as separate from sex-based considerations," courts continue to dismiss sexual orientation claims for failure to state a cognizable claim under Title VII. *See, e.g.*, *Christiansen v. Omnicom Grp., Inc.*, Civ. No. 15-3440 (S.D.N.Y. Mar. 9, 2016).

In response to this, the EEOC has pushed forward with sex discrimination claims based on sexual orientation and recently-filed suits reflecting this strategy. Specifically, on March 1, 2016, the EEOC filed its first of two cases alleging employer violations of Title VII, asserting that the employees in both cases were subjected to harassment on the basis of their sexual orientation.

In *EEOC v. Pallet Cos.*, Civ. No. 16-595 (D. Md.), and on behalf of a lesbian whose sexual orientation was known to most of her coworkers, the EEOC alleges that as soon as she began working a night shift, the employee experienced regular harassing comments such as, "I want to turn you back into a woman" and "you would look good in a dress" and was discharged when she complained about that harassment. In *EEOC v. Scott Med. Health Ctr., P.C.*, Civ. No. 16-225 (W.D. Pa.), the EEOC alleges

that as a gay male, the employee was subjected to harassment, including, for example, being called a "faggot" and "queer" and was constructively discharged as a result.

Both cases specifically assert that the employers' conduct directed at the plaintiffs was "motivated by" the plaintiffs' sex, "in that sexual orientation discrimination necessarily entails treating an employee less favorably because of his [or her] sex; in that [plaintiffs], by virtue of [their] sexual orientation, did not conform to sex stereotypes and norms" to which the defendants "subscribed." Likewise, one recent EEOC decision states that allegations of sexual orientation discrimination necessarily involve sex-based considerations. For example, in *Baldwin v. Dep't of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015), the EEOC reasoned:

> Complainant's claim of sexual orientation discrimination alleges that the Agency relied on sex-based considerations and took his sex into account in its employment decision regarding the permanent . . . position. Complainant, therefore, has stated a claim of sex discrimination. Indeed, we conclude that sexual orientation is inherently a "sex-based consideration," and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII. A complainant alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account.

In addition to its role as a litigant, the EEOC has been actively filing *amicus* briefs which seek explicit decisions holding that sexual orientation discrimination constitutes illegal gender stereotyping in violation of Title VII and recognizing that the basis for such claims are broader than the "requirements" outlined in *Price Waterhouse*. In *Burrows v. College of Central Fl.*, before the Eleventh Circuit, the EEOC as *amici* recently argued that sexual orientation discrimination is cognizable as sex discrimination under Title VII because: (1) sexual orientation discrimination necessarily involves sex stereotyping in violation of Title VII; (2) sexual orientation discrimination constitutes associational discrimination that violates Title VII; and (3) sexual orientation discrimination is, by definition, discrimination "because of . . . sex," in violation of Title VII.

In sum, the EEOC's newly-filed lawsuits mark another step in its strategy to seek broad treatment of claims for sexual orientation discrimination and to continue advocating for LGBT rights. Although it remains to be seen how these cases will be resolved, the lawsuits further signal that issues of LGBT equality are an agency priority and show steps towards aggressive enforcement against employers. In recognition of today's diverse workforce and the rapidly evolving legal landscape involving sexual orientation and gender-identity claims, employers are well advised to stay ahead of the curve by developing clear and appropriate policies of non-discrimination and providing training in order to cut off potential discrimination claims (*e.g.,* failure to hire an individual because he or she is transgender or because of his or her sexual orientation, discharge stemming from a gender transition, and harassment). Employees are also preparing by becoming more aware of their rights and educated on the possible avenues for seeking redress should they experience discrimination. Overall, new suits will likely continue to seek rulings with clear statements of cognizable claims for LGBT-related discrimination under Title VII and, even with or without clear court direction, it is highly likely that the number of investigations and cases involving LGBT discrimination will continue to expand. ■

Kate Bruce and Joel Schroeder are attorneys in the Minneapolis office of Faegre Baker Daniels. Both concentrate their practice in litigating employment cases in state and federal courts across the country. Kate can be reached at kate.bruce@faegrebd.com and Joel can be reached at joel.schroeder@faegrebd.com.

Endnotes

[1]Sexual orientation generally means one's emotional or physical attraction to the same and/or opposite sex. Gender identity, which includes transgender status, generally means one's inner sense of one's own gender, which may or may not match the sex assigned at birth.

[2]Over twenty states have enacted laws addressing sexual orientation discrimination. A few include: California, Colorado, Illinois, and New York. Additionally, more than a hundred cities have passed ordinances prohibiting discrimination based on sexual orientation, gender identity, or both, including, for example, Ann Arbor, MI, New Orleans, LA, and St. Louis, MO.

The Legality of Having Foreign Workers Pay for Their Own Immigration Fees

By David S. Jones

As the unemployment rate has dropped across the country, more employers are turning to foreign workers to fill critical positions, particularly in the STEM (Science, Technology, Engineering, and Math) fields. As these employers discover, hiring a foreign worker is, in many cases, more expensive than hiring a U.S. worker because of visa costs and Department of Labor ("DOL") wage requirements. Employers must file visa applications (generally H-1B visas) and, in most circumstances, eventually sponsor the worker for permanent residence. Perhaps surprisingly, due to DOL wage requirements for H-1B holders, foreign workers' wages also may be higher than those of U.S. workers for the same position.

Given these additional costs associated with hiring foreign workers, many employers seek to either have employees pay for the immigration process themselves or have employees reimburse those fees if they leave employment before a certain period of time. Though numerous regulations and court decisions interact to determine exactly what is and what is not permissible, employers are generally very limited with respect to having foreign workers pay for their own immigration fees and costs.

H-1B Visa Holders

H-1B-Related Filing Fees

Certain H-1B filing fees were created by statutes, and employers may not require employees to pay them. Specifically, an employer may not have an employee pay the American Competitiveness and Workforce Improvement Act ("ACWIA") fee ($1,500 or $750, depending on the size of the employer) or the fraud detection and prevention fee ($500).[1] The I-129 filing fee ($325), on the other hand, established by U.S. Citizenship and Immigration Services ("USCIS"), is not created by statute and, therefore, employers are not mandated to pay the fee. Nevertheless, it most certainly would be considered a business expense for purposes of H-1B wage requirements, which can create other violations that are discussed below.

Department of Labor Provisions for Wages and against Payment of Business Expenses

DOL regulations require employers to pay H-1B holders the "required wage," which is defined as the higher of either the prevailing wage (set by the DOL or other legitimate sources of wage data for the position and location) or the actual wage (what the employer pays other workers with similar experience and qualifications for the specific employment in question).[2] The wage requirement includes the employer's obligation to offer benefits and eligibility for benefits provided as compensation for services to H-1B nonimmigrants on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.

Lawful authorized deductions from H-1B wages such as taxes, insurance, pensions and the like do not impact the required wage.[3] Deductions that are unauthorized under the regulations, however, such as business expenses of the employer, including attorney fees and other costs connected to the H-1B, will be deemed wage violations if they cause the H-1B worker to fall below the required wage.[4] Legal and filing fees associated with the H-1B by regulation are specifically considered unauthorized deductions and therefore must be subtracted from the wage offered when assessing whether the employer is complying with the wage requirements. In other words, if the employer has the employee pay legal fees, and doing so would have the effect of making the worker earn less than the required wage, it is considered a wage violation on the part of the employer.

DOL Fact Sheet #62H specifies that H-1B workers may not pay the following expenses:

- Any expenses, including attorney fees, directly related to the filing of the Labor Condition Application (Form ETA 9035 and/or ETA 9035E) (20 C.F.R. § 655.731(c)(9)(ii));
- Any expenses, including attorney fees and the premium processing fee (INA § 286(u)) directly related to the filing of the Petition for Nonimmigrant Worker (Form I-129/129W) (20 C.F.R. § 655.731(c)(9)(ii) and (iii)(C));
- Tools and equipment (20 C.F.R. § 655.731(c)(9)(iii)(C)); and
- Travel expenses while on employer's business (20 C.F.R. § 655.731(c)(9)(ii) and (iii)(C)).

It is noteworthy that the fact sheet specifically references the premium processing fee, which no other regulation or case concerning authorized deductions has directly addressed. This fee is for expedited processing of the H-1B application, and is not a required fee. Depending on the reasoning for the payment of the premium fee, it may be possible to argue that the premium fee is not a business expense—for example, where the employee requests premium processing for his or her personal benefit.

Courts also have interpreted business expenses broadly. The Administrative Review Board for the Department of Labor ("ARB"), for example, has imposed wage assessments on employers who required H-1B employees to pay for ancillary processes to obtaining an H-1B.[5] Some foreign nationals have home residency requirements imposed on them under the J-1 visa category. This requirement can be waived in some cases in order to allow the individual to switch from J-1 to H-1B status. This scenario is very common with foreign physicians. In *Administrator v. Kutty*, the ARB held that the fees paid by H-1B employees for their J-1 waivers constituted business expenses associated with the H-1B process and therefore were unlawful wage deductions, which the employer must reimburse.[6]

Early Termination Penalties

The H-1B statutes also prohibit an employer from imposing "a penalty (as defined by state law) for the worker's failure to complete the full employment period."[7] Further, the DOL's wage regulations also define any such penalty to be an unauthorized deduction.[8] Regulations do make exceptions for bona fide liquidated damages.[9] The determination as to whether liquidated damages are lawful and not a penalty pursuant to the H-1B regulations is a question of state law.[10] If the liquidated damages are lawful under state law, they will be lawful under the immigration regulations. An example of where a court found the liquidated damages lawful is *In The Matter of*

Administrator, Wage and Hour Div. v. Greater Missouri Med. Pro-Care Providers Inc., applying Missouri law. In this case, the court found that the damages were lawful because they were based on three considerations:

1. Damage to the employer and its need to protect its overall investment and interest as a going concern, and investment of the company in securing the services of the employee;
2. Direct and indirect costs incurred in bringing the H-1B employees to the U.S. and the amount of profits expected to be derived from each worker ($1,000 per worker per month); and
3. The "Market Perspective" value of such employees to other employers who may seek to hire such workers away from the employer and pay the damages because of the market demand for such workers.[11]

While each state will apply a different standard, the factors above are useful in any attempt at drafting a liquidated damages clause.

Permanent Residence Sponsorship

While most employers will pay the costs associated with the H-1B visa, fewer are inclined to bear the costs of the Permanent Residence process, which can be much higher. This process generally includes PERM Labor Certification, Immigrant Visa and Adjustment of Status, and the regulations allow greater flexibility for employers to recoup costs related to the latter two steps.

PERM Labor Certification

Under DOL regulations, all costs associated with the PERM Labor Certification ("PERM") process are to be paid by the employer.[12] This requirement was part of the 2005 regulations regarding the PERM process for labor certification and took effect in 2007. The DOL was concerned that employees were effectively buying green cards when they were paying for labor certification and implemented regulations to ensure that employers took responsibility for the process. There are two exceptions to this rule. One is that the employee may have his own independent counsel for the purposes of consulting with the employee about the application. Any cost related to the actual processing and filing of the PERM, however, is solely the responsibility of the employer.[13] The other exception involves a third party that would benefit from the employee's work.[14] In such cases, that third party may be able to pay the costs associated with the PERM.

Immigrant Visa and Adjustment of Status

There are no regulations specifically addressing the payment of fees associated with Immigrant Visa and Adjustment of Status processes. As such, the consensus is that the fees may be paid by an employee. Employers are nevertheless advised to act cautiously, particularly with the immigrant visa, as such expenses could in theory be deemed to be business expenses for H-1B holders. For example, in certain circumstances, it may be necessary to file the immigrant visa in order to extend H-1B status. Following the logic in *Kutty*, the costs of filing the immigrant visa could equate to an unlawful deduction.

Reimbursement Agreements for the Permanent Residence Process

Many employers choose to implement reimbursement agreements for the Permanent Residence process. For example, where an employee leaves employment within a year of sponsorship, the employer may seek to have the employee reimburse the cost for the Immigrant Visa and Adjustment of Status processes. Where an employer chooses to implement such an agreement, it must be sure to exclude the PERM costs. Likewise, for H-1B holders, it may be advisable to structure any such agreement as liquidated damages in order to avoid violating H-1B regulations, particularly the prohibition against penalties for early termination.

Conclusion

Employers must be cautious whenever attempting to pass any immigration-related fees on to foreign workers. When drafting any sort of reimbursement agreements, employers should refrain from including any costs associated with the H-1B or PERM process. With any other immigration-related fees, employers should carefully weigh the advantages and risks of passing these on to employees. ■

David S. Jones is a Principal in the Memphis, Tennessee, office of Jackson Lewis P.C. He has practiced law exclusively in the area of immigration and related employment matters for over 15 years.

Endnotes

[1]INA 212(n)(2)(C)(vi)(II). "It is a violation of this clause for an employer who has filed an application under this subsection to require an alien who is the subject of a petition filed under section 214(c)(1), for which a fee is imposed under section 214(c)(9), to reimburse, or otherwise compensate, the employer for part or all of the cost of such fee. It is a violation of this clause for such an employer otherwise to accept such reimbursement or compensation from such an alien-214(c)(9)." Noteworthy is that for blanket L-1 applications, 214(c)(9) references alien, not employer.

[2]*See* 655.731(a) defining the required wage.

[3]*See* 655.731(C)(9)(ii) and 655.731(C)(9)(iii)(C).

[4]*Id.*

[5]*Administrator v. Kutty*, ARB No. 03-022, ALJ Nos. 01-LCA-010 through 01-LCA-025, slip op. at 10-11 (ARB May 31, 2005).

[6]*Id.*

[7]INA § 212(n)(2)(C)(vi)(I).

[8]20 C.F.R. § 655.731(c)(10)(i).

[9]20 C.F.R. § 655.731(c)(10)(i)(B).

[10]20 C.F.R. § 655.731(c)(10)(i)(C).

[11]*In The Matter of Administrator, Wage and Hour Div. v. Greater Missouri Med. Pro-Care Providers Inc.*, No. 2008-LCA-26 (Oct. 18, 2011), applying Missouri law.

[12]20 C.F.R. 656.12.

[13]*Id.*

[14]20 C.F.R. § 656.12(c).

CALL FOR ARTICLES

The Labor and Employment Section is seeking articles suitable for publication in the summer and fall editions of its quarterly newsletter, *The Labouring Oar*. Articles can address any timely topic of importance to the labor and employment practitioner and should provide balanced coverage of the topic. Suggested length is between 1,300 and 2,500 words. Citations should be formatted as endnotes. Additional guidelines for authors are available here: http://www.fedbar.org/Resources_1/Copy%20of%20Accepting-Articles-for-Publication/Writers-Guidelines.aspx.

Upcoming submission deadlines are June 1 and September 1, 2016.

Before submitting an article for publication, please contact Kathryn Knight (kknight@stonepigman.com) or Brian Rochel (rochel@teskemicko.com).

The Shift of Policymaking When the Legislative and Executive Branches Do Not Act

By Steven F. Griffith Jr.

I write today as the Co-Chair of the Labor and Employment Section's Committee on Legislation and Government Relations. But, I do so in an interesting posture. Our Committee was established ostensibly to report on legislative initiatives at the federal level. But the last few years of gridlock in Washington have confirmed that little, if any, progress can be made as two dueling parties and the Administration are unable to reach agreement on policy initiatives or other substantive law in the area of employment (or virtually any other area).

Late last year, as our Committee met, we established the framework for a new initiative within our Committee, one that focused not on the progress of legislation in Washington (in part because there was none), but on the consequences of that lack of progress. That initiative will span the next several issues of *The Labouring Oar,* and we will address the shift of policymaking from the Legislative to the Executive Branch as a consequence of the lack of action. Future articles will address the shift to the states for legislative action (minimum wage, for instance), and then what we may be able to expect after the election (such an article seems almost impossible to write in this certifiably insane election season). But for now, let us focus on the lack of traditional Legislative activity.

Congressional Action or, Shall We Say, Inaction:

The last two complete sessions of Congress—the 113th (from 2013-2015) and 112th (from 2011-2013)—passed 296 and 284 bills into law, respectively. These were the two least-productive sessions since at least 1947, and the current Congress is on pace to shatter the record for inaction.

To be sure, Republicans in Congress will tell you that Congressional Democrats and the President are responsible for this gridlock, as they stand ready to help shepherd through legislation that makes good sound sense and would best serve the nation. Democrats in Congress and the President would respond that the gridlock is wholly due to the Republicans' inability to compromise on basic legislative initiatives that benefit the American people as a whole. And they would each have much to say about their positions on the respective divides. Nevertheless, without attempting to resolve who is right and who is wrong (or whether they are both right and both wrong), it is difficult to dispute the basic notion that the gridlock exists. So the question is what happens next.

New Administrative Steps:

Over the last several years, in response to so little coming from Congress, the Administration has not been bashful about attempting to fill the legislative void on its own. In some instances, the President has been clear that he is acting because Congress is unwilling to act: think immigration or gun control. In others, the President has made no such statements and simply proposed new regulations: think Clean Air Act or White Collar Exemptions under the Fair Labor Standards Act. These initiatives by the Administration have often touched on other hot-button issues, but there have been significant changes made in the employment context.

For instance, in 2012, the EEOC issued new guidance regarding the use of criminal background checks in employment decisions. Even that guidance itself acknowledged in its questions and answers that criminal background checks were not prohibited by Title VII; nevertheless, the new guidance reversed the course on practices that had been in place under existing regulations for over 30 years. Under the new guidance, the EEOC required an individualized analysis by employers prior to making an employment decision, and that analysis should include an opportunity for the applicant or

employee to explain the circumstances of the conviction and why the conviction should not be factored into the employment-related decision.

Given that courts often defer to Agency guidance in much the same way they do formal regulations, most employers and their counsel have acted on this new guidance and advised their clients accordingly. In the context of this article, however, the EEOC's guidance was of particular interest, given that it was explicit in noting that the new guidance was the product of statistical evidence suggesting that criminal background checks were disproportionately impacting minorities and other groups protected by Title VII. Of course, as with most proactive steps by the Administration, this guidance (and the suits filed following its issuance) were subject to quite a few judicial challenges, each of which is beyond the scope of this article. But areas in which the Executive Branch altered policy are certainly not limited to guidance in the context of background checks.

In 2015, the Administration proposed new minimum salary thresholds required to qualify for white collar exemptions under the Fair Labor Standards Act. Facing an almost certainly insurmountable battle in Congress, the President proposed new regulations that would roughly double the salary thresholds for individuals to meet those exemptions and has separately hinted that the job duties analysis may be modified as well. The anticipated effect is far reaching, and there is no question that wages (or at least entitlement to overtime) for workers would vastly expand.

Policymakers have argued over whether this is a good or a bad thing, and they will continue to do so, but judicial action to challenge this proposed change in the regulations is certain. Some advocacy groups have already promised to institute such challenges if the regulations take effect, and the comment period has closed, meaning that the Department of Labor could issue the regulations any day now. Regardless of whether you feel these initiatives are an appropriate application of Executive power and the plain language of the U.S. Code, or an unreasonable overreach by a policy-driven Administration, one would have to concede that these initiatives are new and an expression of the President's policy views.

The Implications

Some have argued that the Administration's policymaking via regulation actually adds to division in Washington, and I will not delve into that issue here. There are meritorious constitutional and policy arguments on both sides. But this transfer of policymaking to the Executive Branch does present one interesting consequence.

Each initiative described above is subject to, and virtually assured of, a legal battle. In every instance, public interest groups opposed to the President have filed lawsuits challenging the ability of the Administration to promulgate the regulations in question and, in every instance, the Administration has pushed back. On some issues, our federal courts have sided with the Administration, while on others the Administration has not fared so well. This suggests an interesting conclusion: one could argue that policymaking shifts not from the Legislature to the Executive Branch but rather to the Judiciary. More and more, Article III judges rather than elected representatives have the ultimate authority to decide these policy initiatives. That type of conclusion is encouraging and troubling, all at the same time.

As the year progresses, your Committee will continue to report on this issue, but we welcome your suggestions on additional issues to address. ■

A Membership Perk: Monthly Circuit Updates

Don't forget that your membership in the Labor & Employment Section gives you access to the Monthly Circuit Updates! Each month, summaries of all the major labor and employment decisions in each Circuit are provided to all members in an e-newsletter that is also available on the Section's webpage (www.fedbar.org/sections/labor-employment-law-section.aspx). These updates are an invaluable resource that allows members to stay up-to-date on important developments in each Circuit. Take a deep dive into all the new cases within your Circuit each month, and/or peruse all of the developments around the country to stay abreast of the law for your clients. If you would like to volunteer as a contributor for the Circuit Update, please contact Kathryn Knight (kknight@stonepigman.com) or Brian Rochel (rochel@teskemicko.com) for more information.

New Members

The Labor and Employment Section welcomes its new members:

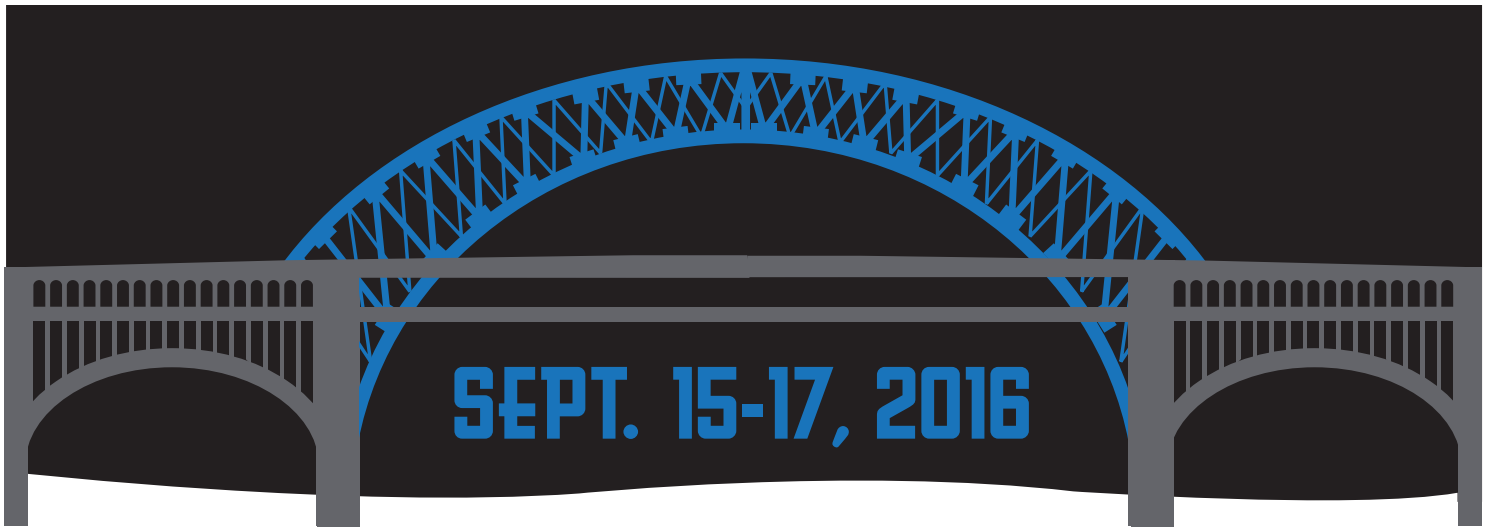
William Alexy
Michael Bartolic
Lisa A. Bolen
Yolanda Carrillo
Deborah Yeng Collins Jade
Alexander Craig
Charles A. Delbridge
Monique Gougisha Doucette
Vivian Rivera Drohan
Sally J. Dworak-Fisher
Kate Fisher
James Friauf
Donna M. Glover
John Cain Harrison
Kevin Robert Lashus
Jennifer Lord
Stephen K. Luxton
Shakira Nicole Mack
Jeffery J. Matthews
Joseph Peter McHugh
Brittany Suzanne Mitchell
Cory Morris
Michael John Mueller
Charles M. Nicely
Dean Norris
Seth James Obed
Jonathan E. Perlman
Gregory Steven Ramirez
Adam Sencenbaugh
Jacob Madison Small
Archibald Magill Smith
Sean Robert Somermeyer
Lindsey Ann Strachan
Rebecca L. Strauss
David Thompson
Spiro J. Verras
William Joseph Volonte
Tracie L. Washington
Kenneth Michael Wentz III
Daniel E. Williams

We encourage each of you to become involved in Section activities. Consider joining us in Cleveland for the FBA Annual Meeting and Convention, Sept. 15-17, 2016, and plan now to attend the Section's 2017 Biennial Conference in San Antonio, March 9-10. Also, visit our webpage (www.fedbar.org/sections/labor-employment-law-section.aspx) to take advantage of the information and resources available there, and watch for our monthly Circuit Updates to stay abreast of recent developments in labor and employment law. For additional information on how you might become even more involved in the Section, contact Donna Currault, Section Chair, at dcurrault@gordonarata.com.

Again, welcome! We look forward to counting you among the ranks of our active members.

Federal Bar Association
Annual Meeting and Convention

CLEVELAND



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