



**EMPLOYMENT
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A Year in Review: Key U.S. Labor and Employment Developments in 2014 and What to Expect in 2015

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Hot Topics in EEO, Recruiting and Hiring, Background Checks, and Retaliation

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Hot Topics – 2014 in Review and Developments to Watch in 2015

- Pregnancy accommodation cases
 - *Young v. United Parcel Service, Inc.*
- New EEOC guidance on religious garb and grooming
 - *EEOC v. Abercrombie & Fitch Stores, Inc.*

Hot Topics – 2014 in Review and Developments to Watch in 2015

- Gender identity and sexual orientation discrimination
 - Implementation of Executive Order 13672
 - Title VII's coverage of transgender employees
 - DOJ Announcement
 - Statutes of Limitation

Hot Topics – 2014 in Review and Developments to Watch in 2015

- Same-sex harassment
 - No change in law, but change in types of cases being brought
 - Bullying as sexual harassment?
 - Title VII and Title IX issues
 - Prove by direct or indirect methods

Background Checks

- Fair Credit Reporting Act (FCRA) requirements
 - Must disclose to applicant/employee before adverse employment action
- EEOC has brought suit against companies, challenging their use of financial and criminal background checks as violating Title VII by disparately impacting racial minorities
 - EEOC conducts background checks on own employees
 - Courts ordering EEOC to turn over its own policies with respect to background checks

Background Checks

- Employee suits against employers for failure to comply with requirements of FCRA
- Legislation introduced to protect employers' rights to conduct background checks on prospective employees
 - HR 5423, would amend 42 U.S.C § 2000e-2, stating it is not unlawful for an employer “to engage in an employment practice that is required by Federal, State, or local law, in an area such as, but not limited to, health care, childcare, in-home services, policing, security, education, finance, employee benefits, and fiduciary duties.”

Class Actions and Pattern and Practice Cases

- EEOC's increased focus on systemic, class-wide discrimination/harassment cases
- Class action waivers in arbitration agreements

Class Actions and Pattern and Practice Cases – “Preserving Access”

- Other “barriers to enforcement” and EEOC’s efforts to “preserve access to the legal system”
 - *EEOC v. CVS*
 - *EEOC v. Doherty*
- State law issues

Retaliation, Adverse Action, and Whistleblowing Claims

- Disclosure of whistleblower's identity as an adverse employment action
- SCOTUS extends Sarbanes-Oxley's whistleblower protections to employees of public company's private contractors and subcontractors
- First ever SEC whistleblower retaliation enforcement action under Dodd-Frank



Keeping up with the Changes and New Direction of the NLRB

Louis P. DiLorenzo
Bond Schoeneck & King

Collegiate Athletics

- Northwestern University: 13-RC-121359
 - Decision and direction of election concerning 85 grant-in-aid scholarships
 - Factors relied upon: special rules, time commitment, recruitment, academic life, revenues and expenses of football program
 - Definition of employee
 - Case status
 - Implications going forward



The Speed Organizing Election Rules

- Implemented 12/12/14; Court challenge 01/05/15.
- Tortured history of attempted rule making in this area.
- Elections held in a range of 10-21 days of petition filing.
- Election issues deferred until after election unless large portion (e.g., 25%).

The Speed Organizing Election Rules

- Implications
 - Less pre-election hearings
 - Lesser campaign opportunity (quality and quantity)
 - Mandatory position statement
 - Alternative voter lists
- Best practices for employers wishing to remain union-free

Email Reversal in Purple Communications, Inc.

- 3-2 decision found employees have a presumptive right to utilize employer's email system for organizing
- Exception for “special circumstances”
- Implications of the decision

University Organizing Issues

- Pacific Lutheran University, 361 NLRB No. 157 (2014)
 - New several factor test for determining jurisdiction over religious colleges and universities
 - New Yeshiva University test for determining managerial status
- Implications of the decision

Expectations for 2015

- The road map: 02/25/14 General Counsel Memorandum 14-01
- Successorship
- Duty to furnish information
- Joint employer
- Weingarten rights

Immigration Issues

Leigh Cole
Dinse, Knapp & McAndrew

Something Employers Can Do Now

- H-1B season: Consider H-1B sponsorship for positions in specialty occupations
 - Annual H-1B cap, H-1B lottery in April for jobs to start in October
 - “Cap Gap” for graduates of U.S. schools to work from April to October
 - Exempt employers may obtain H-1Bs any time of year
 - All compliance duties are the employer’s, not the employee’s
 - Costs must be paid by employer for H-1B wage compliance

Something Employers Can't Do Anything about Yet

- Executive action on immigration
 - Measures can't take effect until further details are developed
 - Limited to items controlled by administrative regulations and policies, not statutes
 - Key issues of interest to the business community were not addressed
 - o H-1B cap
 - o Backlog for permanent residency cases



Deferred Action for Childhood Arrivals (DACA) and Parental Accountability (DAPA)

- DACA to be expanded
- New DAPA program for parents of U.S. citizens and lawful permanent residents'
- Temporary lawful status and employment authorization
- Renewable indefinitely until the program changes or Congress changes the law
- On hold until details are developed

Employment Authorization for Green Card Applicants

- Country-specific annual numerical limitations on new permanent residents
- Case approved but applicant still waits years for green card, with no work authorization
- New plan for employment authorization and travel document during the waiting period
- For employee and immediate family
- On hold until details are developed

Employment Authorization for Spouses of H-1B Workers

- Spouses of H-1B workers don't have work authorization
- New program may allow spouse to work during H-1B approval (to be determined)
- On hold until details are developed



Immigration Relief for Start-Up Entrepreneurs, Inventors and Researchers

- Visas exist for business from abroad to transfer staff to the United States
- No visas exist for new businesses in the U.S. unless a substantial investment is made
- New immigration program will support newly formed businesses
- On hold until details are developed



Expanded Employment for International Graduates of U.S. Colleges and Universities

- Extending Optional Practical Training beyond current max of 29 months
- Limited to STEM fields and E-Verify employers
- On hold until details are developed



Other Actions Announced in Broad Terms

- Modernize and improve the employment-based immigration system
- Better coordinate the efforts of the government agencies involved
- Allocate more resources to border security
- Focus federal enforcement and prosecution efforts on those who engage in criminal behavior while unlawfully present in the United States
- Provide a more humane experience for individuals who claim a lawful right to live in the United States.

What's Next?

- These efforts should improve the U.S. immigration experience for employers and expand the pool of U.S. workers
- Stay tuned for details from the Obama administration in 2015
- For now, focus on potential H-1B cases for the April H-1B lottery



Conclusion and Wrap-Up

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