The 2017 Employment Law Year in Review: “A Year To Remember”

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Supreme Court Roundup
Supreme Court Roundup

Cases Decided in 2017

- **NLRB v. SW General**
  - Court decided that nominated GC of the NLRB became ineligible to perform the duties of the post in acting capacity once nominated for that position.

- **McLane Company, Inc. v. EEOC**
  - Court decided that a trial court’s decision as to whether to enforce or quash an EEOC subpoena should be reviewed for abuse of discretion, not *de novo* by Court of Appeals.

- **Microsoft v. Baker**
  - Court decided that voluntary dismissal of class claims by named plaintiffs is *not* an appealable final order sufficient to warrant review of a district court’s denial of class certification.
Supreme Court Roundup

Cases to Look Out for in 2018

- **NLRB v. Murphy Oil**
  - Court to decide whether mandatory arbitration agreements are permitted under federal labor law if they contain a class action waiver.
  - In 2017, DOJ reversed its position on the issue, and now supports employers’ ability to prohibit class action disputes in arbitration agreements.
  - Will resolve significant split among the Fifth, Seventh, and Ninth Circuits on whether such waivers violate employees’ rights under the NLRA to engage in “concerted activities” in pursuit of their “mutual aid or protection.”
  - Court’s decision is expected to provide welcome certainty to both employers and employees on the issue.
Cases to Look Out for in 2018

Encino Motorcars LLC v. Navarro

- Case previously remanded to 9th Circuit in 2016.
- Court to decide whether “service advisors” who talk to customers about repair work, but do not actually perform the work themselves, are exempt from overtime.
- Outcome to impact not only the country’s 18,000 auto dealerships, but will likely extend to any number of other industries that employ “service advisors.”
- Of potentially even greater impact, the Court may squarely decide the merits of the “narrow construction” principle when it comes to interpreting the FLSA, often a plague for employers.
Supreme Court Roundup

Cases to Look Out for in 2018

✦ *Digital Realty Trust v. Somers*

- Court to decide whether the anti-retaliation provision for “whistleblowers” in Dodd-Frank extends to individuals who have not reported alleged misconduct to the SEC, thus falling outside the act’s definition of “whistleblower.”

- Decision will impact both Dodd-Frank and Sarbanes-Oxley whistleblower protection statutes.

- Will resolve a split between the 2nd, 5th, and 9th Circuits on Dodd-Frank’s definition of “whistleblower,” but may also give the Court an opportunity to re-address *Chevron* deference.
Supreme Court Roundup

Cases to Look Out for in 2018

- **Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission**
  
  - Court to decide whether applying Colorado’s public accommodations law to compel the petitioner to create expression that violates his sincerely held religious beliefs about marriage violates free speech or free exercise clause of First Amendment.
  
  - Decision may fall on a bifurcation of the issue of custom vs. standard work performed.
#MeToo: Sexual Harassment Goes Viral
#MeToo: Sexual Harassment Goes Viral

**Sharp increase in Americans who say sexual harassment of women in the workplace is "serious problem"**

Q: Do you think sexual harassment of women in the workplace is a problem in this country or not? If problem: Is that a serious problem, or not serious? (% saying "serious problem")

![Graph showing the increase in percentage of Americans who consider sexual harassment of women in the workplace a serious problem from 2011 to 2017. The graph indicates a significant increase from 47% in 2011 to 64% in 2017.]

Source: Oct. 11-15 Post-ABC News poll with error margin of 3.5 points among U.S. adults.

EMILY GUSKIN/WASHINGTON POST
#MeToo: Sexual Harassment Goes Viral

Over half of women cite unwanted sexual advances from a man, including 3 in 10 from a coworker

(AMONG WOMEN) Q: Have you ever received unwanted sexual advances from a man...

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<thead>
<tr>
<th>Description</th>
<th>Percentage</th>
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<tr>
<td>...that you felt were inappropriate</td>
<td>54%</td>
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<tr>
<td>...who worked for the same company</td>
<td>30%</td>
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<tr>
<td>...who had influence over your work</td>
<td>23%</td>
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Source: Oct. 11-15 Post-ABC News poll with error margin of 4 points among national sample of 740 women.

EMILY GUSKIN/WASHINGTON POST
Status of Executive Orders
Fair Pay and Safe Workplaces (the “black-listing” rule)

- Repealed by President Trump on March 27, 2017
- Required prospective federal contractors to disclose violations of certain workplace protections, including wage and hour, safety and health, collective bargaining, family and medical leave, and civil rights, before receiving DOD, GSA, or NASA contracts
Prohibition on Sexual Orientation and Gender Identity Discrimination for Federal Contractors

- Has *not* been repealed
- Prohibits workplace discrimination against employees and applicants for employment based on sexual orientation or gender identity.

Paid Sick Leave for Federal Contractors

- Has *not* been repealed.
- Requires federal contractors to provided at least 56 hours of paid sick leave per year for personal illness of to care for a family member
Minimum Wage for Federal Contractors

- Has *not* been repealed
- Effective January 1, 2018, the minimum wage for federal contractors working on or in connection with contracts covered by E.O. 13658 is $10.35/hour.

“Two-for-One” – Reducing Regulation and Controlling Regulatory Costs

- Signed by President Trump on January 30, 2017
- Directs federal agencies to identify two existing regulations to eliminate for every one new regulation issued.
- Lawsuits challenging E.O. filed, citing the negative impact, for example, on OSHA’s ability to set safety and health standards based on findings of significant risk of material impairment and technological and economic feasibility.
Buy American and Hire American

- Signed by President Trump on April 17, 2017
- Directs departments of Homeland Security, Labor, State, and Justice to propose revisions to current immigration programs, and to propose changes to the programs and regulations, and to issue new agency guidance for implementation.
- Specifically directs agencies to evaluate the H-1B visa process in order to determine how to increase wage minimums to promote the hiring of US workers. For example, it suggests reforming the program to allocate priority to the most-skilled or highest-paid foreign workers.
- Came after heightened compliance and enforcement initiatives from various government agencies. For example, on April 4, 2017, DOL announced it will increase investigation and audit efforts with H-1B employers.
Buy American and Hire American

- What does this mean for Employers of Foreign Workers?
  - More targeted H1B site visits
  - USCIS rollback of guidance requiring deference to previous adjudications
  - USCIS mandating interviews for all work based Adjustment of Status Applications
  - Changes to State Department Foreign Affairs Manual scrutinizing intent at entry
  - Investigations of discriminatory hiring offenses for preferring foreign over US Workers (H2A)
  - Changes to rules allocating limited number of H1B Visas
  - Higher Fees for Work Visas
  - Adjust the Wage Scale to more “honestly” reflect prevailing wages in these fails
Federal Legislation
Tax Cuts and Jobs Act (effective January 1, 2018)

- Provides a Paid Family and Medical Leave Tax Credit
  - First initiative of its kind on a national level.
  - *Does not* require employers to provide paid leave. Instead, it lets employers claim a general business tax credit equal to 12.5% of the wages they pay to qualifying employees when they take family and medical leave.
  - Amount can increase to up to a maximum of 25% if the employer pays the employee 100% of their regular wages while on leave.

- Repeals the ACA’s Individual Mandate
  - Individual penalties eliminated, employer mandate remains in place.

- Changes Fringe Benefit Deductions and Exclusions
Tax Cuts and Jobs Act (cont.)

- Prohibits Deductions for Settlement Payments Subject to Non-Disclosure Agreements in Sexual Harassment Cases
  - Amends section 162 of the tax code, which generally allows businesses to deduct certain ordinary and necessary expenses paid or incurred during the year. No deductions for the claims themselves or attorneys’ fees related to any such claims.

- Employers will need to decide whether any amount paid to settle a sexual harassment claim is significant enough to be worth the deduction. If so, these employers should ensure their agreements do not include nondisclosure agreements.

- Amends ERISA to exempt employers from state and local paid leave laws
- Range from:
  - Employers with fewer than 50 employees giving workers with fewer than five years of service 12 days off
  - Employers with 1,000 or more workers giving workers with more than five years of service 20 days off
- Employers can also apply up to six paid holidays to that requirement, and the minimum leave requirements are prorated for part-time workers.
- Employers must offer employees at least one of six “flexible scheduling” options. Those include remote work and schedules allowing for variable allocation of 80 hours across two workweeks, or 40 hours across a single workweek of days longer than eight hours.
State & Local Legislation: All Politics is Local
The gridlock of Washington, DC has not prevented state & local governments from passing a wealth of employment legislation.

- Paid Sick and Family and Medical Leave
- Equal Pay
- Pregnancy Accommodations
- Non-Compete Agreements
- Ban the Box
- Fair Scheduling
- Minimum Wage
- California’s Immigrant Worksite Enforcement Law
Many states and localities are enacting laws requiring employers provide workers with paid “Sick and Safe Leave”

- Maryland (Passed on January 12, 2018)
- Washington, DC (effective March 2019)
- Prince George’s County, MD (effective May 24, 2018)
- New York, NY (expansion effective May 5, 2018)
- New York (effective January 1, 2018)
- Arizona (effective January 1, 2017)
- Tacoma, WA (amendments took effect on January 1, 2018)
- Seattle, WA (amendments took effect on December 15, 2017)
What do these laws require?

For example, New York:

- Provides eligible employees with a paid, job protected leave of absence.
- Coverage for both full and part time employees, but full time employee is defined as any employee working more than 20 hours per week.
- Leave of absence starts at 8 weeks in 2018 and expands to 12 weeks by 2021.
- Employees may use paid family leave to bond with a new child, to care for a family member with a serious health condition, or to assist with family obligations when a family member is called to active military service.
- The wage replacement benefits, with certain exceptions, will be funded through payroll deductions, which will cover 50% of the employee’s average weekly wage commencing in 2018 and increase to 67% by 2021.
The EEOC has taken an interest in paternity leave policies.

- Guidance issued in 2014, increased enforcement, RFPs for maternity/paternity leave policies

- Trump has proposed requiring employers to provide six weeks of full or partially-paid maternity leave

- Revisit policies, ensure equal leave for fathers and mothers, same-sex couple considerations, and adoption leave
Several states and localities are enacting laws that prevent employers from inquiring about salary histories.

- California
- Massachusetts
- New York City
- Pittsburgh
- Oregon
- Delaware
- Philadelphia
- Puerto Rico

This tool is believed to help narrow the pay gap between male and female employees.
Several states have expanded employers’ obligation to accommodate pregnant employees.

- Massachusetts
- Washington
- Connecticut
- Vermont

Like the ADA, these laws require employers to engage in the interactive process in order to accommodate pregnant employees for any pregnancy-related conditions.
Several states and localities passed or have pending legislation that severely limit the use of non-compete agreements.

- Massachusetts (Partial Ban)
- New York City (Partial Ban)
- New Jersey (Partial Ban)
- New Hampshire (Partial Ban employees)
- Vermont (Proposed Total Ban)
- Pennsylvania (Proposed Total Ban)

Partial bans provide protections for “low-wage workers,” provide “garden leave” periods, and require agreements “not be broader than necessary[].”

Remember – California, North Dakota, and Oklahoma have already enacted broad non-compete bans.
In 2017, several states and localities joined a growing list of places where employers must consider a job applicant’s qualifications before asking for a criminal background check.

- California
- Los Angeles, CA
- Vermont
- New York City
- Spokane, WA
- New Jersey (strengthened existing law)
- Florida, Michigan, Maine, Pennsylvania, and Wisconsin (pending legislation)
“Fair Scheduling” laws generally mandate on or more of the following:

- a good-faith estimate of the employee’s anticipated work schedule;
- the right to request input into one’s work schedule;
- the right to rest between work shifts;
- advance notice of the work schedule;
- the right to decline employer-requested changes to the posted work schedule;
- compensation for schedule changes (if the employee agrees to accept such changes); and/or
- a duty to offer available work hours to existing employees before hiring externally.
After San Francisco first passed an ordinance imposing scheduling requirements on private employers in 2014, predictive or fair scheduling laws were considered in various jurisdictions, but failed to take hold.

In 2017, however, fair scheduling laws spread to numerous cities, including San Jose, CA, Emeryville, CA, Seattle, WA, New York City.

In late 2017, Oregon became the sixth jurisdiction to adopt predictive scheduling requirements.

Washington, DC and New Hampshire also have limited-scope fair scheduling laws.
21 States and the District of Columbia have changed their minimum-wage laws since January 2014.

In that same time, 39 localities have adopted minimum wages above their state minimum wage.

In 2018, many states’ minimum wage is set to increase again:

- AK, AZ, CA, CO, DC, FL, HI, ME, MD, MI, MN, MO, MT, NJ, NY, OH, OR, RI, SD, VT, WA

$15/hr Minimum Wage Proposals Persist
Beginning on January 1, 2018, CA employers can no longer voluntarily consent to an ICE agent:

- entering any nonpublic areas of a worksite if the agent does not have a warrant; and/or
- accessing, reviewing, or obtaining the employer’s employee records without a subpoena or warrant, with the exception of I-9 forms and other documents for which a Notice of Inspection has been provided to the employer.

Also requires CA employers to notify each current employee (and any applicable union representative) of any inspection of I-9s or other employment records conducted by ICE within 72 hours of receiving notice of the inspection.
EEOC Developments
In late 2016, EEOC announced it would require employers to include compensation data on annual EEO-1 reports.

EEOC and OFCCP planned to use data to identify companies for pay discrimination investigations to help close the “pay gap.”

President Trump nominated Janet Dhillon, GC from Burlington Shoes, to be new Chair of EEOC.

EEOC then announced the pay data collection was too burdensome on employers and will be suspended indefinitely. Traditional EEO-1 reports for 2017 will be due by March 31, 2018.
Sexual Orientation/Transgender Status

Coverage for Sexual Orientation/Gender Identity Discrimination Under Federal Law Remains in Flux

- 7th Circuit – sexual orientation is covered by Title VII
- 2nd, 5th, and 11th Circuits – sexual orientation is *not* covered by Title VII
- 2017 – Attorney General Jeff Sessions informed U.S. Attorneys that Title VII does *not* protect transgender individuals from discrimination in the workplace.
- SCOTUS – December 2017, petition denied in *Evans v. Georgia Regional Hospital*, which would have squarely addressed this issue
Sexual Orientation/Gender Identity Status

The EEOC’s Guidance Remains in Effect

- The EEOC interprets and enforces Title VII’s prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation.

- The EEOC has seen a steady increase in the number of LGBT charges filed since 2013:

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<thead>
<tr>
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<th>FY 2013</th>
<th>FY 2014</th>
<th>FY 2015</th>
<th>FY 2016</th>
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<tr>
<td></td>
<td>808</td>
<td>1,100</td>
<td>1,414</td>
<td>1,768</td>
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- On January 1, 2018, California’s Transgender Work Opportunity Act goes into effect, requiring employers to dedicate a portion of required, biennial training to gender identity, expression, and sexual orientation harassment.
Medical Leave and the ADA

*Severson v. Heartland Woodcraft*, No. 15-3754
(7th Cir. Sept. 20, 2017)

- 7th Circuit finds that a request for a two-to-three month leave of absence is not a reasonable accommodation pursuant to the Americans with Disabilities Act
- Rejected the EEOC’s argument that the inquiry as to whether a reasonable accommodation is reasonable should focus on the employee’s ability to perform essential functions at the *end* of requested leave.
- “If, as the EEOC argues, employees are entitled to extended time off as a reasonable accommodation, the ADA is transformed into a medical-leave-statute – in effect, an open-ended extension of the FMLA.”
NLRB Developments
“Right-to-Work”

- 28 states (incl. Virginia) have RTW laws, including two new in 2017 (Kentucky and Missouri)
- Federal version proposed in February 2017
NLRB – Board Members

Mark Gaston Pearce (D)
Member
term ends 8/27/18
Confirmed 2013, 59-38

Lauren McFerran (D)
Member
term ends 12/16/19
Confirmed 2014, 54-40

William Emanuel (R)
Member
term ends 12/16/21
Confirmed 9/25/17, 49-47

Marvin Kaplan (R)
Chairman
term ends 8/27/20
Confirmed 8/2/17, 50-48

Phillip A. Miscimarra (R)
Former Acting Chairman
term ended 12/16/17

Vacant
NLRB – General Counsel

Former

Richard Griffin (D)
General Counsel
term ended 11/4/17

Current

Peter B. Robb (R)
Sworn in November 17, 2017

- Management attorney with law firm in Vermont
- NLRB Field Attorney 1977-79
- Chief Counsel, NLRB Member Hunter 1981-85
- Previously attorney at Proskauer Rose
On December 1, 2017, NLRB GC issued first guidance letter. Some of the issues identified in the letter include:

- Common employer handbook rules found unlawful (e.g., rules prohibiting “disrespectful” conduct, no camera/recording rules, rules requiring employees to maintain the confidentiality of workplace investigations)
- The “Purple Communications” finding that employees have a presumptive right to use their employer’s email system to engage in Section 7 activities
- Off-duty employee access to property
- Conflicts with other statutory requirements (e.g., a finding that social media postings were protected even though the employee’s conduct could violate EEO principles)
- Joint employer determinations
- Successorship

Rescinded several memos previously issued by the General Counsel’s office in addition to some initiatives highlighted in previous Advice memoranda.
Reversing Course?

**Boeing Co., 365 NLRB No. 154 (Dec. 14, 2017)**

- Board establishes a new standard for weighing the illegality of employee handbook policies.

- Previously, the Board held that a policy is illegal if employees could “reasonably construe” it to bar them from exercising their rights to band together under the National Labor Relations Act.

- The Obama Board had used that standard in an expansive way to strike down a wide array of employer policies, including rules blocking workers from criticizing their employers on social media or making recordings in the workplace.

- Under the new standard, the Board will consider the “nature and extent” of a challenged rule’s “potential impact on NLRA rights” and the “legitimate justifications associated with the rule.”

- The decision also sets forth three categories into which the Board will classify rules — lawful, unlawful, or subject to individual scrutiny on a case-by-case basis.
Reversing Course?

  - The Board reversed its previous *Browning-Ferris* decision and returned to a standard of finding joint-employer status where the second entity has actually exercised control over another entity’s employees in a direct and immediate way.
  - This new test provides more certainty as to when a joint-employer relationship exists.
  - Employers who have avoided business relationships due to joint-employer concerns can now re-evaluate such joint ventures in light of this decision.
Reversing Course?

- **PCC Structural**, 365 NLRB No. 160 (Dec. 15, 2017)
  
  - The Board abandoned the “overwhelming” community-of-interest standard, established in **Specialty Healthcare**, 357 NLRB 934 (2011).
    - There, the Obama Board held that if a union petitioned for an election among a particular group of employees, and those employees shared a community of interest among themselves, the Board would not find the petitioned-for unit inappropriate unless the employer proved that the excluded employees shared an “overwhelming” community of interest with the petitioned-for group.
  
  - In **PCC Structural**, however, the Board held:
    - “[T]here are sound policy reasons for returning to the traditional community-of-interest standard that the Board has applied throughout most of its history, which permits the Board to evaluate the interests of all employees — both those within and those outside the petitioned-for unit — without regard to whether these groups share an ‘overwhelming’ community of interests.”
  
  - This revised standard will make it more difficult for unions to seek small groups of employees within larger organizations, which often disenfranchise employees who do not support union representation.
Department of Labor Developments
Final Overtime Rule

• In June 2017, after a Texas federal district court enjoined the Obama administration’s FLSA overtime rule, which would have raised the salary threshold for overtime eligibility from $455 per week to $913 per week, DOL dropped its defense of the rule.

• In November 2017, the 5th Circuit granted DOL’s motion to halt the litigation over the rule, thereby paving the way for continued rulemaking and public comment.

• Although the threshold remains unchanged, signals point to a modest increase in the salary threshold, potentially in 2018.
In June 2017, Labor Secretary Alexander Acosta announced the withdrawal of two controversial Wage & Hour Administrator’s Interpretations on independent contractors and joint employment.

- In 2017, House Republicans passed the Save Local Business Act (H.R. 3441), that amends two labor and employment statutes to clarify when an entity is a “joint employer.”

In its news release the DOL’s Wage and Hour Division stated that this “does not change the legal responsibilities of employers” under federal laws and that it will “continue to fully and fairly enforce all laws within its jurisdiction,” including the FLSA.

So while withdrawal of the guidance does not significantly change the landscape in the courts, it does send an employer-friendly signal on enforcement.
In December 2017, after four federal appellate courts expressly rejected DOL’s six-part test to determine whether interns and students are employees under the FLSA, DOL announced that it will now apply the “primary beneficiary” test.

Test is aimed at assessing whether the employer or the individual is the “primary beneficiary” of the relationship. Establishes seven-factor test evaluating the extent to which:

- The intern and employer understand there is no expectation of salary;
- The internship provides training similar to that which would be given in an educational environment;
- The internship is tied to the intern’s formal education;
- The internship accommodates the intern’s academic commitments;
- The internship’s duration is limited to the period in which it provides beneficial long-term learning;
- The intern’s work complements, rather than displaces, the work of paid employees; and
- The intern and the employer understand that the internship is conducted without entitlement to a paid job at its conclusion.
Immigration
Border Security and Interior Enforcement – Worksite

What to Anticipate

- Increased Worksite Enforcement
  - Ramped up I-9 audits, including E-Verify users
    - Paperwork violations now $216 to $2,156 per form.
  - Expanded E-Verify
  - Heightened Scrutiny of Use of Contractors/Subcontractors
  - Enforcement Actions at the Worksite
  - Heightened Scrutiny in Sanctuary Jurisdictions

“ICE chief pledges quadrupling or more of workplace crackdowns”

- Washington (CNN) - The administration's top immigration enforcement official on Tuesday said his agency will vastly step up crackdowns on employers who hire undocumented immigrants -- a new front in President Donald Trump's hardline immigration agenda.
DACA and TPS (Temporary Protected Status)

- DACA and TPS were both meant to be temporary
  - DACA – Until legislation could be passed
  - TPS – Until country conditions improved significantly
- Rescission of DACA means about 800,000 individuals may become subject to deportation if Congress does not act by March 2018
- TPS is slowly being eliminated
  - Guinea, Liberia, Sierra Leone ended in May 2017
  - Sudan will terminate in November 2018
  - Haiti will terminate in July 2019 – Approximately 50,000 individuals directly affected
  - El Salvador will terminate September 2019 – Approximately 200,000
What Legislation May Be Coming Up Next Year?

- Plans to cut legal immigration by 50% over 10 years
- Ending the Diversity Lottery
- Cap refugees at 50,000 annually
- DACA
- End “chain migration”
- Additional merit-based changes to non-immigrant visa benefits (replacement of H-1B lottery system)
- Establish point-based green card system
  - English language, Education, Job Skills Age
Marijuana In The Workplace
Recreational Marijuana

**Marijuana Use**
- 43% of U.S. adults tried marijuana
- 13% are current users
- 60% favor legalizing

**Legalized**
- Alaska
- California
- Colorado
- Maine
- Massachusetts
- Nevada
- Oregon
- Washington
- District of Columbia

Note: more than 20% of Americans live in states where marijuana is legal

**Canada**
- Expected to be legalized by 7/1/18
Medical Marijuana

- **States Where Permitted**
  - 29 states and D.C.
  - 17 other states allow low THC products in limited situations
  - Can employers discharge if prescribed?

- **Can Employers Discharge/Rescind?**
  - Connecticut (Noffsinger)
  - Massachusetts (Barbuto)
  - Rhode Island (Callaghan)

- **Drug Enforcement Agency**
  - Marijuana remains a Schedule I controlled substance because it does not meet the criteria for currently accepted safety for its use under medical supervision and it has high potential for abuse

- **DOJ Policy**
  - Three days after retail sales of recreational marijuana became legal in California, AG Jeff Sessions announced a new marijuana enforcement policy that rescind the long-standing, lenient policy of the Obama Administration

Source: NCSL
Marijuana – the states weigh in…

- **Barbuto v. Advantage Sales & Marketing, LLC, SJC - 12226 (July 17, 2017).**
  - An employee fired after she tested positive for marijuana on a test administered in the hiring process should be able to proceed with her “handicap discrimination” claim under Massachusetts’ anti-discrimination statute, the Massachusetts Supreme Judicial Court has ruled.

  - Employers cannot refuse to hire a medical marijuana cardholder, even if the individual admittedly would not pass the employer’s pre-employment drug test required of all applicants, a Rhode Island state court has held under the state medical marijuana law.
Marijuana – CT Fed. weighs in…

- **Noffsinger v. SSC Niantic Operating Co., LLC, Docket No. 3:16-cv-01938 (D. Conn., Aug. 8, 2017).**

  - Conditional offer of employment was rescinded when applicant test positive for marijuana, despite the fact she had disclosed medical usage, legal under CT law.
  
  - Applicant claimed violation of anti-discrimination provision, “no employer may refuse to hire a person . . . solely on the basis of such person’s status as a qualifying patient.”
  
  - Court rejected the defendant’s arguments:
    - CT law is not preempted by federal law including the ADA
    - There is an implied private right of action
    - The law does not violate the Equal Protection Clause
2017: Five Takeaways
2017 Takeaways

1. For Federal Contractors, not much has changed.
2. The #MeToo movement is here to stay.
3. On medical marijuana, apart from safety-related positions, employers’ ability to act appears hamstrung.
4. At the Department of Labor, no radical policy changes.
5. There was no major decline in federal government enforcement across all sectors/agencies.
2018: Five Issues to Monitor
2018 Issues to Monitor

1. Federal sexual harassment laws will not change, but states/localities will respond to #MeToo.
2. State and local legislation will continue to be where the action is.
3. There will be more decisions that impact NLRB enforcement.
4. On immigration, expect increased H1B scrutiny and heightened enforcement to impact labor force.
5. Federal court treatment of sexual orientation/gender identity discrimination will remain in flux.
THANK YOU

With 800 attorneys practicing in major locations throughout the U.S. and Puerto Rico, Jackson Lewis provides the resources to address every aspect of the employer/employee relationship.