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# LABOR AND EMPLOYMENT OBSERVER

2015/2016



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# LABOR AND EMPLOYMENT OBSERVER

## MESSAGE FROM THE CO-CHAIRS

We are pleased to provide you with our 2015/2016 Labor and Employment Observer, which looks back at significant developments in labor and employment law over the past year and forward to what employers can expect in 2016.

Speaking of significant developments, we are very pleased to announce that Susan Eisenberg and Jennifer Williams joined our department in early December, resident in our Miami office. For more than 25 years, Susan has focused her practice exclusively on representing management in labor and employment matters, and is known nationally for her experience with wage and hour issues. She represents employers in state and federal courts and has extensive trial experience. In addition, Susan counsels clients in all aspects of employment law, including conducting wage and hour audits and training sessions for managers and staff. She is a Fellow of the College of Labor and Employment Lawyers, a certified mediator and an arbitrator with the American Arbitration Association. Jennifer brings 15 years of labor and employment law experience to the table, representing employers in both federal and state court and before government agencies, advising employers on compliance issues under Title VII, the Fair Labor Standards Act, the Family and Medical Leave Act, and the Americans with Disabilities Act. Her practice also includes employment counseling, negotiating restrictive covenant agreements, and conducting diversity and harassment training. We are delighted that Susan and Jennifer have joined Cozen O'Connor, and look forward to sharing their considerable talents with our clients in South Florida and beyond.

This year's Labor and Employment Observer covers issues such as:

- A surprising social media catch-22 created by the National Labor Relations Board and the Federal Trade Commission that has employers locked in the crosshairs;
- What non-union (as well as union) employers need to know about the blockbuster changes the National Labor Relations Board wrought in 2015;
- Significant developments in pregnancy discrimination law delivered in 2015 and what employers can expect in 2016;
- Judicial decisions regarding compensable time that continue to confound, and a new focus on "predictability pay" that could catch unwary employers off guard;
- What employers can and cannot do to address marijuana use in states that have said "can do" to cannabis;
- How to overcome evidentiary issues raised by electronic signatures on employment agreements, and why it is critical that employers address this latent risk;
- An update on the long-awaited changes to the overtime exemption rules under the Fair Labor Standards Act, and what employers can do now to prepare;
- Recent developments in unionization in higher education, and how to make the grade in 2016;
- New gun laws and what they mean for Texas employers;
- Employment issues inherent in the ever-burgeoning gig economy; and
- An update on immigration issues that touch most employers, and an overview of where the presidential candidates stand on immigration reform.

We trust that you will find the enclosed articles both interesting and informative. As always, we welcome your inquiries and look forward to serving your labor and employment needs in the New Year.

Best Regards,

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## THE IRONY IN REGULATING EMPLOYEE SOCIAL MEDIA SPEECH: THE NLRB VS. THE FTC



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**BREAKING NEWS:** Employees use social media. A lot. And, in a related story, Bush beat Gore, according to the Supreme Court. All breaking news, of course, for those just returning to Earth after a lengthy PTO.

As we begin a new year, it should also be old news that employers must tread carefully when it comes to their employees and social media, and that the government continues and will continue to step in and scrutinize employer conduct when it comes to their employees and social media. So, what did we see in 2015 and what will we see in 2016? An interesting conundrum has developed for employers as one government entity is telling employers that they must let employees freely speak on social media, while another is telling employers that they must not.

### On One Side: The NLRB and Letting Employees Post Freely On Social Media

The National Labor Relations Board (NLRB) continues to represent the biggest source of potential exposure to your company in two primary ways involving social media and employment law. First, the NLRB has closely scrutinized when employers (unionized **and** non-unionized) take adverse action against an employee because of something the employee says or does through social media. Section 7 of the National Labor Relations Act (the Act) affords a right to covered employees “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]” Just as certain in-person statements by an employee might be protected under Section 7, so too are employee statements made on a social networking site such as Facebook, even if in some cases the employer deems the statement to be “insubordinate,” “inappropriate,” “offensive” or otherwise not “consistent with the company’s values.”

The analysis in which employers must engage to determine whether the NLRB might deem adverse action to violate Section 7 of the Act is three-fold: (1) Was the statement *concerted*; that is, did it involve two or more co-workers or was it initiated with the anticipation that other co-

workers would get involved in the discussion? (2) If yes, was the statement *protected*; that is, did the subject matter involve the terms and conditions of work? (3) If yes, did the employee otherwise lose the protection of the Act because he or she was so malicious or reckless with regard to the statement about the company, or its products or services? The NLRB will continue to focus on this issue in 2016, and the takeaway is that employers cannot simply be over-reactionary when it comes to taking adverse action based on a statement or act on social media that it simply does not like.

Second, the NLRB has also closely scrutinized workplace policies and handbooks that implicate or attempt to regulate what an employee can say or do through social media. Thus, an employer has been found to violate the Act if its policy would “reasonably tend to chill employees in the exercise of their Section 7 rights [i.e., as noted above, the right to engage in protected concerted activities].” In turn, a policy might “chill” employees if: (1) the policy explicitly violates Section 7; (2) an employee would reasonably construe the policy’s language to prohibit Section 7 activity; (3) the policy was promulgated in response to union activity; or (4) the policy has been applied to restrict the exercise of Section 7 rights. Much ink has been spilled recently over the types of workplace policies, and the particular language in those policies, that will not likely pass muster under the NLRB’s guidelines. We anticipate that the NLRB will remain vigilant – at least through the end of the Obama administration – in attacking employers’ workplace policies.

***The NLRB has mandated that employers minimize their involvement in employee speech on social media.***

Yet, a funny thing has happened on the way to complying in good faith with the NLRB’s position on social media and employment law issues. The potential exposure to your company on that side has been based on what you do in response to employee statements, or what you do to try to regulate employee statements through workplace policies. In other words, the NLRB has mandated that employers minimize their involvement in employee speech on social media. However, in an interesting bit of irony, another government agency has now told employers that they **must** inject themselves into certain employee social media speech to **avoid** potential liability.

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## **On the Other Side: The FTC and Not Letting Employees Post Freely on Social Media**

Meet the United States Federal Trade Commission (FTC).

The FTC has issued rules pertaining to the use of endorsements and testimonials in advertising in a manner that has a direct impact on the use of social media by companies and their employees. While you have (understandably) been programmed to step back from regulating employee social media speech, the FTC's rules highlight the need for employers to nevertheless pay attention to what their employees do and say as it may relate to the products and services offered to the general public, and to create and effectively communicate workplace policies on social media use on this particular point.

The purpose of the FTC's rules on endorsements and testimonials is to apply the use of advertising endorsements to Section 5 of the FTC Act, which prohibits certain unfair and deceptive practices in commerce. An "endorsement" is defined by the FTC's rules to include:

any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.

The FTC's rules should be considered by any company that has employees who, for example, may be blogging, tweeting or otherwise posting opinions about the company's products or services. An employer can face potential liability for opinions offered by its employees, even if the opinions are not authorized or sponsored by the company in the first instance. According to the FTC's rules, any endorsements "must reflect the honest opinions, findings, beliefs, or experience of the endorser," and "may not convey any express or implied representation that would be deceptive if made directly by the advertiser." In practice, your company would be the "advertiser" and

your employee blogger would be an "endorser." In fact, the rules specifically address blogging and the duty to monitor blogging when individuals (particularly those paid) are speaking about the company's products or services:

In order to limit its potential liability, the advertiser should ensure that the advertising service provides guidance and training to its bloggers concerning the need to ensure that statements they make are truthful and substantiated. The advertiser should also monitor bloggers who are being paid to promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered.

Beyond the general considerations set forth in the rules, the FTC rules generally address: (i) endorsements by consumers, experts and organizations, and (ii) the disclosure of relationships between the endorser and the advertiser of the product or service. Thus, certain guidelines must be followed when one is deemed to be a consumer speaking about the performance of a product or service, as well as when one holds himself or herself out to be an "expert" in the particular field discussed, as it relates to some aspect of your company's product or service such as quality, price or uniqueness. Again, one of your employees discussing any aspect of your company's products or services through social media may fall within the reach of the FTC's rules.

Finally, the FTC's rules provide that any individual who is endorsing a product or service, and who also has a "connection" with the seller of the product or service, must disclose that connection. Thus, for example, an employee who provides testimonials on Facebook about how great your company's product works would need to disclose the fact that she is an employee of your company.

In May 2015, the FTC updated its frequently asked questions to expressly address issues relating to social media-based statements. It is worth highlighting some of the questions and answers directly from the FTC update that may be relevant to both the employee and your company:

### **Do the Endorsement Guides apply to social media?**

Yes. Truth in advertising is important in all media, whether they have been around for decades (like, television and magazines) or are relatively new (like, blogs and social media).

### **What if I upload a video to YouTube that shows me reviewing several products? Should I disclose when I got them from an advertiser?**

Yes. The guidance for videos is the same as for websites or blogs.

### **My Facebook page identifies my employer. Should I include an additional disclosure when I post on Facebook about how useful one of our products is?**

It's a good idea. People reading your posts in their news feed – or on your profile page – might not know where you work or what products your employer makes. Many businesses are so diversified that readers might not realize that the products you're talking about are sold by your company.

### **My company runs contests and sweepstakes in social media. To enter, participants have to send a Tweet or make a pin with the hashtag, #XYZ\_Rocks. ("XYZ" is the name of my product.) Isn't that enough to notify readers that the posts were incentivized?**

No. It's likely that many readers would not understand such a hashtag to mean that those posts were made as part of a contest or that the people doing the posting had received something of value (in this case, a chance to win the contest prize). Making the word "contest" or "sweepstakes" part of the hashtag should be enough. However, the word "sweeps" probably isn't, because it is likely that many people would not understand what that means.

### **Our company's policy says that employees should not post positive reviews online about our products without clearly disclosing their relationship to the company. All of our employees agree to abide by this policy when they are hired. But we have several thousand people working here and we can't monitor what they all do on their own computers and other devices when they aren't at work. Are we liable if an employee posts a review of one of our products, either on our company website or on a social media site and doesn't disclose that relationship?**

It wouldn't be reasonable to expect you to monitor every social media posting by all of your employees. However, you should establish a formal program to remind employees periodically of your policy, especially if the company encourages employees to share their opinions about your products. Also, if you learn that an employee has posted a review on the company's website or a social media site without adequately disclosing his or her relationship to the company, you should remind them of your company policy and ask them to remove that review or adequately disclose that they're an employee.

### **Our company uses a network of bloggers and other social media influencers to promote our products. We understand we're responsible for monitoring our network. What kind of monitoring program do we need? Will we be liable if someone in our network says something false about our product or fails to make a disclosure?**

Advertisers need to have reasonable programs in place to train and monitor members of their network. The scope of the program depends on the risk that deceptive practices by network participants could cause consumer harm – either physical injury or financial loss. For example, a network devoted to the sale of health products may require more supervision than a network promoting, say, a new fashion line. Here are some elements every program should include:

1. Given an advertiser's responsibility for substantiating objective product claims, explain to members of your network what they can (and can't) say about the products – for example, a list of the health claims they can make for your products;
2. Instruct members of the network on their responsibilities for disclosing their connections to you;
3. Periodically search for what your people are saying; and
4. Follow up if you find questionable practices.

It's unrealistic to expect you to be aware of every single statement made by a member of your network. But it's up to you to make a reasonable effort to know what participants in your network are saying. That said, it's unlikely that the activity of a rogue blogger would be the basis of a law enforcement action if your company has a reasonable training and monitoring program in place.

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Note the FTC's reference to having a "reasonable training and monitoring program in place." The takeaway here is not for you to remember, let alone know, each and every rule as it may pertain to social media statements by your employees about your company's products or services. Rather, the takeaway is that your company should develop the mindset that social media has introduced these issues and that you may have potential exposure if your policies and practices run afoul of the rules.

Is your company thinking about having employees generate interest in your products or services? Are your employees doing so without a formal, company-sponsored program? Is your company thinking about having clients, customers, experts or other members of the general public tout your products or services? Most importantly, do your policies and practices reflect any consideration given to these issues?

Like the NLRB, the FTC has become active in its investigations and enforcement proceedings commenced against those who violate its rules. Given the fact that the FTC chose to be more specific in 2015 in advising how its rules apply to social media statements, it is likely that the agency may be gearing up for a more specific crackdown as we move into 2016.

Just recently the FTC sent a letter to Cole Haan advising that a company-sponsored contest on Pinterest may run afoul of deceptive practice rules when the company incentivized users to "pin" photos of favorite footwear from the company's website, without requiring applicable disclosures. And, in March 2015, the FTC entered into a post-enforcement proceeding consent order with an advertising agency that allegedly had its employees use personal social media accounts to post positive feedback about a gaming system, without disclosing the employees' "material connection" to their employer (the ad agency) or to their employer's client (the gaming system's manufacturer).

***The NLRB has mandated that employers minimize their involvement in employee speech on social media.***

In light of the FTC's recent focus on social media issues involving employee statements about their company's products and services, it is imperative that employers adopt an appropriate policy on social media use by their employees, and communicate and train employees on those policies. Such policies should include, at a minimum, the

types of posts and statements that may be inappropriate under the law, prohibitions on certain company- and client-related disclosures, and appropriate direction for disclosing the employee's relationship with the company. Maintaining effective policies will minimize the risk of potential liability for statements made by employees about the employer's products and services through blogs and other forms of social media.

At the same time, and to come full circle here, employers should also continue to be mindful of overstepping any attempt to regulate employee speech generally, whether during or outside of the employee's working time. Whether it is the ire of the NLRB when your company does too much, or that of the FTC when you don't do enough, 2016 will unquestionably bring more guidance, rules, and potential liability to those who do not sufficiently navigate the intersection between social media and employment law.

## 2015 BRINGS BLOCKBUSTER CHANGES AT THE NLRB



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In 2015 the National Labor Relations Board (the Board or NLRB) continued, indeed accelerated, its recent trend of decisions that have the greatest impact on **non-union employers**. These decisions have made it easier for unions to organize non-union employees, expanded the types of employees that may be unionized, and struck down common policies adopted by many employers, whether unionized or not.

Perhaps the most important change was the adoption of the "ambush" election rules in April 2015. These new rules contain radically new procedures for determining when union organizing elections are held and who gets to vote. They also have drastically shortened the time between the filing of a union election petition and the date of an election. This timing is critical, because when unions conduct "silent organizing" the petition is sometimes the first notice an employer has that a union is working on its employees.

In the past, an employer could usually count on about six weeks' time to campaign against the union before an election occurred. Under the new rules, our experience so far has shown that employers have only **half** as much time, 21 days, between the petition and the election. We

believe that amount of time could shrink to as little as 14 days in 2016 due to the Board and unions becoming more comfortable and knowledgeable about the new process.

The good news is that unions do not appear to be winning a higher percentage of elections under the new rules. Even so, unions have been winning more than 60 percent of the elections held for the last few years. The shortened campaign time frame means employers have to up their game with employees if they wish to remain non-union. Clear, effective channels of communication must be maintained with the workforce; and managers, from first-line supervisors to the executive ranks, need to be trained how to avoid actions that lead to union organizing and how to recognize and respond to organizing when it occurs. Companies also should consider establishing “tiger teams” with experts who know both the law and the psychology surrounding union organizing, and who also have the tools to nip organizing in the bud or to win union elections through lawful communications with employees.

We also are seeing the technical requirements of the new rules cause problems. A voter list, previously called an *Excelsior* list, now must be filed two business days after an election is directed, which usually occurs about a week after the petition is filed. This list must be in a particular format, and it must include names, home addresses, job classifications, work locations, shifts, and available personal email addresses and home and personal phone numbers. In October 2015, a regional director gave an incredibly expansive definition to this provision in *Danbury Hospital*. In that case, although information in the hospital’s database, including correct information for 94 percent of the telephones of the 700+ voters was supplied, a re-run of the election that the employer won 390 to 346 was ordered. The regional director found that because departments sometimes had more up-to-date information about employees (such as cell phone numbers) than the human resources department, and the employer had not made a systematic effort to obtain available information from other databases, the new rules were violated. This decision means that employers must work harder than ever to ensure that employee information is accurate, and some system should be in place to obtain the most accurate information that may be available from all databases, departments and supervisors.

In addition to speeding up (and also complicating) the election process, the Board has been assisting union organizing by increasing the classes of employees eligible for organizing. In an August 2015 decision, *Browning-Ferris*

*Industries of California*, the Board adopted a new standard for determining when two companies are “joint employers.” This is of critical importance to companies that provide or utilize a “staffing” model of employment.

The Board stated the new test as “whether the user employer affects the means or manner of employees’ work either directly or through an intermediary.” Further, the Board now looks to whether the user employer possesses the authority to control the employees’ terms and conditions of employment and **not** whether it has actually exercised that authority. This new test greatly expands the numbers of joint employers around the country. If you are one, then you have joint liability with the co-employer, including liability for unfair labor practices, as well as joint exposure to union organizing and bargaining.

**Those wishing to avoid joint employer status should stay out of hiring, firing and setting wages for provided employees.**

*Browning-Ferris* is a game-changer for many employers. To minimize your risks you should review all contracts with providers for possible red-flags, such as maintaining authority to order discipline of the provider employer’s employees or setting their wages and working conditions. Even if you do not exercise that authority, by contractually reserving these rights you jeopardize single employer status. Those wishing to avoid joint employer status should stay out of hiring, firing and setting wages for provided employees, and avoid, as much as possible, dictating policies that affect how, when and where the provided employees work. We are watching for further developments to provide more guidance on this issue, but every employer using the employees of another entity should be thinking about the impact of *Browning-Ferris* on its operations.

Beyond expanding the joint employer definition, the Board also has been pushing to increase the kinds of employees eligible for unionization, and recent decisions have involved adjunct faculty members, tugboat officers, employees of tribal casinos and others. One area where a union was unsuccessful was the well-publicized effort to unionize scholarship football players at Northwestern University. The union contended the student-athletes were really employees subject to unionization. Northwestern, represented by Cozen O’Connor attorneys, succeeded in its efforts to avoid unionization. Although the Board ducked the question of employee status for athletes, it declined jurisdiction.



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The Board stated that it typically asserts jurisdiction over an entire league, and as Northwestern's league consists of many state universities, which are excluded from the Board's jurisdiction, it was not appropriate to assert jurisdiction over the school.

In March 2015, the Board's general counsel issued guidance on lawful employer policies in GC Memorandum 15-04. This guidance applies to **union and non-union** employers alike. The guidance reviews recent Board decisions, and provides the general counsel's own interpretations of acceptable and unacceptable employer policies. The guidance gives examples of bad and good language for policies on keeping employer information confidential (broad policies are deemed unlawful, because employees must be allowed to discuss wages and other issues of mutual interest), professionalism, media contact (employees have the right to talk to the media on their own behalf or on behalf of others), use of company logos (employees are allowed to use logos and marks for their own, non-commercial purposes), conflicts of interest, and, quite controversially, recording and photography at work, which the general counsel says must be permitted on non-work time when employees are engaged in protected activity.

The general counsel guidance comes on the heels of a variety of Board decisions, including one limiting employer rights to request employees involved in investigations to keep their testimony confidential, another forbidding waivers of the right to bring class claims (a decision so far rejected by one Court of Appeals), and many others that invalidate long-accepted employer policies. Employers are also reminded that, in its December 2014 *Purple Communications* decision, the Board essentially held that email is the new workplace water cooler, and ordered employers to permit workers to engage in organizing and other protected activities on the company email system during non-working time, absent extraordinary circumstances.

What do we see for 2016? Unfortunately, more of the same. Union elections will become quicker, and we believe the Board will find more ways to regulate employer practices. One example, on November 25, 2015, the Board filed a motion opposing a global Fair Labor Standards Act/unfair labor practice settlement reached between Liberato Restaurant and the Department of Labor, because the settlement contains non-disparagement and confidentiality provisions. The Board reasons that employees may want to use the settlement to assist organizing or other protected

activities, and that only the amount of the settlement can be withheld. Cases on the horizon involve more guidance on joint employer status for franchisers, and the potential for more organizing in higher education, among others. Given the current make-up of the Board, we do not expect the Board's decisions to be employer friendly. So, stay tuned, and keep your guard up.

## DEVELOPMENTS IN PREGNANCY DISCRIMINATION AND ACCOMMODATION LAWS THAT KEEP EMPLOYERS UP AT NIGHT



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2015 brought with it several key changes in the area of pregnancy discrimination law, reinforcing the need for employers to carefully weigh and consider accommodation requests by pregnant employees to avoid running afoul of both state and federal laws. Not only did the Supreme Court issue its decision in the closely watched case of *Young v. United Parcel Service, Inc.*, clarifying an employer's accommodation obligations under the Pregnancy Discrimination Act (PDA), but the Equal Employment Opportunity Commission (EEOC) also revised its controversial 2014 enforcement guidance regarding pregnancy discrimination, and several states passed new legislation essentially treating pregnancy and related conditions as disabilities that private employers may need to accommodate.

### ***Young v. United Parcel Service***

In *Young*, the Supreme Court addressed employers' obligations to accommodate pregnant employees under the PDA. In its decision, the Court both adopted a new standard for evaluating pregnancy discrimination claims under the PDA and rejected the EEOC's 2014 controversial enforcement guidance regarding the workplace rights of pregnant employees.

## Background

As a part-time driver for United Parcel Service (UPS), plaintiff Peggy Young's job responsibilities included the pickup and delivery of packages weighing up to 70 pounds. Upon becoming pregnant, Young's doctor advised her that she should not lift more than 20 pounds during the first 20 weeks of her pregnancy or more than 10 pounds thereafter. Young requested from UPS a light-duty accommodation, but her request was denied, despite the fact that UPS offered similar accommodations to three other categories of employees: 1) those with disabilities under the ADA; 2) those injured on the job; and 3) those who had lost their Department of Transportation certificates because of a failed medical exam. As a result, Young was forced to take an unpaid leave of absence and eventually lost her medical coverage.

Young argued that because UPS offered accommodations to other categories of employees with disabling conditions, UPS was obligated under the PDA to provide her with the same accommodations. UPS, on the other hand, argued that its policy did not violate the PDA because it did not single out pregnancy as the only condition that did not merit some form of accommodation.

These arguments came on the heels of the EEOC's July 2014 controversial enforcement guidance, to which the U.S. Solicitor General urged the Court to defer. That guidance stated that, "[a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (e.g., a policy of providing light duty only to workers injured on the job)." EEOC Compliance Manual § 626-1(A)(5), p. 626:0009 (July 2014). The EEOC went even further to offer an example of disparate treatment, explaining that if "[a]n employer has a policy or practice of providing light duty, subject to availability, for any employee who cannot perform one or more job duties ... due to injury, illness or a condition that would be a disability under the ADA," refusing to provide the same light duty to an employee who requests a light duty assignment related to her pregnancy would be a violation of the PDA.

## Supreme Court's Decision

The Supreme Court's decision hinged on its interpretation of the second clause of the PDA, which provides that "women affected by pregnancy, childbirth, or other related medical conditions shall be treated the same for

all employment-related purposes as other persons not so affected but similar in their ability or inability to work."

Writing for the majority, Justice Breyer rejected the interpretations offered by both parties. Breyer noted that, with respect to Young's interpretation, pregnant women were not entitled to "most favored nation" status under which they could demand any accommodation offered to other workers. As for UPS's interpretation, the Court reasoned that such an interpretation ignored Congress' intent in adopting the PDA as means for overturning the Court's 1976 holding in *General Electric Co. v. Gilbert* that employers would treat pregnancy different from other illnesses or disabilities so long as it did so on a neutral basis. Notably, although the U.S. Solicitor General argued that the Court should give EEOC's July 2014 enforcement guidance special, if not controlling, weight, the Court rejected that contention, based in part on the fact that the guidelines were inconsistent with the government's prior position on the issue.

Instead, the Court crafted a new approach, allowing a plaintiff alleging pregnancy discrimination based on the denial of an accommodation to proceed under the *McDonnell Douglas* framework generally applied to Title VII discrimination claims. Under this framework, a plaintiff may demonstrate a *prima facie* case by demonstrating that: 1) she belongs to the protected class; 2) she sought an accommodation; 3) the employer refused to accommodate her; and 4) the employer accommodated others similarly situated in their ability or inability to work. Once the plaintiff has set forth a *prima facie* case, the employer may justify its treatment of the plaintiff by pointing to a legitimate, non-discriminatory reason for denying the accommodation. However, the Court noted that employers should not rely on cost or inconvenience as a legitimate, nondiscriminatory reason. Finally, if an employer could offer a legitimate, nondiscriminatory reason, the plaintiff would then have the opportunity to show that the offered reason is actually pretext for discrimination.

The Court explained that a plaintiff could reach a jury on the issue of pretext by providing evidence that an employer's policy imposed a significant burden on pregnant workers and that the employer's "legitimate, nondiscriminatory" reasons were not sufficiently strong to justify the burden. The Court noted that such evidence could be in the form of an employer's accommodation of a large percentage of non-pregnant employees and failure to do so for a large percentage of pregnant employees.

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Applying these principles, the Court ultimately reversed the Fourth Circuit's ruling to find that Young had at least raised a genuine dispute as to whether UPS provided more favorable treatment to some employees whose situations were not reasonably distinguished from Young's. The Court further held that the Fourth Circuit should have considered UPS's three separate accommodation policies, which raised the question as to why UPS could not accommodate pregnant women when it could accommodate so many other employees.

***Employers will need to closely examine their accommodation policies and, if necessary, reconsider any exclusion of pregnant employees.***

## **What this Means for the Future of Pregnancy Discrimination Act Claims**

While the Court did not find that UPS's policy was outright discriminatory, the Court made clear that an inference of pregnancy discrimination may arise from the non-accommodation of pregnancy despite the accommodation of many workers with non-pregnancy related disabilities. As a result, employers will need to closely examine their accommodation policies and, if necessary, reconsider any exclusion of pregnant employees from those policies, especially if the only justification for their exclusion is the result of cost or convenience.

## **EEOC Amends its Guidance on Pregnancy Discrimination in Light of *Young v. UPS***

Following the Supreme Court's ruling in *Young v. UPS*, the EEOC issued revised guidance on pregnancy discrimination that supersedes its July 2014 version. Specifically, the EEOC echoed the new standard articulated by the Supreme Court, stating that "[e]mployer policies that do not facially discriminate on the basis of pregnancy may nonetheless violate ... the PDA where they impose significant burdens on pregnant employees that cannot be supported by a sufficiently strong justification." By way of example, the EEOC explains that if an employer provides light-duty work to a large percentage of non-pregnant employees but does not provide the same accommodation to pregnant workers, this may "establish that the policy or practice significantly burdens pregnant employees" and will give rise to an inference of discrimination. This revised guidance from the EEOC makes clear that employers need to be cautious in

denying accommodation requests to pregnant employees and to carefully examine whether they have offered such an accommodation to non-pregnant employees and the burden posed by extending the accommodation to pregnant employees.

## **States Continue to Pass Legislation Banning Pregnancy Discrimination**

In 2015, Illinois, Nebraska and Rhode Island joined several other states, including California, Connecticut, Delaware, Hawaii, Louisiana, Maryland, Minnesota, New Jersey and West Virginia, as well as the District of Columbia, in passing state laws essentially treating pregnancy and related conditions as disabilities that private employers may need to accommodate. Thus, in implementing pregnancy accommodation policies, employers must remain cognizant of not only federal law, but applicable state laws as well.

### **Illinois**

Effective January 1, 2015, Illinois amended the Illinois Human Rights Act (IHRA) to include pregnancy as a protected classification. Consistent with federal law, the amendments added pregnancy as a class protected against discrimination under the IHRA.

The most notable aspect of the amendment was the addition of reasonable accommodation obligations for pregnant employees. Significantly, this applies to job applicants, part-time, full-time or probationary employees, and to employers with one or more employees. Employers must make reasonable accommodations for **any medical or common condition** of the job applicant or employee related to pregnancy or childbirth unless the employer can demonstrate that the accommodation would impose an undue hardship on the ordinary operation of the business of the employer. The types of reasonable accommodations expressly set forth in the statute include providing:

- More frequent or longer bathroom breaks
- Breaks for increased water intake
- Breaks for periodic rest
- Private, non-bathroom space for expressing breast milk and breastfeeding
- Seating
- Assistance with manual labor
- Light duty

- Temporary transfer to a less strenuous or hazardous position
- The provision of an accessible worksite
- Acquisition or modification of equipment
- Job restructuring
- Part time or modified work schedule
- Appropriate adjustments or modifications of examinations, training materials or policies
- Reassignment to a vacant position
- Time off to recover from conditions related to childbirth
- Leave necessitated by pregnancy, childbirth, or medical or common conditions.

Employers are further required to reinstate employees returning to work from pregnancy-related absences to the same or equivalent positions with equivalent pay, and without loss of seniority or other benefits, unless doing so would impose an undue burden.

Although not defined in the IHRA, the new proposed regulations do define the term “common conditions” as “a condition that commonly develops as a result of pregnancy or childbirth, or the physiological changes or processes that accompany pregnancy or childbirth. Examples of common conditions related to pregnancy or childbirth include, but are not limited to, backaches, cramping, headaches, morning sickness or nausea, frequent urination, sleeplessness, swollen ankles, feet or fingers, and lactation.”

These proposed regulations also make clear that a covered “medical condition” related to pregnancy/childbirth does not need to constitute a disability within the meaning of the IHRA and may be transitory. It cites examples such as “gestational diabetes, preeclampsia, post-partum depression, ectopic pregnancy, miscarriage, hypothyroidism, and toxoplasmosis.”

Like the ADA, the IHRA permits employers to request medical documentation if:

- The employer also requests similar documentation for conditions related to a disability;
- The request is job-related and consistent with business necessity; and

- The request is limited to information concerning the need or medical justification for the requested accommodation; a description of the reasonable accommodation medically advisable; the date the reasonable accommodation became medically advisable; and the probable duration of the reasonable accommodation.

Whether a request for medical documentation is job-related or consistent with business necessity depends on a “totality of circumstances,” including, whether the need for accommodation is readily apparent; whether the applicant/employee can explain the relationship between the requested accommodation and pregnancy condition; the employer’s reasons for requesting the information; and the degree to which the requested accommodation would impact the employer’s operations if it were granted.

However, the new proposed regulations make clear an important caveat to requesting medical documentation by stating that such documentation may be requested only if “[t]he information sought is not known or readily apparent to the employer.” Thus, some accommodation requests may be so obvious that the employer should not request medical documentation.

### **Nebraska**

On April 13, 2015, the Nebraska Pregnant Workers Fairness Act (NPWFA) was signed into law. This Act amended the Nebraska Fair Employment Practice Act to make it unlawful for an employer to “discriminate against an individual who is pregnant, who has given birth or who has a related medical condition.”

In addition to prohibiting pregnancy discrimination, the NPWFA requires employers to make reasonable accommodations for pregnant individuals so long as the request would not impose an undue hardship on the employer. Examples of reasonable accommodations include, “acquisition of equipment for sitting, more frequent or longer breaks, periodic rest, assistance with manual labor, job restricting, light duty assignments, modified work schedules, temporary transfers to less strenuous or hazardous work, time off to recover from childbirth, or break time and appropriate facilities for breast-feeding.”

Notably, unlike accommodations for disabled workers, pregnant workers in Nebraska will only have to demonstrate a “known physical limitation” (as opposed to a medical need) to be entitled to a reasonable accommodation. This minimal showing will obligate employers to provide

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the requested accommodation unless the employer can demonstrate that doing so would create an undue hardship. Factors to be considered in determining whether an accommodation would pose an undue hardship include the employer's financial resources, the nature and cost of the accommodation, and the overall size of the business.

## Rhode Island

On June 25, 2015, Rhode Island passed legislation requiring employers to provide workplace accommodations for pregnant workers. The new law amended the Rhode Island Fair Employment Practices Act, making it unlawful for an employer to refuse to reasonably accommodate an applicant's or employee's conditions related to pregnancy, childbirth or related conditions. Interestingly, "related conditions" is defined by the Act to include "lactation or the need to express breast milk for a nursing child" but makes no reference to what other related conditions might be covered. The new law also expanded on the state's Nursing Working Mothers Act by requiring break time for nursing mothers to express breast milk.

Examples of reasonable accommodations include, "more frequent or longer breaks, time off to recover from childbirth, acquisition or modification of equipment, seating, temporary transfer to a less strenuous or hazardous position, job restructuring, light duty, break time and private non-bathroom space for expressing breast milk, assistance with manual labor, or modified work schedules." An employer is not, however, required to provide an accommodation if it can demonstrate that the request creates an undue hardship. But, the fact that the employer provides a similar accommodation to other classes of employees will create a rebuttable presumption that the accommodation does not impose an undue hardship for the employer.

## What Employers Can Expect Regarding Expecting Mothers in 2016

Employers should anticipate increasing state and municipal legislation requiring the accommodation of pregnant employees, and even employers in states without such laws need to be cognizant of the Supreme Court's most recent ruling in *Young* with respect to accommodating pregnant employees. Employers should carefully consider accommodation requests from pregnant employees before making a decision whether to grant or deny a request. Otherwise, those little bundles of joy could spawn bundles of litigation.

## TIME OUT: FLSA COMPENSABLE TIME ISSUES AFTER INTEGRITY STAFFING



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Considering that in recent years wage and hour lawsuits in federal court have plagued employers more than any other form of employment litigation, it is no surprise that questions about compensable work time continued to dominate dockets in 2015. And despite the Supreme Court's 2014 decision in *Integrity Staffing Solutions, Inc. v. Busk* that helped define the perimeters of compensable time, this past year employers faced unrelenting claims by employees alleging that they were improperly denied payment for a host of activities. Topping the list of litigation-spawning activities were preliminary and postliminary acts, meal breaks, time during which employees are remotely connected to work, and on-call time. Below we highlight emerging compensable time issues under the Fair Labor Standards Act (FLSA) and areas for employers to watch in 2016.

### Courts Get Comfortable (or Not) with *Integrity Staffing* on Pre/Postliminary Activities

In *Integrity Staffing*, the Supreme Court considered whether warehouse workers had to be paid for time they spent undergoing post-shift security screenings, including time spent waiting in line. The *Integrity Staffing* Court held that the security screenings were noncompensable because they were not "an integral and indispensable part" of the employees' principal activities. The Court reasoned that the employees had not been hired for the purpose of going through the screenings and the employer could have eliminated them at no detriment to the employees' ability to complete their work. Thus, the screenings were not activities the employees could not dispense with in performing the principal activities of their work responsibilities.

Observers hoped that *Integrity Staffing* would provide clarity on preliminary and postliminary activities and curtail adverse decisions from lower courts in 2015. But this has

not been true across the board. On the positive side, the Ninth Circuit held that the time firefighters spent picking up gear from their home stations to bring to a visiting station, after the firefighters had volunteered to be on-call for overtime in the first place, was noncompensable because it was “two steps removed” from the job firefighters are employed to do (i.e., fight fires). Other activities courts have held to be noncompensable include maintaining uniforms by hospital employees, time spent waiting at an employer’s warehouse to be transported to job sites via the employer’s van service, and time spent by miners attending pre-shift safety meetings.

But courts have also relied on *Integrity Staffing* in finding employers were required to pay for certain activities, such as time spent by a laborer and foreman at a landscaping business loading work vehicles with required tools and maintaining the vehicles and tools, and time spent by limousine drivers travelling from home to a first pickup. An Illinois federal court even rejected *Integrity Staffing* as inapplicable when it held that cable technicians with company vehicles were not required to be paid for time spent logging in before shifts to check assignments, performing vehicle checks, and securing equipment. The court chose instead to rely on the Employee Commuting Flexibility Act to find that these activities were incidental to the employees’ commutes and therefore noncompensable. Employers thus face 2016 with continuing uncertainty, and need to review all conceivable off-the-clock claims with a careful eye and the assistance of experienced employment law counsel.

### **Third Circuit Adopts the “Predominant Benefit” Test for Unpaid Meal Periods**

Under the FLSA, “bona fide meal periods” can be unpaid because they are not considered compensable work time. In determining whether the meal period is compensable, some courts have applied a test based on FLSA regulations that provides that a meal period is not compensable where the employee is “relieved of all duties.” However, an emerging majority of courts have adopted a fact-intensive “predominant benefit test” under which if the employee was primarily engaged in work-related duties during the meal break, the time must be paid. But if the *employee* received the predominant benefit of the break for her own purposes, the time need not be paid.

In November 2015, the Third Circuit joined the majority and adopted this test when it considered whether corrections officers should be compensated for 15 minutes of work

interruptions during a 60-minute meal break. The court held that, on balance, the time was noncompensable even though the officers could not leave the prison during the breaks without permission, and they had to remain in uniform, close to emergency response equipment, and on call. The court found significant, but not dispositive, that the officers’ collective bargaining agreement (CBA) provided them with partially-paid meal breaks and mandatory overtime pay if the break was interrupted. The court interpreted the CBA as assuming that “generally an officer is not working during a meal period, but [it] provides for appropriate compensation when an officer actually does work during the meal.” (In December 2015, the plaintiffs moved for *en banc* reconsideration of the Third Circuit’s decision. As of this writing, that motion had not been decided.)

In light of the emerging popularity of this predominant benefit test, employers should review their meal break policies to be sure they make clear that, even if an employee is not “relieved of all duty,” the employee at least has the freedom to use the bulk of the unpaid meal period for her own benefit. Developing a mechanism for employees to report work interruptions during a meal period (and to get paid for the interruption) increases the likelihood a court will view the meal period as generally a time of no work, which can be unpaid.

### **Do Workers Need BlackBerry Curfews? A Decision in *Allen v. City of Chicago* Avoids Answering That Question**

In 2015 the Department of Labor (DOL) announced it would publish a “request for information” about electronic device usage by non-exempt employees outside of work hours. We expect that in response to the data submitted, the DOL might issue guidance on the compensable time issues that arise when non-exempt employees can access their work email through a BlackBerry, iPhone, or other device. Accordingly, employers need to take a good, long look at their overtime procedures, particularly their approach to employees connecting remotely.

Plaintiffs’ lawyers find fertile ground for alleged off-the-clock work when non-exempt employees feel compelled to complete certain work-related tasks via their remote access outside of work hours. In December 2015, the Northern District of Illinois decided one such case that went to a bench trial in August, after several years of litigation, in favor of an employer. In *Allen v. City of Chicago*, a group of Chicago police officers argued that they should be

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compensated for time spent responding to communications from supervisors and colleagues over their BlackBerry devices. The officers alleged that there was an unwritten policy in the department not to compensate for off-duty work performed on the BlackBerrys that permeated through department culture, and orders and statements officers signed when issued their BlackBerrys.

The court found that the officers had performed off-duty work that was not *de minimis*. The judge wrote that some but not all activities on the BlackBerrys are compensable work under the FLSA. For example, gathering information on investigations and contacting and reallocating teams of officers in response to a shooting were “necessarily and primarily” part of their jobs and had to be paid. On the other hand, simply “monitoring” the BlackBerry is not compensable so long as the officers could still spend their off-duty time primarily for their own benefit without persistent interruption. Ultimately, the court found that the officers failed to show that supervisors routinely knew if or when the officers were working off-duty on their BlackBerrys without submitting time-due slips for the work, and that they failed to establish that the supervisors pressured their subordinates not to put in for off-duty work.

The decision provides important guidance on how explicit overtime policies should be, and the point at which remote work ceases to be *de minimis* and becomes compensable. The trial court’s views could very well be expanded on by the Seventh Circuit as the case works its way through the appellate process.

In the meantime, courts will likely look to *Allen* for guidance on off-the-clock cases. Employers should review their overtime policies, and consider explicit statements on when overtime is permitted, when it is not, and that in any event qualifying overtime will be compensated. Employers should also decide whether to bear the risk associated with having non-exempt employees remotely connecting without pay and, if so, consider “curfews” where access terminates to prevent employees from working after hours. Finally, be sure supervisors do not encourage a culture where employees feel pressured to ignore company policy, and respond to emails and calls immediately while off-duty.

**DOL views employee rights to predictable work schedules as an emerging and important issue.**

## Lawmakers Get into the Act on Predictability Pay

Lawmakers also have been active on compensable time issues, and in 2016 employers need to monitor legislation that gives workers the right to a predictable work schedule. Another legislative item to watch is “predictability pay” for certain work schedule changes. In January, a San Francisco ordinance took effect requiring retail chain stores with at least 40 establishments worldwide and 20 or more employees in the city to provide, among other things, work schedules at least two weeks in advance, cash payment for changes made to the employees’ schedules with less than seven days’ notice, and on-call pay for employees who are required to be on-call but are not called into work. In a 2015 interview with Bloomberg BNA, the DOL Wage and Hour Division Administrator David Weil intimated that DOL views employee rights to predictable work schedules as an emerging and important issue, and called whether the FLSA covers predictable scheduling “an open question.”

Since that interview, both the Senate and the House have introduced bills on predictable scheduling. Under one such bill, called the Schedules That Work Act, if an employee makes a request for a change in employment due to the employee’s health conditions or responsibilities as a caregiver, the employee’s enrollment in a career-related educational or training program, or the employee’s second job, the employer must grant the request, absent a bona fide business reason. The Schedules That Work Act would further require that retail, food service and cleaning employees be paid reporting time and split shift pay, and employers would have to provide advance notice of these employees’ expected hours and schedule, two weeks’ notice for changes, and pay for schedule changes made with less than 24 hours’ notice. While these bills face an uphill battle in Congress, similar bills have been proposed and introduced in several states, including Connecticut, Illinois, Minnesota and New York, within the last year. And in New York, the Attorney General recently opened an investigation into the on-call practices of 13 major retailers for violations of the state’s reporting time laws.

With this landscape as a backdrop, 2016 could be a watershed year for both federal and state wage and hour law, and it is essential that employers of all sizes keep their finger on the pulse of this perennial hotbed of litigation.

## MARIJUANA NUGGETS: SOME BLUNT ADVICE FOR EMPLOYERS IN STATES THAT HAVE LEGALIZED MARIJUANA



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It is abundantly clear that states were not thinking of employers when they passed the wave of marijuana legislation that has come down in recent years. While marijuana use of all kinds remains illegal under federal law, the various states are handling marijuana legislation in their own ways: some have made its use entirely legal, some have reduced criminal penalties for its use, and some have legalized its use for medical purposes. Regardless, businesses must navigate the risks of making a wide range of employment decisions based on their employees' use of marijuana —including, but not limited to, whether to discipline an employee who tests positive for marijuana while at work, whether to allow employees to store marijuana at work, and whether to even ask an employee if he uses marijuana. This article is meant to help you avoid drifting among the dazed and confused in this sea of uncertainty.

### Where is marijuana use illicit?

Marijuana use of all kinds — whether for medical or recreational purposes — and for all users remains illegal under federal law. And critically, marijuana's continued placement in Schedule I of the Controlled Substances Act undercuts its legalization for medical use under state law; a Schedule I drug is defined as a substance that, among other things "has no currently accepted medical use in treatment in the United States."

Likewise, marijuana use of all kinds remains illegal in some states (e.g., Pennsylvania and Texas). In those states, employers have no obligation to refrain from disciplining employees who fail a drug test because of marijuana use, and need not accommodate use or possession at work or during work hours.

Still, employers in those states should keep abreast of both state *and local* drug laws for signs of movement toward legalization. For example, while the use, possession and distribution of marijuana for any purpose remains illegal in Pennsylvania, the state's Senate passed legislation ([SB 3](#)) in May 2015 that would legalize its use for medical purposes; the bill was removed from the table in the House in November 2015. In addition, in October 2014, Philadelphia's Mayor signed an [ordinance](#) that amended the Philadelphia Code to decriminalize the possession and use of 30 grams or less of marijuana in the city.

### In what states is marijuana use legal?

Despite federal law's clear prohibition against the use, possession, and distribution of marijuana for any purpose, 23 states (including California, Delaware, Florida, Georgia, Illinois, Minnesota, New Jersey, New York and North Carolina) have passed legislation allowing the use of marijuana for medical purposes. That these states have taken varying approaches to forming their respective medical marijuana programs can complicate matters for employers attempting to craft employment policies that govern operations in more than one of these states. In addition, there are also five jurisdictions (Alaska, Washington, Oregon, Colorado and Washington, D.C.) that have passed legislation legalizing all uses of marijuana.

Below is a glimpse into the significant differences among various state marijuana laws.



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Jurisdiction	Conditions authorizing medical marijuana use	Limitations in employment
<p><b>California</b></p>	<p>“Serious medical conditions” (e.g., AIDS, anorexia, arthritis, cachexia, cancer, chronic pain, glaucoma, migraines, persistent muscle spasms, seizures and severe nausea).</p> <p>Any other chronic or persistent medical symptom that can cause serious harm to the patient’s safety or physical/ mental health <b>or</b> one that substantially limits the person’s ability to conduct one or more major life activities, as defined by the Americans with Disabilities Act (ADA).</p>	<p>Specifically provides that nothing in it requires the accommodation of any use of marijuana at work or during work hours.</p>
<p><b>Delaware</b></p>	<p>“Debilitating medical conditions” (e.g., cancer, HIV/AIDS, decompensated cirrhosis, ALS, Alzheimer’s disease, PTSD, intractable epilepsy) or the treatment of that condition or its symptoms (e.g., cachexia, severe, debilitating pain, intractable nausea, seizures, severe and persistent muscle spasms).</p>	<p><b>Unless</b> failing to do so would cause the employer to lose a monetary or licensing-related benefit under federal law or regulations no employer can discriminate against a person <b>solely</b> for (1) his status as a registered qualifying patient or designated caregiver, or (2) a registered qualifying patient’s positive drug test <b>unless</b> the patient used, possessed, or was impaired by marijuana at work or during work hours.</p> <p>Nothing in the statute requires an employer to allow marijuana use at work or during work hours, nor to allow an employee to work while under the influence.</p>
<p><b>Florida</b></p>	<p>Cancer or a physical medical condition that produces symptoms of seizures or severe and persistent muscle spasms.</p>	<p>(none)</p>
<p><b>Georgia</b></p>	<p>Cancer, ALS, seizures related to epilepsy, multiple sclerosis, Crohn’s disease, mitochondrial disease, Parkinson’s disease, or sickle cell disease.</p>	<p>Nothing in the statute (1) requires an employer to allow the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana in any form, nor (2) limits the employer’s ability to have a written, zero-tolerance policy prohibiting (a) the on- and off-duty use of marijuana or (b) an employee from having a detectable amount of marijuana in his system while at work</p>

<p><b>Illinois</b></p>	<p>“Debilitating medical conditions,” including but not limited to cancer, glaucoma, HIV/AIDS, hepatitis C, ALS, Crohn’s disease, muscular dystrophy, severe fibromyalgia, multiple sclerosis, seizures, lupus, or the treatment of any of these conditions.</p>	<p>No employer can penalize a person for being a registered qualifying patient or designated caregiver <b>unless</b> failing to do so would cause the employer to lose a monetary or licensing-related benefit under federal law or rules</p> <p>Nothing in the statute prohibits an employer from (a) adopting reasonable regulations concerning the marijuana consumption, storage, or timekeeping requirements of qualifying patients, (b) enforcing a policy concerning drug testing, zero-tolerance, or a drug-free workplace provided the policy is applied in a nondiscriminatory manner, (c) disciplining an employee for violating a workplace drug policy, or (d) disciplining an employee for failing a drug test <b>if</b> failing to do so would cause the employer to lose a federal contract or funding.</p>
<p><b>Minnesota</b></p>	<p>Cancer, severe or chronic pain, nausea, cachexia, glaucoma, HIV/AIDS, Tourette’s syndrome, ALS, seizures, multiple sclerosis, Crohn’s disease, terminal illness.</p>	<p><b>Unless</b> failing to do so would cause the employer to lose a monetary or licensing-related benefit under federal law or regulations no employer can discriminate against a person <b>solely</b> for (1) his status as a registered qualifying patient or designated caregiver, or (2) a registered qualifying patient’s positive drug test <b>unless</b> the patient used, possessed or was impaired by marijuana at work or during work hours</p>
<p><b>New Jersey</b></p>	<p>“Debilitating medical conditions” (e.g., seizure disorder, intractable skeletal muscular spasticity, glaucoma, HIV/AIDS, cancer, ALS, terminal illness).</p>	<p>(none)</p>
<p><b>New York</b></p>	<p>“Serious conditions” (e.g., cancer, HIV/AIDS, ALS, Parkinson’s disease, multiple sclerosis, epilepsy, Huntington’s disease, cachexia, severe or chronic pain, severe nausea, seizures).</p>	<p>The statute shall not prohibit an employer from prohibiting an employee from performing his duties while impaired by marijuana, nor shall it require an employer to do anything that would put it in violation of federal law or cause it to lose a federal contract or funding.</p>
<p><b>North Carolina</b></p>	<p>Intractable epilepsy</p>	<p>(none)</p>

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## How do marijuana laws affect employers?

Employers are often concerned about the effects of medical marijuana legislation on their workforces. As a practical matter, however, a review of the conditions and symptoms enumerated above leads to the conclusion that a person using medical marijuana is typically already on the employer's radar for one reason or another. That is, these are employees who are already on leave for a medical condition or its treatment, and who often are too sick to be at work for any reason, much less to be at work under the influence of any drug.

***There is no benefit to asking an employee or applicant whether he is authorized to use medical marijuana under state law.***

Nevertheless, employers soliciting advice about marijuana's effect on their operations ask a number of important questions, but there is one question that always arises first: **Can I ask applicants and/or employees whether they are authorized to use medical marijuana?** There are many questions — particularly in this area — for which the answer will be “maybe,” but the answer to this question is a resounding “no.” There is no benefit to asking an employee or applicant whether he is authorized to use medical marijuana under state law.

As you can see from the summary above, states have authorized patients to use medical marijuana only for very serious health reasons. Indeed, California has gone so far as to say that if a person is disabled within the meaning of the ADA, that person is also authorized to use medical marijuana. Thus, an employer who learns that an employee uses medical marijuana instantly knows that the employee has a major health condition. As a result, learning that an employee is authorized to use medical marijuana immediately exposes the employer to a potential claim of “regarded as” discrimination under the ADA if the employer later takes an adverse employment action against an employee who has shared that he does use medical marijuana. Similarly, learning that an applicant or employee is a designated caregiver (i.e., a person who is authorized, under state law, to possess and/or administer, but not use, marijuana for the purpose of assisting the medical marijuana user) for a family member can potentially provide the employer with genetic information about that employee and expose the employer to a potential claim under the Genetic Information Nondiscrimination Act if the employer takes some adverse action against that person. **In sum, do not ask an applicant or employee this question.**

There are three other categories of behaviors with which employers are typically concerned: (1) **using, possessing, or distributing** marijuana at work or during work hours; (2) **being under the influence** of marijuana at work or during work hours; and (3) **testing positive** for the presence of marijuana metabolites at work or during work hours. The most conservative approach to crafting employment policies is to discipline an employee who engages in any of the three behaviors, under the rationale that all three behaviors remain illegal under federal law. Indeed, some state statutes authorize precisely this approach; for example, Georgia's and Illinois' statutes are particularly helpful because they authorize employers to have written zero tolerance policies and to discipline employees for violating the same.

Less conservative employers may be interested to learn of other approaches to these issues. Here are some key considerations:

### **Use, possession, and distribution at work**

There is no state statute that **requires** an employer to allow an employee to use, possess or distribute marijuana. It is appropriate and not a violation of federal or state law to strictly prohibit these activities, and, as a best practice, employers should maintain these policies in writing and clearly communicate them to all employees.

### **Being under the influence at work**

There is also no state statute that **requires** an employer to allow an employee to be under the influence of marijuana while at work or during work hours. The trickier issue is how an employer will know, without the use of a drug test, that an employee is under the influence of marijuana while at work or during work hours. Here, it is critical that an employer observe and **record** specific, articulable symptoms that have led it to conclude that the employee was under the influence. In fact, the Illinois Compassionate Use of Medical Cannabis Pilot Program Act enumerates specific symptoms that might assist an employer in concluding that an employee was under the influence (e.g., speech, dexterity, coordination, negligence or carelessness in operating machinery, etc.). This will allow the employer to defend against a claim that it discriminated against the employee because of a medical condition, as opposed to because the employee, for example, fell asleep and crashed a forklift into a wall. As with anything else, documentation is of utmost importance.

### Testing positive at work

In addition, some states (e.g., Delaware, Illinois, and Minnesota) prohibit an employer from disciplining an employee **solely** because he tested positive for the presence of marijuana. As a practical matter, this makes sense because it is possible for a person to have used marijuana weeks ago, but still test positive today for the presence of metabolites long after the employee has ceased to feel the effects of the substance. There are two important limitations to this prohibition, however: (1) statutes like these specifically allow an employer to discipline an employee if failing to do so would cause it to lose a monetary or licensing-related benefit under federal law; and (2) nothing prohibits an employer from disciplining an employee for failing a drug test **if that employer can also show that the employee was under the influence of marijuana at work or during work hours**. Again, this is where it is critical that an employer articulate (and document) the observations underlying the conclusion that the employee was under the influence of marijuana at work or during work hours.

### Interactions with the drug testing provider

Separate from the medical marijuana statutes, some states allow employees to explain a positive drug test before the business takes an adverse employment action on the basis of such a test. As a best practice, to limit the likelihood that a business will have information about an applicant or employee’s medical history, it is best to discuss a protocol with the drug testing provider that will keep that information from the employer. For example, the drug testing provider should only tell the employer that the employee tested positive if the employer did not have a medical marijuana card; if the employee did test positive but had a medical marijuana card, the drug testing provider should report that the employee passed the test.

In sum, it is perfectly reasonable to continue to discipline employees for using, possessing, distributing, being under the influence of, or testing positive for the use of marijuana while at work or during work hours. For a more nuanced approach — particularly for an employer attempting to craft employment policies governing operations in more than one jurisdiction — it is absolutely critical for employers to take the following steps: (1) review the state and local legislation in the relevant jurisdictions to understand what they prohibit and authorize; and (2) document, in detail, any employee behavior that will form the basis for an adverse employment action.

## WILL ELECTRONIC SIGNATURES IN EMPLOYMENT AGREEMENTS BECOME THE NEW NORMAL IN 2016? HERE’S WHAT TECH-SAVVY EMPLOYERS SHOULD KNOW ABOUT THE LAW



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To say that all companies now communicate and execute transactions electronically is to state the obvious. Due to advanced teleconferencing technologies, virtual meetings now take place as often — if not more frequently than — in-person meetings. To increase flexibility and reduce overhead costs, more companies are allowing their employees to telecommute and work in digital offices, necessitating more effective and less costly means of communication. Electronic signatures, as alternatives to handwritten, wet ink signatures, are particularly effective means of conducting business. Through the simple click of a mouse, companies can avoid the delay and increased costs associated with the delivery of a handwritten signature, and scanning, archiving, storing and retrieving paper documents. But electronic signatures come with their own rules, and to avoid clicking their way to noncompliance, tech-savvy employers should also ensure that they also are up on the law.

Congress and state legislatures have passed laws protecting and endorsing the use of electronic signatures and electronic records. The Uniform Electronic Transactions Act (“UETA”) is a model law released in 1999 by the Uniform Law Commission, a nonprofit, nonpartisan organization that drafts model legislation for states to adopt. The UETA provides a legal framework for the use of electronic records and signatures. It does not apply to all writings but covers only electronic records and signatures relating to a transaction.

Similar to the UETA, the federal Electronic Signatures in Global and National Commerce Act (E-Sign) authorizes the substitution of electronic signatures and records for paper documents in interstate and foreign commerce. In most instances, E-Sign defers to state law where the state has adopted the UETA. Otherwise, E-Sign will preempt any state laws that do not provide equivalent protection for electronic records and signatures. Under both the UETA and E-Sign, an electronic signature is defined as an electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

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Forty-seven states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands have adopted a form of the UETA. The remaining three states — Illinois, New York and Washington — have their own unique statutes. New York's and Illinois's statutes permit the use of electronic signatures and records, while Washington's laws permit only the use of "digital" signatures. For those wondering what the difference is, digital signatures are a narrow subset of electronic signatures that use a form of encryption that helps to ensure the authenticity and integrity of a signature.

Although electronic signatures are accepted in all states and are widely used, employers should be careful in the way they are implemented. Electronic signatures are more difficult to authenticate than handwritten signatures. The author of a handwritten signature can be determined by analyzing the handwriting, ink and other factors. Accordingly, it is difficult, although not impossible, to forge such a signature. By contrast, an electronic signature is easier to forge because it is not necessarily associated with a specific characteristic (e.g., handwriting). Further, unlike with a handwritten, wet ink signature, it may be more difficult to ascertain the intent of a person alleged to have created an electronic signature. These challenges are highlighted in court decisions addressing the enforceability of such signatures.

## **Your Arbitration Agreement is only as Strong as the "Click" Behind It**

Since the enactment of E-Sign and state electronic signature laws, only a handful of courts have addressed the enforceability of electronic signatures in the employment context. The majority of these cases involve employment arbitration agreements. In each case, the enforceability of the electronic signature rests on proof of an affirmative act and the intent to perform that affirmative act. A recent case is illustrative.

In *Ricci v. Sears Holding Corporation*, a federal court in New Jersey held that an employee's electronic acknowledgement of an employment arbitration agreement was binding. In that case, the employer distributed a new employment arbitration policy to its employees for their review and signature. Employees accessed the policy online through the employer's intranet. To acknowledge receipt and agreement with the policy, the employees had to click a "yes" button and then a "submit" button. After completing the online acknowledgment, the plaintiff filed a lawsuit in federal court, alleging unlawful discrimination. As expected, the employer sought to compel arbitration and dismiss the complaint on the grounds that the plaintiff agreed to

arbitrate employment disputes. The plaintiff claimed he had no knowledge of the arbitration agreement. He also argued the agreement was invalid because it lacked his handwritten signature and that he did not properly assent to the agreement although he clicked "yes" and "submit." The court refuted this argument and noted that a handwritten signature is not required to create an enforceable contract. By clicking on the relevant electronic buttons, the plaintiff sufficiently acknowledged his assent to the arbitration agreement. As such, the court enforced the arbitration agreement and dismissed the complaint.

## **Use Unique Identifiers to Authenticate E-Signatures**

Similarly, other courts have enforced electronically signed employment arbitration agreements where employers set up the signing process in a manner requiring each employee to use unique identifiers and login information to access the electronic form. For instance, a federal court in Texas endorsed an employer's careful process of obtaining electronic signatures. The employer initially informed its employees of its arbitration agreement by sending out a company-wide email. The email provided instructions for logging on to the employer's HR system and affirmatively assenting to be bound by the arbitration agreement. Each employee could log on to the HR system only with the unique username and password used to access his/her computer and email account at work. Accordingly, each employee could view only those documents and information related to that specific individual on the HR system. After logging on and viewing the arbitration document, each employee could then click on the appropriate buttons to either "Accept" or "Decline" the agreement. Once the employee clicked "save," the system generated a timestamp indicating the date, time and the words "Accepted By" preceding the employee's name.

Through these secure processes, the employer was able to prove a high likelihood that the plaintiff created the electronic signature at issue when the arbitration agreement was challenged. Although the court acknowledged the impossibility of being completely certain that the electronic signature represented the plaintiff's own actions, the court noted this deficiency is also present in written signatures and should not be a bar to the use of electronic signatures.

On the other hand, a California employer failed to present sufficient evidence that its employee electronically signed an arbitration agreement because the employer did not state the exact date on which the electronic signature was obtained or present specific information that the electronic signature was an act attributable to the employee.

Electronic signature challenges are not limited to employment arbitration agreements. A case decided by a federal court in Missouri in early 2015 addressed the enforceability of electronic signatures under the Fair Credit Reporting Act (FCRA). As part of its hiring process, an employer required new hires to electronically sign a form authorizing disclosure of their consumer reports. The plaintiffs later brought a class action challenging the enforceability of the electronic signatures under the FCRA. The plaintiffs argued that the electronic authorization form was not a “transaction,” and, thus, did not fall under the scope of E-Sign. The court disagreed, stating that an employment application and consumer report authorization are documents that clearly relate to the conduct of business under E-Sign.

Another federal court held that under the Connecticut Uniform Electronic Transactions Act and E-Sign, an email exchange containing the employer’s signature block was binding and enforceable. In another case, after orally agreeing to settlement terms at a mediation presided over by a court, an employer’s attorney of record sent out emails confirming his client’s agreement to the settlement. When the employer later attempted to renege, the court held that the attorney’s emails constituted binding and enforceable electronic signatures under Rhode Island law.

A common theme in the above examples is the affirmative act needed to complete the electronic signature process. Without an affirmative act, a court will likely strike an electronic signature. The Washington Supreme Court did just that when the employee electronically signed an acknowledgment form but failed to “opt out” of arbitration. The employer claimed that by failing to opt-out, the employee was subject to mandatory arbitration of employment disputes. The court disagreed, concluding that the employer failed to show the uniqueness of the electronic signature and failed to present evidence that the employee affirmatively consented to arbitration of employment disputes.

Although cases addressing the enforceability of electronically signed employment agreements are few and far between, it is clear that e-signatures are here to stay. While the courts have been slow to acknowledge or accept their enforceability, there is a slow but steady move toward enforcing such signatures. Thus, so long as employers use the right processes and remain compliant with the relevant laws, they are likely to win any legal challenge to their electronic signature processes.

### Your E-Signature To-Do List for 2016

To shore up electronically signed agreements against potential challenge, employers should select processes that are secure and can be clearly authenticated. Test and retest the process to ensure that its integrity cannot be easily compromised. As discussed above, each employee’s assent must be affirmative. And, when in doubt, a good old handwritten, wet ink signature will work just fine. Finally, employers should know the electronic signature laws in each state in which they do business. Remember that each state’s law may be different. Therefore, employers operating in more than one state must be vigilant and careful about reviewing all applicable laws to ensure that their electronic signatures and records are compliant.

### IS YOUR ORGANIZATION READY FOR THE U.S. DEPARTMENT OF LABOR’S NEW OVERTIME EXEMPTION RULES?



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### ***These changes will make up to five million additional workers eligible for overtime.***

In July 2015 the U.S. Department of Labor (DOL) issued proposed changes to the Fair Labor Standards Act’s (FLSA) executive, administrative and professional overtime exemptions, also known as the “white collar” exemptions. The most important of these changes will dramatically increase the salary threshold for those exemptions to \$50,440 per year. Solicitor of Labor M. Patricia Smith recently announced DOL expects to issue its final regulations in late 2016, and the salary threshold increase likely will go into effect shortly thereafter. These changes will make up to five million additional workers eligible for overtime. The new regulations will require significant changes for certain employers, and now is time to start planning for their impact.

The FLSA generally requires that non-exempt employees be paid a minimum wage (currently \$7.25 an hour) and overtime (at time-and-a-half the worker’s hourly rate) after 40 hours of work in a workweek. Currently, to qualify for one of the white collar exemptions under federal law, employees

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must be paid a salary of at least \$455 per week (or \$23,660 per year), and their “primary duty” must be executive, professional or administrative, as those categories are defined under DOL regulations. The \$23,660 salary threshold has been in effect since 2004.

DOL now intends to set the minimum salary level for the white collar exemptions at the 40th percentile of weekly earnings for full-time employees, which results in the planned \$50,440 figure. In addition, federal law currently provides that certain “highly compensated” employees qualify for exempt status if they earn a salary of at least \$100,000 per year and customarily and regularly perform some executive, professional or administrative duties. DOL also plans to increase the compensation needed to qualify for this “highly compensated employee” exemption to the 90th percentile of weekly earnings, or \$122,138 annually.

DOL also proposed to annually raise these salary thresholds to adjust for inflation. Assuming this provision remains in the final regulations, this will require employers to stay up-to-date on future changes to the salary levels applicable to these exemptions. Otherwise, not giving an employee a raise, or not giving a large enough raise to keep an employee at or above the minimum salary threshold, could lead to that employee suddenly becoming eligible for overtime.

DOL did not make specific proposals to change the duties tests to qualify for the white collar exemptions, but it did ask for public comments on whether they too should be changed. It remains to be seen whether any changes to the duties tests will be included in the final regulations. DOL is in the process of reviewing the 270,000 comments it received from employer and employee organizations during the comment period, which ended in September 2015. It is possible the final regulations will differ from the proposal, but it is unlikely that the final salary levels will differ significantly.

It is important to note that state and local governments may set their minimum wage higher than federal law and have different rules on which workers are eligible for overtime. Many states and municipalities have overtime pay rules that are more generous for employees than federal law. DOL’s proposed changes will not impact any state or local wage and hour laws not currently tied to the FLSA. Employers must ensure they are complying with state and local wage and hour laws when establishing their compensation policies and practices.

If they have not done so already, employers need to begin determining how they will respond to these changes. Here’s what you can do now to be ready:

- Consult with counsel about the particulars of DOL’s proposal and how it will impact your organization. While the proposed changes will apply in some way to almost every for-profit, nonprofit and government employer, there are still specific jobs and entire professions that can remain exempt even if they are paid less than the minimum salary. For example, most teachers would remain exempt from overtime under federal law even if paid less than the proposed \$50,440 salary. It is important to understand exactly how the final regulations will impact your organization and its employees.
- Talk internally about how an increase of the minimum salary level for exemption to \$50,440 will impact your salaried workforce and the impact any changes to compensation or classification will have on operational issues, labor costs, eligibility for bonuses, PTO and other benefits, job responsibilities, and reporting relationships.
- For each exempt employee earning a salary of less than \$50,440, consider the options for addressing the new requirements: (1) raise their salary above the minimum threshold (assuming they continue to meet the duties tests of the white collar exemptions); (2) reclassify them as non-exempt so they become eligible for overtime going forward; (3) if they are reclassified as eligible for overtime, adjust their hourly rate to reflect the impact overtime pay will have on their overall compensation; or (4) as part of any reclassification, reduce or manage their hours to minimize any overtime costs. Some of these options will have obvious employee morale issues, which should be considered in evaluating options. While some workers may welcome eligibility for overtime, others may consider any reclassification to be effectively a demotion.
- If any of your exempt employees are covered by collective bargaining agreements, or have individual employment contracts, consider whether negotiations will be necessary to address any planned changes to employees’ compensation, classification or hours of work.

As is so often the case, increased preparation now will help diminish perspiration later. Employers that evaluate the impact DOL's planned changes will have on their organization, and begin to formulate plans on how they will respond, will be in a much better position when the final regulations are released.

## UNIONIZATION IN HIGHER EDUCATION: 2015 DEVELOPMENTS AND WHAT TO WATCH FOR IN 2016



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Organized labor continues to see declining numbers in its membership ranks. As a result, unions are looking for new targets and employing unique and aggressive organizing methods to increase their membership and representation of workers. Campus police and facilities/clerical personnel have been organized at many colleges and universities for years. Now, however, unions (particularly the Service Employees' International Union (SEIU) and the United Auto Workers (UAW)) are engaging in widespread campaigns to organize faculty and students.

Many employees have a statutory right to form or join a labor union. Private educational institutions and their employees are subject to the National Labor Relations Act (NLRA), while state schools may or may not be subject to a state or local labor relations act governing public institutions. Whatever the source of the right, however, the organizing process is a swift one that allows little time for learning as you go, particularly in light of the National Labor Relations Board's (NLRB) new election rules. In fact, we have already seen election cycles as short as 13 days in higher education organizing drives. Thus, it is critical for university counsel to be prepared to respond to a representation petition before actually receiving one.

### The NLRB's New Election Rules

In late 2014, the NLRB adopted a final rule amending its representation case procedures effective April 14, 2015. The new rules dramatically reduce the time between the date of a petition for election and the election itself. An employer may now have as few as 10 days to educate its employees about the facts and risks of union representation before the election begins.

The new rules also curtail employers' ability to litigate issues about the scope and composition of the bargaining unit prior to the election. Most critically, employers are now unable to obtain pre-election decisions from the NLRB regarding supervisory versus employee status. Thus, before the election, an employer might not know for sure whether a particular employee is included within the voting unit or is a member of the management circle (and therefore lawfully able to campaign for the employer).

Finally, the rules also require that the employer file a statement of its position about all election issues one day before the pre-election hearing, together with a list of eligible voters, their classifications and shift assignments. For the first time, this new "voter list" requires employers to provide personal email addresses and cell phone numbers to the NLRB to facilitate union communications with employees.

### Resurgence of Adjunct Organization Using New Tactics

Over the past several years, the SEIU has engaged in targeted and highly effective campaigns to organize non-tenure track (adjunct) faculty across the country. In the past three years alone, the SEIU has won elections among adjunct faculty at more than two dozen institutions, with bargaining units as large as nearly 1,000 employees. The hallmark of the SEIU's strategy is what has been dubbed a "metro campaign," where SEIU organizers descend upon a major city (e.g., Washington, D.C., Boston, San Francisco and Chicago) and start to collectively solicit adjunct faculty across institutions in the metropolitan area. This has proven to be particularly effective because it brings together faculty from different institutions who can then compare per course pay rates and other benefits.

At the same time, the SEIU has aligned with – and even created its own – activist groups. One of these groups, "Faculty Forward," is described by the SEIU as a "grass roots awareness campaign" designed to educate faculty about pay and working conditions. According to Faculty Forward's website, its primary goal – a riff on the fast



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food and retail worker rally for a \$15 hourly wage – is to obtain the equivalent of \$15,000 per course compensation packages for adjunct faculty, including the value of benefits. In Chicago, Faculty Forward was recently instrumental in the City Council's passage of a resolution in favor of adjunct unionization, a tactic that garnered significant media attention and support from high-profile politicians. Faculty and union organizers alike often pull students into adjunct organizing campaigns by appealing to their concerns about mounting student debt and rising administrator pay.

In launching these campaigns, the SEIU employs carefully orchestrated media strategies, including social media campaigns, student rallies and student media outlets. Those strategies, combined with the shortened time frame under the new rules for NLRB-supervised elections, can make it difficult for colleges and universities to respond effectively to organizing campaigns involving adjunct faculty.

## Challenging Long-Standing Precedent

Emboldened by the current labor-friendly majority on the NLRB, unions have also begun targeting non-traditional units (e.g., student-athletes in revenue-generating sports) and launching challenges to well-established precedent. Although a team of Cozen O'Connor attorneys recently defeated an unprecedented attempt on the part of the United Steelworkers of America to organize football student-athletes at Northwestern University (see *Northwestern University v. College Athletes Players Ass'n*, 362 NLRB 167 (Aug. 17, 2015)), the Board appears prepared to overturn longstanding precedent regarding graduate student unionization. Just as importantly, other recent Board decisions have encroached on the favorable Supreme Court holdings in *NLRB v. Yeshiva University* and *NLRB v. Catholic Bishop & University of Great Falls*. The new Board jurisprudence limits these cases and muddies the waters for university counsel.

## Expect the Board to Reverse Course on Graduate Student Organizing

In its 2004 *Brown University* decision, the Board overturned a four-year-old decision (*New York University*) and returned to its long-standing position that graduate students who teach and perform research activities are not “employees” of their colleges and universities under the NLRA. In doing so, the Board expressly rejected a rigid application of the common law test for employee status, recognizing that “the student-teacher relationship is based on the ‘mutual interest in the advancement of the student’s education,’ while the employer-employee relationship is ‘largely predicated on the

often conflicting interests’ over economic issues.” Noting that the educational setting is unique, the Board applied the “predominantly educational relationship” test, which recognizes graduate assistants’ status as students; the role of the assistantship in their own educational experience; their relationship to the faculty under whom they study; and the fact that they receive financial aid to attend school.

Despite the Board’s holding in *Brown University*, the UAW has in recent years repeatedly sought to organize graduate assistants at private schools in New York. Now, it has a Board that appears to be fully prepared to overturn that decision. In December 2014, the UAW filed simultaneous petitions to represent graduate students at Columbia University and the New School. Although both petitions were twice denied based on *Brown University*, the Board has granted the UAW’s petitions for review and now is poised to overturn *Brown University* sometime in 2016.

## Full-time Faculty May No Longer Be Managers

In *Yeshiva University*, the Supreme Court held that full-time faculty members were excluded from coverage of the NLRA. In particular, the Supreme Court ruled that full-time faculty could not organize because they exercised “absolute managerial” functions related to academic offerings at colleges and universities. These functions included deciding upon course offerings and determining which students would be admitted, retained and allowed to graduate; debating and determining teaching methods, grading policies and matriculation standards; and occasionally determining the size of the student body and the cost of tuition.

In 2014, the SEIU successfully challenged Yeshiva University in *Pacific Lutheran University v. Service Employees International Union*. There, the Board majority discussed its view that educational institutions are “increasingly run by administrators, which has the effect of concentration and centering authority away from the faculty.” Based on what it referred to as the “corporatization” of higher education, the Board set forth additional factors that must be considered in deciding whether faculty play a “crucial role ... in determining ... central policies of the institution” such that they are excluded from coverage under the NLRA. The additional factors to be considered include the faculty members’ actual control or influence in the following areas, with the greatest weight given to the first three: decision-making in academic programs; enrollment management; finances; academic policy; and personnel policy.

The Board's decision in *Pacific Lutheran* is important because it signifies that merely having authority over academic programs and policies (as many faculty do) will no longer exclude them from the reach of the NLRA. Unless faculty members also have authority with respect to enrollment and finances, the Board will likely rule in favor of coverage under the Act. Not only does this mean that full-time faculty at private institutions may be more successful at organizing in the future, it also raises concerns about whether a university can engage its full-time faculty as spokespersons in an organizing campaign on behalf of adjunct or non-tenure track faculty.

### Challenges Involving Religious Institutions

For more than three decades, religious schools have been excluded from the coverage of the NLRA. In *NLRB v. Catholic Bishop & University of Great Falls*, the Supreme Court held that the NLRA excludes religious educational institutions because exercising jurisdiction would result in excessive entanglement in violation of the First Amendment. After challenges at Seattle and Pacific Lutheran Universities, the Board again modified long-standing Supreme Court precedent by articulating a new test for determining whether faculty at religious institutions are themselves performing a religious function such that they are excluded from the coverage of the NLRA.

On this issue, the Board found that Pacific Lutheran University had failed to establish that it holds out the subject faculty as performing a religious function. As a result, the Board found that the faculty members were subject to its jurisdiction. In making this determination, the Board noted that the university did not require or encourage the subject faculty to perform any religious function; that the by-laws and articles of incorporation were silent as to the faculty's role in furthering the university's Lutheran mission; that the university's website does not indicate that its faculty plays any role in advancing the Lutheran religion; and that there is no requirement that course material contain a religious component.

As one might expect, this aspect of the Board's ruling in *Pacific Lutheran* has resulted in an increased number of representation petitions being filed on behalf of non-tenure track faculty at religious institutions. We expect to see more of the same going forward. It is also quite possible that this issue could reach the Supreme Court in the foreseeable future.

### Conclusion

Colleges and universities across the country have become high-profile targets for unionization by some of the most sophisticated labor organizations, who have launched coordinated, media-savvy campaigns seeking to organize students and faculty alike. The momentum behind these campaigns is further fueled by a pro-labor Board majority and severely compressed timeframes for educating employees about the pros and cons of unionization, and colleges and universities can no longer rely upon long-standing precedent excluding graduate student assistants, full-time faculty or religious institutions from the NLRA's coverage. Consequently, university counsel would be well-advised to take stock of the working conditions of their graduate students, adjunct faculty and full-time faculty well in advance of any word of unionization, so that the school can effectively combat a campaign if and when it is launched.

## NEW TEXAS GUN LAWS: WHAT THEY MEAN FOR EMPLOYERS



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The prevalence of civilian gun ownership in Texas makes concealed carry, and now "open carry," a hot-button issue of contention. In its most recent session in 2015, the Texas Legislature passed two bills — House Bill No. 910 (HB 910) legalizes the open carry of handguns in Texas, and Senate Bill No. 11 (SB 11) permits handgun license holders, under some circumstances, to carry a concealed handgun onto college campuses in Texas. With fierce opposition on both sides of the gun rights issue, employers often find themselves caught in the middle — between trying to ensure a safe workplace and staying within the confines of the law.

With new gun laws taking effect on January 1, 2016, it is important that employers know what to expect. This quick go-to guide provides a summary of the changes created by the new open carry law and can aid employers in navigating through the legal and business implications that could arise as a result.

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## FAQS:

### 1. What do you mean by open carry?

For the last 20 years, Texas has allowed handgun license holders to carry concealed handguns in public and private places. Beginning January 1, 2016, license holders in Texas will be allowed to carry handguns in plain view of others, so long as the gun is holstered in a shoulder or waist holster. Handguns will still be prohibited (i.e., it will still be illegal to possess a handgun) in certain places such as nursing homes, professional sporting events, correctional facilities, hospitals, amusement parks, government buildings, churches and synagogues, and airports. The new law goes into effect on January 1, 2016.

### 2. Can employers generally prohibit those licensed to carry a gun from bringing it onto their premises?

Yes, **if the property is owned by the employer**. Not surprisingly, property rights trump gun rights in Texas. Texas allows private property owners to ban guns on their premises by notifying the public either “orally or by written communication” that guns are prohibited on their property. Therefore, for an employer (or any private property owner) to generally prohibit handguns on its premises (including those owned by employees, customers and all third parties), the employer must post a sign (with language specified in the law) in a conspicuous manner that is clearly visible to the public.

This posting requirement will not change under the new law. What will change is that if the property owner wants to prohibit the **open** carry of guns in addition to licensed concealed guns, the owner will need to add language to the sign making clear the scope of the prohibition.

### 3. If the employer does not own the property, can it prohibit employees from bringing guns to work?

Yes. An employer can still set the rules for the workplace. For example, an employer may prohibit employees from carrying guns of all types into the workplace (without regard to whether they are concealed, licensed, etc.). An employer may also broadly prohibit employees from carrying guns while in the course and scope of employment, which would include operating company vehicles or traveling while on duty.

### 4. Can an employer make exceptions and allow certain employees to carry guns in the workplace?

To answer this question, you must determine whether the employer owns the property. For example, if an employer leases office space in a building with a sign from the property owner prohibiting firearms, any employee who violates the rule would be trespassing. The employer’s permission does not trump the property owner’s rights.

If the employer owns the property, however, the employer can decide whether to make exceptions. For example, an employer may allow security guards to carry weapons. Other exceptions might include executives or employees with a military/law enforcement background who are trained to assist with an active shooter or other threat of violence in the workplace.

### 5. Can employers prohibit workers from storing licensed handguns in their private vehicles?

Generally, no. Senate Bill No. 321 was signed into law in 2011 and provides that most public and private employers in Texas may not prohibit employees, who hold a license to carry a handgun, from transporting or storing a lawfully possessed firearm in the employee’s locked, privately owned motor vehicle in a parking lot, parking garage or other area provided by the employer. Of course, there are several exceptions, including vehicles leased or owned by the employer; vehicles parked in lots owned or controlled by schools; or specified properties owned or leased by chemical manufacturers or oil and gas refiners.

### 6. How does the new law regarding concealed carry on college campuses work?

SB 11 (dubbed the “campus carry” law) will now allow license holders to carry concealed handguns in university campus buildings under certain circumstances. This law will go into effect on August 1, 2016 for private and public colleges, universities other institutions of higher learning. Notably, the law will not go into effect for private junior and community colleges until August 1, 2017. Campus carry should not be confused with “open carry.” The open and unconcealed carry of handgun on college campuses is still prohibited under the new law.

To be eligible under the new campus carry law, an individual must:

1. Be over 21 years of age;
2. Be a legal resident of the state for a six-month period preceding the application;
3. Not have been convicted of a felony;
4. Not currently be charged with commission of a Class A or B misdemeanor;
5. Not be chemically dependent;
6. Be capable of exercising sound judgment;
7. Be qualified under federal and state law to purchase a handgun; and
8. Be current on child support payments or other monies collected by a state agency.

Colleges and universities are expected to adopt reasonable policies and rules for individuals who want to carry concealed handguns on campus. SB 11 permits private universities to “opt-out” (i.e., ban concealed handguns on campus), and public universities will be permitted to set up gun-free zones; however, universities may not adopt policies that would effectively ban the carrying of a concealed handgun on campus.

**7. We already have a policy that prohibits guns in the workplace. Can we keep this policy in place? What, if any, changes will we need to make?**

Yes, existing policies prohibiting guns in the workplace can be maintained under the new law (as long as they were lawful under the old law). The chief aim of HB 910 was to amend several Texas Codes to remove the term “concealed” and leave only the word “handgun.” Thus, employers have the right to continue to prohibit employees from bringing guns, both concealed and openly carried, in the workplace.

Employers who own their own property may also continue to prohibit third parties from bringing guns onto the property so long as the proper posting requirements are met.

**8. Now that the law has changed, what should employers do?**

Employers should review their current policies to ensure that they are in compliance with the new laws. Also, we recommend that employers clearly communicate gun policies to their employees and be sure that the policies are consistent with the requirements imposed by Texas law.

**9. What happens if an employer violates the “open-carry” law?**

The “open carry” law — like the 2011 law permitting firearm storage in employer parking lots — does not provide or create a private cause of action for employees who believe their right to carry a handgun has been infringed. Thus, it appears that the employee’s only remedy at this time would be to report the alleged violation to the attorney general’s office or seek declaratory relief through an injunction.

**EMPLOYMENT IN THE GIG ECONOMY: SUBTERFUGE, SUCCESS STORY, OR BOTH?**



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One of the biggest issues in 2015 — and an upcoming issue for 2016 and beyond — is the growth of the so-called “gig economy,” a new and fast-growing model for entrepreneurs and other businesses across the country where independent contractors perform work for customers on an *ad hoc* basis, with an intermediate business that connects the parties and handles the money. This new system, made well-known by Uber and its legion of drivers in cities across the country, defies prior assumptions about traditional employment relationships and presents employers with the challenge of applying old laws to a modern-day landscape. How can employers of all types and sizes be prepared for the gig economy in the years to come?

To understand just how the gig economy upends the traditional system, a review of the traditional methods of employment is important. For decades, employers had two main methods of hiring workers: a traditional employment relationship and an independent contractor system. In the traditional system, employers gain a high degree of control

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over what, how, and when their employees perform work but were on the hook for an ever-increasing bevy of taxes, fees, regulations, and other liabilities. In the independent contractor system, the employer retained control only over the ultimate objective and left to the independent contractor the means and methods of arriving at that objective. In exchange for its loss of control, the employer was absolved of most of the traditional liabilities and tasks associated with having employees.

The gig economy attempts to straddle the line between the traditional employment model and a traditional independent contractor model. In the gig economy, the typical intermediate company does not hire workers as “employees” but still wants to exercise considerable control over the manner and means by which those workers perform services. At the same time, the typical intermediate company does not dictate whether or when an individual performs services — a critical hallmark of the employment relationship — and does not restrict the ability of workers to contract with other companies, agencies or otherwise perform work for competitors.

With its new model, the gig economy leaves governments and courts struggling to react. Is the new model a path to success for new businesses and temporary workers who can earn additional money with little-to-no investment? Or is it a mere subterfuge, an attempt to evade taxes, laws and regulations to which employers have been beholden for years? These questions will be answered, sooner or later, by the various courts and governments where these companies and their workers reside. Uber is facing several class action lawsuits in California and fighting an adverse determination from the California Labor Commissioner. Other well-known entities, such as Lyft and Postmates, are facing similar suits. State governments — always exploring new revenue sources — seem eager to test the boundaries of existing statutes and to investigate employers for failure to pay/withhold taxes for its employees.

How employers should react to this new model depends on various factors, including their current employment model, their potential liability, and their tolerance for risk.

Companies already using a gig economy employment model should monitor the pending litigation and periodically evaluate their systems to confirm their willingness to tolerate the liability risk. Instacart, for example, which is fighting a lawsuit brought by its gig economy workers, decided this year to shift away from contract workers and toward part-time employees for part of its business model. Even without changing models, gig economy players should

seek counsel on how to decrease the chances of significant penalties or liability, for instance by minimizing overtime hours or utilizing arbitration agreements with class-arbitration waivers. Companies that are later found to have misclassified workers may be able to avoid significant costs for overtime payments by reducing the number of people working more than 40 hours in a week. Along the same lines, arbitration agreements and class-arbitration waivers may be useful in managing (though not eliminating) risk to the company.

For new businesses or entrepreneurs, the allure of the gig economy business model is strong. Not only are several competitors likely using it, but the model also allows companies to avoid the startup costs inherent in a traditional employment model that can impede early growth. Often, these entities think they have the most to gain and least to lose from the gig economy model. Whether or not that assessment is accurate, these entities should still be aware of the legal landscape involving the gig economy and monitor legislation, especially in areas where its workers are employed or reside.

## ***Shifting an existing workforce to an independent contractor model is a perilous endeavor.***

For traditional employers eager to take advantage of the gig economy, shifting an existing workforce to an independent contractor model is a perilous endeavor. Not only are such “switches” usually considered as evidence that the true relationship between the company and its workers is one of employer/employee, the paper trail created by such a switch can serve as a red-flag to government investigators. Employers wishing to switch to a gig economy model should consult with counsel first, and only make the change with full awareness of the potential risks.

The concept of the gig economy is fast attracting the attention of legislators across statehouses and in Washington, D.C. Legislators are being lobbied in various directions, with some forces pushing them to explicitly permit this new, hybrid-style of employment and others eager to see statutory limits to prohibit its expansion. But any legislation, whether protecting or burdening the gig economy model, would be years into the future if it is enacted at all. In the meantime, federal and state regulators are also facing pressure when answering these questions. Some regulators are considering proposals to provide some clarity to this area in the absence of legislation. For most

employers, though, the likelihood is that no statutory or regulatory changes will provide clarity to this confusing new area of employment law in the near future.

In the end, the gig economy waits for no one. Companies will continue to find new ways that allow them to attract workers, serve their customers or clients, and minimize their risks. As the law plays catch-up to this new paradigm, companies can protect themselves by being knowledgeable about the available options and the risks associated with each, and can then choose the right model for their business.

## PRESIDENTIAL CANDIDATES ON IMMIGRATION: A PRIMER FOR EMPLOYERS



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Immigration is a hot-button topic for many employers, and has stirred up much debate, controversy and argument among the presidential candidates. Rhetoric abounds amid a few immigration reform proposals. Predictably, hardline Republicans have focused on border security and deportation, while Democrats and moderates on both sides have emphasized more comprehensive immigration reform. This article provides an overview of the candidates' positions on the immigration issues that carry significant implications for many employers in 2016 and beyond.

### Republican Rumblings

True to style, Republican candidate Donald Trump has unleashed his ambitious immigration plan, titled Immigration Reform That Will Make America Great Again. The plan calls for 1) building a wall across the U.S.-Mexico border; 2) enforcing immigration laws by tripling ICE officers, requiring nationwide use of E-verify, deporting "all criminal aliens," defunding so-called "sanctuary cities," and imposing criminal penalties for those who overstay their visas; 3) eliminating birthright citizenship, and 4) reducing foreign worker visa programs and mandating companies to hire from the "domestic pool of unemployed." Trump has emphasized the need to deport all estimated 11 million undocumented aliens. The other Republican candidates have taken a more moderate approach.

Job Bush unveiled a six-point plan on how to secure the

border and enforce immigration laws. The former Florida governor's plan seeks new resources to improve technology and infrastructure at the border; illustrates the need to identify and "send home" individuals who have overstayed their visa; and threatens to defund so-called "sanctuary cities." As for the 11 million undocumented immigrants in the country, Bush suggests a "rigorous path" to legal status. The path includes passing criminal background checks, paying fines and taxes, learning English, and earning a provisional work permit. Bush, however, has stated that border security and enforcement must come first: "Finding a practical solution to the status of the people who are here illegally today is a nonstarter if our borders are not secure against future illegal immigration."

Florida Senator Marco Rubio outlined a three-step plan to address the 11 million undocumented immigrants living in the United States. Two years ago, the Senator voted for a comprehensive reform bill, stated that the "[immigration system] cannot be fixed in one massive comprehensive piece of legislation. There is only one way forward, and it will require three steps, and they have to happen in the following sequence." Senator Rubio has, however, since tried to distance himself from the bi-partisan bill by taking a stricter stance on immigration, arguing that the border should be secured before any reform is addressed.

### Democratic Dreamers

The Democratic candidates support President Obama's Executive Actions to provide legal status to minors and parents of citizen children. The top three presidential contenders — Bernie Sanders, Hilary Clinton and Martin O'Malley — have promised to go even further than Obama by extending relief to other types of illegal aliens.

Bernie Sanders touts a six-point immigration reform plan. Specifically, his plans calls for the following parameters:

- Dismantle inhumane deportation programs and detention centers;
- Pave the way for a swift and fair legislative roadmap to citizenship for the 11 million undocumented immigrants;
- Ensure our border remains secure while respecting local communities;
- Regulate the future flow of immigrants by modernizing the visa system and rewriting bad trade agreements;

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- Enhance access to justice and reverse the criminalization of immigrants; and
- Establish parameters for independent oversight of key U.S. Department of Homeland Security (DHS) agencies.

While Hilary Clinton has stated she supports comprehensive reform that includes a pathway to citizenship, she has refrained from calling to limit immigration detention. Nevertheless, Clinton criticized President Obama's immigration enforcement, calling for "less harsh and aggressive" deportations.

Martin O'Malley has been promoting his immigration policies by calling to "#endfamilydetention" on his Twitter account. The detention of women and children in centers has sparked outrage from immigrant groups, who call the practice inhumane and unjust. O'Malley has also been keen on the Hispanic vote by writing an article in Spanish about his immigrant heritage and America's need for comprehensive immigration reform. His plan, titled "15 goals to rebuild the American Dream," emphasizes the need to provide legal pathways to citizenship for illegal aliens.

Immigration will continue to be a looming beast of a topic on the road to the presidential elections. The litmus test of the new president may be the one who can facilitate sensible solutions to the many questions surrounding immigration law. Clearly, only a mighty statesperson will have the courage and perseverance to tame this mighty beast.

## IMMIGRATION LEGISLATION UPDATE FOR 2015



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2015 was another year in which the Obama administration tried to fix the immigration system by presidential decree, since Congress failed to come to any kind of consensus on how to mend the broken system. The bills that were introduced in Congress this year did not even try to overhaul the immigration system and continued to show the division in the immigration policies of the Republican and Democratic parties. Below we discuss the current legal challenge to the president's executive actions on immigration. Accompanying this article is a chart summarizing the major immigration legislation proposed in 2015, some highlights of which are discussed below.

<sup>1</sup> With the assistance of Rachel Coyne, paralegal intern.

### Presidential Executive Orders: *Texas v. United States*

The year also was not a successful one for the Obama administration's efforts to fix the immigration system. In fact, it ended with a major loss for the administration. In *Texas v. United States*, the U.S. Court of Appeals for the Fifth Circuit blocked the president's executive orders on immigration, negating the administration's efforts to protect millions of undocumented immigrants from deportation.

The case stems from November 20 and 21, 2014, when the president announced a series of administrative reforms called the Immigration Accountability Executive Action. These reforms included an expansion of the current Deferred Action for Childhood Arrivals (DACA) initiative and the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) initiative for the parents of U.S. citizens and permanent residents (green card holders) that meet certain criteria. The president authorized the Department of Homeland Security (DHS) to defer for three years the deportation of certain individuals who pose no threat to the United States. The delay was imposed in the hope that Congress would pass comprehensive immigration reform within that time period.

Leading a charge that ultimately included 25 states, Texas filed a lawsuit (*Texas v. United States*) to stop the president's initiatives. On February 16, 2015, Texas federal judge Andrew Hanen of the U.S. District Court for the Southern District of Texas temporarily enjoined DAPA and the planned expansion of DACA pending a higher review or a trial on the merits. To summarize, Judge Hanen found DAPA, and the expanded DACA, to be substantive rules requiring notice-and-comment procedures under the Administrative Procedures Act (APA), rather than general statement of the administration's policy.

The government appealed the lower court's decision, but on May 26, 2015, a divided panel of the U.S. Court of Appeals for the Fifth Circuit denied the government's request for an emergency stay of the preliminary injunction, and on November 9, 2015, a divided panel of the same court upheld the district court's order granting the preliminary injunction. Judge Jerry Smith (joined by Judge Jennifer Elrod) determined that the states had standing to challenge DAPA and were likely to succeed on both their procedural and substantive claims.

Among other things, Judge Smith concluded that DAPA is not authorized under existing law, nor is it justified by historical practice. The majority wrote:

DAPA would make 4.3 million otherwise removable aliens eligible for lawful presence, employment authorization, and associated benefits, and "we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic

and political magnitude to an administrative agency.” DAPA undoubtedly implicates “question[s] of deep ‘economic and political significance’ that [are] central to this statutory scheme; had Congress wished to assign that decision to an agency, it surely would have done so expressly. ...

The interpretation of those provisions that the Secretary advances would allow him to grant lawful presence and work authorization to any illegal alien in the United States — an untenable position in light of the INA’s intricate system of immigration classifications and employment eligibility ...

Presumably because DAPA is not authorized by statute, the United States posits that its authority is grounded in historical practice, but that “does not, by itself, create power,” and in any event, previous deferred-action programs are not analogous to DAPA. “[M]ost ... discretionary deferrals have been done on a country-specific basis, usually in response to war, civil unrest, or natural disasters,” but DAPA is not such a program. Likewise, many of the previous programs were bridges from one legal status to another, whereas DAPA awards lawful presence to persons who have never had a legal status and may never receive one ...

Historical practice that is so far afield from the challenged program sheds no light on the Secretary’s authority to implement DAPA. Indeed, as the district court recognized, the President explicitly stated that “it was the failure of Congress to enact such a program that prompted him ... to ‘change the law’”...

Through the INA’s specific and intricate provisions, “Congress has ‘directly addressed the precise question at issue.’” As we have indicated, the INA prescribes how parents may derive an immigration classification on the basis of their child’s status and which for work authorization. DAPA is foreclosed by Congress’s careful plan; the program is “manifestly contrary to the statute” and therefore was properly enjoined.

The Justice Department has said that it plans to appeal the ruling to the U.S. Supreme Court. The question remains whether the Supreme Court will accept the case.

### **Congress: Another Year with a Lack of Progress**

Overall, 2015 was another year where Congress failed to make any progress on reforming the immigration system. However, in response to the terrorist bombings in Paris and killings in California, it appears that Congress may pass

legislation to provide more scrutiny of visitors traveling under the Visa Waiver Program (VWP). Under VWP, travelers from 38 countries may enter the United States without a visa and stay for up to 90 days.

To apply for the VWP, the traveler must use the Electronic System for Travel Authorization (ESTA), the process by which every prospective VWP traveler undergoes counterterrorism screening and receives preliminary approval to enter the United States. Under the new legislation, VWP travelers will have to provide ESTA information regarding past travel to countries constituting a terrorist safe haven, including Iraq and Syria. DHS would also accelerate its review of VWP partner countries and expand the collection and use of passengers’ biometrics (fingerprints and/or photographs).

The legislative proposal that sent a shudder through the U.S. business community, and the rest of the world, was introduced by Senator Dick Durbin (D-III.), chairman of Senate Judiciary Committee, and Senator Chuck Grassley (R-Iowa), assistant democratic leader, seeking to reform and reduce alleged fraud and abuse in the H-1B and L-1 temporary work visa programs. This bill, or the H-1B and L-1 Visa Reform Act, stems from ongoing criticism of the H-1B Visa program, among other programs, because of the accusation that large outsourcing companies have been abusing the system.

Senator Durbin and Senator Grassley have been trying to reform the H-1B program since 2007. In the spring of 2007, they introduced “The H-1B and L-1 Visa Fraud and Abuse Prevention Act of 2007” to overhaul the H-1B and L-1 visa programs by giving priority to American workers and regulate employers who may be depriving qualified Americans of high-skill jobs.

The proposed legislation addresses reforms to increase enforcement, modify wage requirements, and ensure protection for American workers as well as visa holders. A few highlights of the bill include:

- Requiring all employers who seek to hire H-1B worker to first put a strong effort to recruit American workers before turning to other countries.
- Prioritizing the annual allocation of H-1B visas: Currently, many large IT services companies receive more than half of the annual visa allotment, which lowers the chances of employers trying to hire a smaller number of workers. The bill will prohibit large companies from hiring H-1B workers if more than 50 percent of their employees are on H-1B or L-1 visas.
- Prohibiting the replacement of American workers by H-1B or L-1 visa holders.



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- Giving graduates of U.S. universities preference in the visa distribution.
- Giving the Department of Labor enhanced authority to review, investigate and audit employer compliance, as well as to penalize fraudulent or abusive conduct.

This bill is just one of many proposed related to immigration that have been circulating in the Senate and the House in 2015.

Another bill that has raised the interest of the U.S. business community was proposed by Senator Orrin Hatch (R-Utah) and is called the Immigration Innovation (I-Squared) bill. The bill would raise the annual cap on H-1B visas from 65,000 to between 115,000 and 195,000. Senator Blumenthal (D-Conn.) is a co-sponsor for this legislation. Contrary to the Durban-Grassley Bill, this is a bill welcomed by American businesses that rely on the H-1B visas to supplement their workforce.

Please refer to the accompanying chart for a summary of these and other bills introduced in 2015.

## Predictions for 2016

With the upcoming 2016 presidential election, and the lack of agreement in Congress, it is doubtful that any meaningful immigration legislation will be passed in 2016. The new president will certainly try to influence the direction of the country's immigration policies, but until there is agreement in Congress, the status quo will continue. The question remains whether the political climate will be kinder and gentler in 2017 to actually get some work done or, at minimum, to allow the new president to use executive orders to try to fix the immigration system.

Name of Legislation	Short Summary	Current Status
S.153: Immigration Innovation (I-Squared) Act of 2015	This bill amends the Immigration and Nationality Act to establish an annual cap on H-1B nonimmigrant visas at between 115,000 and 195,000 visas depending on existing demand and market conditions. The current annual cap on visas is 65,000. This bill was first introduced in the 113th Congress.	Referred to the Committee on the Judiciary (1/13/2015)
H.R.38: Preventing Executive Overreach on Immigration Act of 2015	This bill prohibits the executive branch of government from exempting from removal, through executive order, categories of aliens considered under the immigration laws to be unlawfully present in the United States. The bill also prohibits the executive branch from treating such aliens as if they were lawfully present or had a lawful immigration status. The bill declares that any executive branch action intending to circumvent the objectives of the Act will be null and void and without legal effect.	Referred by the House Judiciary to the Subcommittee on Immigration and Border Security (1/22/2015)
H.R.213: Fairness for High-Skilled Immigrants Act of 2015	This bill amends the Immigration and Nationality Act to eliminate the per country numerical limitation for employment-based immigrants and to increase the per country numerical limitation for family based immigrants from 7 percent to 15 percent of the total number of family-sponsored visas.	Referred to the Subcommittee on Immigration and Border Security (2/2/2015)
H.R.240/Public Law No. 114-4: Department of Homeland Security Appropriations Act, 2015	The Department of Homeland Security Appropriations Act of 2015 provides FY2015 appropriations for the DHS, including U.S. Customs and Border Protection, The U.S. Coast Guard, U.S. Immigration and Customs Enforcement, Transportation Security Administration, and other DHS programs. Appropriations for these DHS programs include funding for salaries and expenses, automation modernizations, facilities management, and improved security measures.	Became public law on 3/4/2015
H.R.1123: Protecting Immigrants from Legal Exploitation Act of 2015	This bill amends the federal criminal code to subject a person to fine, imprisonment, or both if the person knowingly or recklessly executes a scheme in connection with any federal immigration law-related matter to obtain anything of value (identity, money, etc.) from a person by means of false or fraudulent pretenses, representations, or promises. The bill authorizes the attorney general to bring a civil injunction against an immigration service provider engaging in fraudulent conduct that interferes with the administration of immigration laws or who knowingly misrepresents such provider's legal authority to provide representation before DOJ or DHS. The bill also directs the secretary and attorney general to create outreach programs that educate aliens regarding who may provide legal services and representation in various immigration proceedings.	Referred to the Subcommittee on Immigration and Border Security (3/31/2015)

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<p>H.R.2314: Accountability in Immigration Detention Act of 2015</p>	<p>This bill directs the Secretary of Homeland Security to ensure that people detained pursuant to the Immigration and Nationality Act are treated in compliance with specified requirements regarding humane treatment, detention facility standards, telephone access, investigation of grievances, transfers, medical care, legal access, and more. The bill states that the secretary must inspect all detention facilities on an annual basis and the secretary must impose meaningful financial penalties upon facilities that fail to comply with the listed requirements.</p>	<p>Referred to the Subcommittee on Immigration and Border Security 6/26/2015</p>
<p>H.R.2956: Preventing Illegal Immigrants from Abusing Tax Welfare Act of 2015</p>	<p>This bill amends the Internal Revenue Code to deny the earned income tax credit to any individual who is not a citizen or a lawful permanent resident of the United States.</p>	<p>Referred to the House Committee on Ways and Means (7/7/2015)</p>
<p>S.2193: Stop Illegal Reentry Act (Kate's Law)</p>	<p>This bill amends the Immigration and Nationality Act to increase the penalties for individuals who illegally reenter the United States after being removed. The bill seeks to increase the minimum prison term for an alien who reenters after being denied admission, excluded, deported, or removed from two years to five years. The bill establishes a 10-year maximum prison term for an alien who reenters after being removed on 3 or more prior occasions. The bill also establishes a 5-year mandatory minimum prison term for an alien who reenters after being removed following 2 or more prior convictions for illegal reentry.</p>	<p>Placed on Senate Legislation Calendar under General Orders (10/22/2015)</p>
<p>H.R.3818: Ending Special National Origin-Based Immigration Programs for Cubans Act of 2015</p>	<p>This bill states that Cuban nationals should be treated under the same immigration rules as nationals of other countries with which the United States has diplomatic relations. The bill requests that Cuban nationals should not receive preferential treatment.</p>	<p>Referred to the Subcommittee on Immigration and Border Security (11/23/2015)</p>



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