



# Federal Law Update

Kathy Butler and Linda Headley

State Bar of Texas

Labor & Employment Law Section



# Agenda

- Election, Politics and Beyond
- Agency Actions
- Employment Legislation
- Supreme Court
  - Decisions
  - Future Issues
- Fifth and Other Circuit Decisions



# The Election: Politics and Beyond



# What a Year...



THE INAUGURATION  
OF DONALD J. TRUMP

CHIEF JUSTICE ROBERTS ADMINISTERS  
PRESIDENTIAL OATH TO DONALD TRUMP

YAHOO!

# What a Year...

- We Had a Presidential Election
- A Woman was Nominated by Major Political Party as Candidate for President for First Time in History
- A Businessman—Not a Politician—was Nominated as Presidential Candidate for the First Time in History
- A 75 Year Old Avowed Socialist Captured the Votes of the Younger Generation
- Pollsters got it wrong in prediction of winners and losers
- “Inside the Beltway” types in **both** major political parties got it wrong
- And...Donald J Trump is the 45<sup>th</sup> President of the United States

# President Trump – The First Six Months

- What does this all mean for Labor and Employment Law?
- For Employers and Employees?
- Can we expect dramatic changes and when?
  - What's changed?
  - What's changing?
  - What hasn't changed...yet?



2016-2017:  
Agencies, Laws,  
and Regulations



# The Common Theme





# Wage & Hour Division



# White Collar Exemption: Status?

- **Just before Dec. 1:** Federal Court enjoins DOL enforcement of the new white collar regulations
- **December 2016:** DOL files appeal in 5<sup>th</sup> Circuit
- **June 30:** (after many extensions) DOL files brief in 5<sup>th</sup> cir.—but says it “will not advocate for specific salary level” and intends to do further review as to what the salary level should be...
- **July 26:** DOL issues Request for Info
- Employers have 60 days to respond
- **Speculation:** DOL may revisit the entire scope of the regulations based on broad nature of questions in RFI



# Compliance Assistance



- Begin issuing opinion letters again-Acosta favors
- Reinstate 14 opinion letters withdrawn in 2009
- Fate of Administrator's Interpretations under Obama Administration
- Bring back employer incentives for best practices and voluntary compliance

# The Opportunity

## FLSA Reform?

- Updating the computer exemption
- Expanding inside sales exemption to all commissioned employees
- Bring back the overtime exemption for home care workers
- Allowing comp time in the private sector
- An affirmative defense to willfulness and liquidated damages
- Excluding some bonuses from the regular rate



**EXEMPT**


Legislation:  
Is there a  
Republican Party  
Wish List?



# Possible Future Legislative Efforts:

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## “Likely” list:

- Repeal and replace ACA 
- Federal Minimum Wage of \$10.00
- National Parental Leave of 6 weeks
- Gender Pay Equity
- National E-verify
- Modify “white collar” overtime exemption rules
- “Fix” NLRB activism on arbitration, quickie elections, joint employer...
- Withdraw DOL persuader rule **–on life support...**

## SHRINK GOVERNMENT



# Affordable Care Act



- Trump's first EO ordered government agencies to repeal and **replace ACA as soon as possible.**
- **Senate** passed a budget resolution for FY 2017 to allow the Senate to use reconciliation to repeal major parts of the ACA without threat of a filibuster. (i.e.: only 52 votes needed to pass)
- After initial setback, House Bill Passed on 5/4/17 to “repeal and replace”
- Multiple efforts in Senate have failed
  - Despite various efforts—nothing to-date
- Compliance takeaway:
  - **ACA remains the law of the land, for now**



# Federal Paid Leave

- Federal voluntary paid sick leave legislation anticipated within the month
  - Rep. Mimi Walters (R-CA) expected to introduce SHRM-crafted leave legislation to:
    - expand paid leave and
    - provide workplace flexibility opportunities for all employees:

Employers who participate in offering a minimum threshold of paid leave and a flexible work option will automatically **satisfy** all state and local requirements.

 ***Would try to end patchwork quilt of state leave laws***

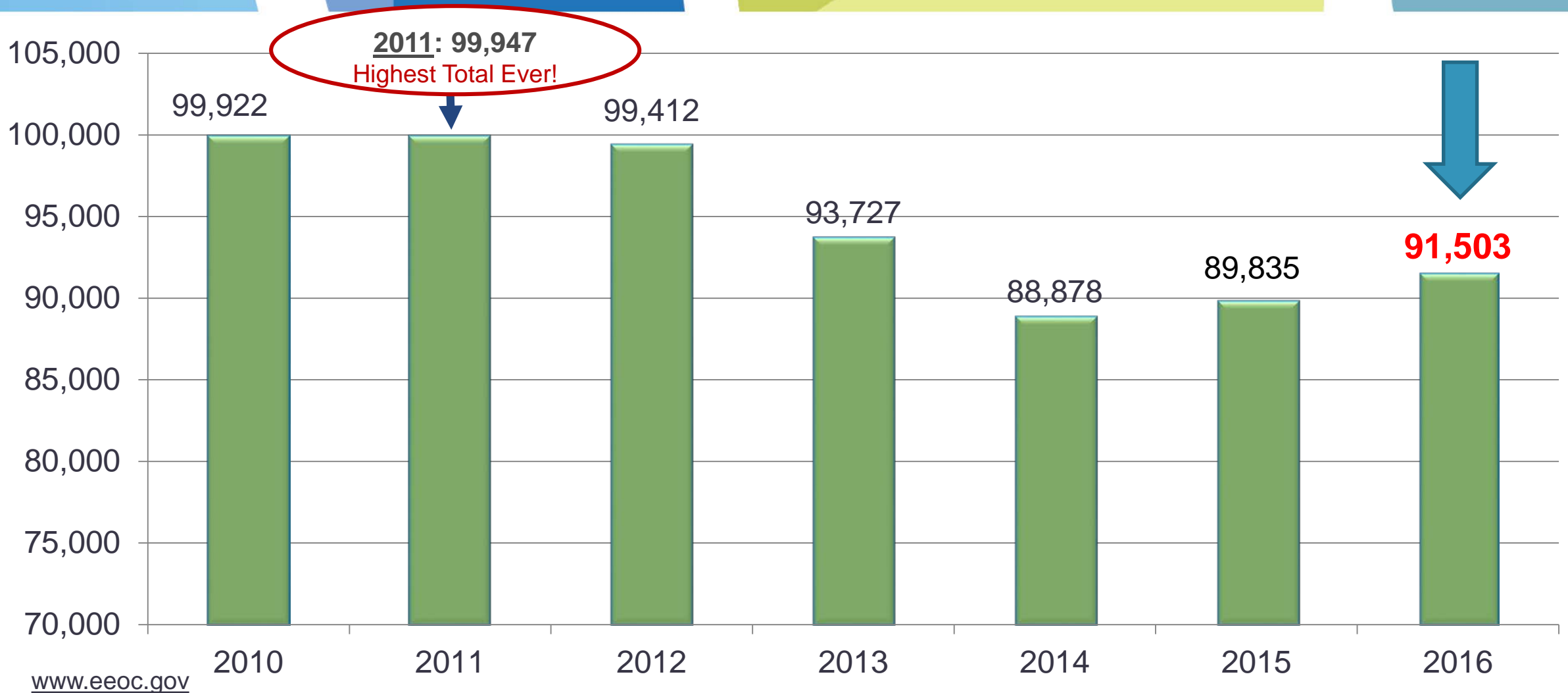




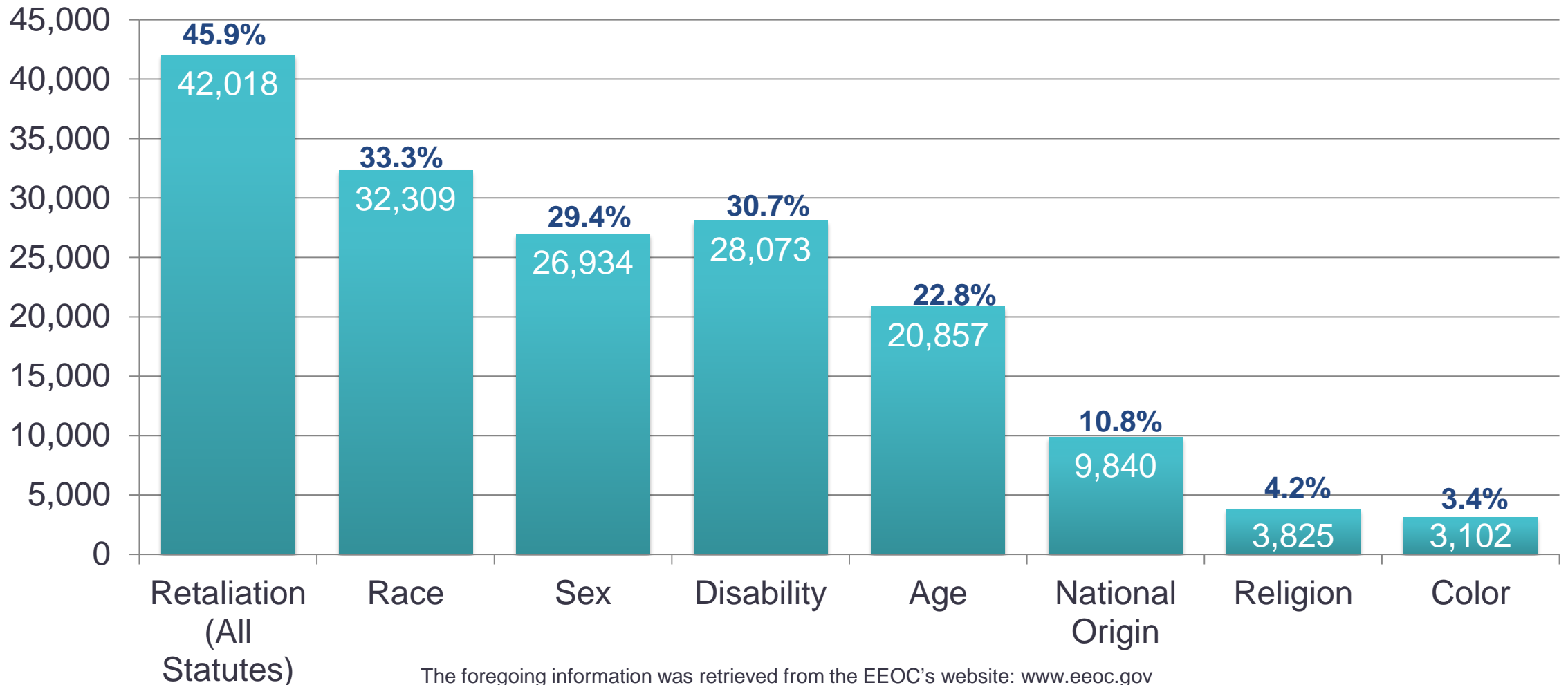
# EEOC Charge Statistics



# Charge Filings FY 2016



# EEOC Statistics: FY 2016 by Category



# Status of Revised EEO-1 Form?

- March 2018: Effective Date
- Until full complement of Commissioners at EEOC this is on hold
- Chair Lipnic does not favor this effort—due to flawed methodology
- There is potential it will never become effective



# EEOC – Changes Ahead?

- **Revised EEO-1 reporting requirements – on the chopping block?**
- EEOC wellness rules – criticism from both sides
- Strategic Enforcement Plan for 2017-2021
  - Current focus on LGBT rights, systemic discrimination etc.
  - **Redirected to address backlog of claims**
- EEOC reform legislation
- **Merge with OFCCP?** (Trump budget proposal...pushed by Heritage Foundation for cost cutting purpose)
  - **Employers and civil rights groups alike are against**

2016-2017:  
United States  
Supreme Court



# Meet Justice Neil Gorsuch

- Columbia Undergrad, Harvard Law
- Clerked for Justices White and Kennedy
- Private litigation practice for 10 years, then joined the DOJ
- Appointed to the 10<sup>th</sup> Circuit by President George W. Bush in 2006, unanimously confirmed
- Has also taught antitrust, legal ethics and professionalism at the University of Colorado Law School
- **April 7, 2017:** Senate confirmed for the Supreme Court by a 54-45 vote, after “nuclear” option invoked
- Early signs have conservatives saying “*he is just like Scalia...*”
  
- Reality: Only time will tell



# 2017 Class Photo: The Court





# What's Next?

- At least three justices are 80, over 80 or close to 80:
  - Anthony Kennedy( Reagan age 80) **R** (*retirement in 2018 is rumored...*)
  - Ginsburg ( Clinton 84) **D**
  - Breyer ( Clinton 78) **D**
- Other justices:
  - Robert, Thomas, Alito, Gorsuch (Republican appointees)
  - Sotomayor, Kagan (Democrat appointees)

# What's Next?



Politico article. Illustration by Patrick Welsh

# Trends at the Court

- Court likes:
  - Arbitration
  - Retaliation/Whistleblower claims
  - ERISA issues
- Court is not so fond of the EEOC
- Class actions/ Class action waivers—
  - who knows?
- 9 employment decisions in 2015
- 8 in 2016
- 6 so far in 2017



# Universal Health Svcs. v United States, *ex rel* Escobar

pp. 13-15

- **New Whistleblower Claim**
- Implied False Certification Theory is viable under False Claims Act
- “Half truths”—in claims to Medicaid by omitting serious violations of state regulations by staff—render claim misleading
- BUT misrepresentation must be material
- Court vacated 1<sup>st</sup> Cir. Decision
- **Most Important SCOTUS decision of 2016 -2017 term**



# Other SCOTUS decisions: ERISA, Arbitration, Whistleblower, EEOC

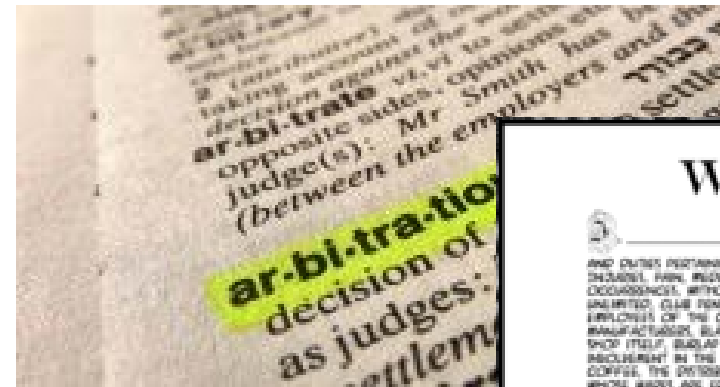
pp. 8-15

- *Advocate Health Care Network, et al v Maria Stapleton, et al*: **8-0 June 5**
  - ERISA religious exemption extends to church-affiliated plans --so three hospital plans not covered...BUT beware state law claims
- *Kindred Nursing Centers v Clark*
  - Nursing home asserts arbitration for claims brought by residents' relatives.
  - Ky SCt—power of attorney cannot accept arbitration agreement unless says so
  - SCOTUS: Ky clear statement rule does not apply—FAA prevails
- *McLane v EEOC*
  - No “double deference” to EEOC—review DCt decision on abuse of discretion—Courts do not have to defer to EEOC
- *Zubik v Burwell*:
  - ACA issue of opt out or automatic exclusion-remanded for reconsideration — VICTORY for Little Sisters of the Poor
- *NLRB v SW General*:
  - Once nominated and not approved, recess appointee cannot serve

# Pending Cases Before the Court: Class Action Waiver Issue

pp. 15-16

- *NLRB v Murphy Oil USA, Inc and others*
- **Most important labor case this year.** Issue of validity of class and collective action waivers in arbitration agreements in the wake of *D.R. Horton* decision resulting in Circuit split
- **D.R.Horton:** Class action waivers in arbitration agreements are **not** enforceable
- **5th, 2nd and 8th Circuit:** Yes, they are
- **7th and 9th Circuit:** No, They are not



BEAN COUNTERS  
**WAIVER**

\_\_\_\_\_ HEREBY RELEASE ALL LEGAL RESPONSIBILITIES AND OBLIGATIONS TO ANY AND ALL ACCIDENTS, INJURIES, DAMAGES, FUTURE MEDICAL EXPENSES, AND OTHER LEGAL OCCURRENCES, WITHOUT EXCEPTION FROM ECONOMIC BENEFITS UNLIMITED, BLUE CROSS, TRICARE, MEDICARE, MEDICAID, THE EMPLOYER OF THE COFFEE SHOP, BEAN AND TRILL MANUFACTURERS, BLACKSMITHS, FLORENCE, WISCONSIN THE COFFEE SHOP ITSELF, BUDJAP JACK BEANS, AND ANY PARTY THAT HAS ANY INTEREST IN THE TRANSPORTATION AND UTILIZATION OF COFFEE, THE DISTRIBUTION AND DELIVERY THEREOF, OR THE PARTIES WHOSE GOODS ARE PROHIBITIVELY THROWN FROM THE DELIVERY TRUCKS, OR ANY PARTY IN CONNECTION WITH BEAN COUNTERS, WITHOUT EXCEPTION.

IN WISCONSIN, I HEREBY WAIVE MY RIGHT TO Sue, BRING, DEMAND, SECURE, REQUEST, OR DEMAND COMPENSATION FOR ANY INJURY I MAY SUSTAIN DURING THE DURATION OF MY EMPLOYMENT AS A BEAN COUNTER, EXCEPT THAT OF IMMEDIATE DEATH OR THE PRESENT OR THE PROPERTY OF THE COFFEE SHOP.

FURTHER, EXCEPT IN DEATH OR THE PROPERTY OF THE COFFEE SHOP, I ASSUME ALL RESPONSIBILITIES FOR BEANS, BEANS OR OTHERS I HAVE HAD AND THEREFORE ASSUME ALL FISCAL BURDEN THEREIN.

IN PLACING BEAN COUNTERS, I ACKNOWLEDGE THE RISKS AND POSSIBILITIES OF EXTENSIVE INJURY, INCAPACITATION, OR DEATH. I WILLFULLY ENGAGE IN THE GAME AND ITS ACTIVITIES AT MY OWN RISK.

I ALSO ACCEPT THE COIN PAYMENT AS GIVEN FOR COMPENSATION OF MY WORK AS A BEAN COUNTER AND WAIVE MY RIGHT TO FILE SUIT FOR HIGHER BEAN COUNTER WAGES, OR TO FILE COMPLAINTS IN REGARD TO THE CONDUCT OF ANY ASPECT OF THE BEAN COUNTERS GAME.

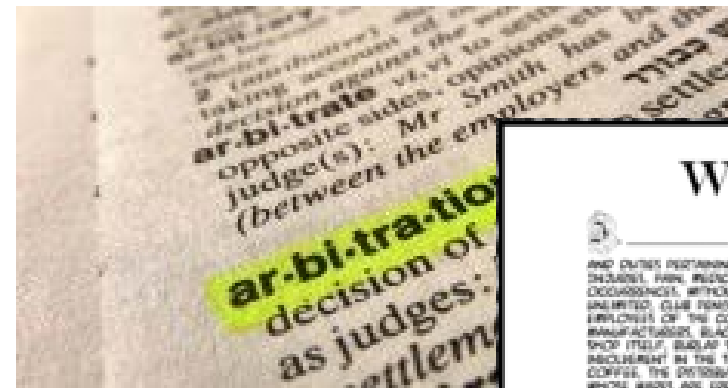
OR, IN SHORT, ANYTHING AND EVERYTHING THAT HAPPENS TO ME IN THE GAME IS MY FAULT, AND THE FAULT OF NO OTHER, AND NO MATTER WHAT HAPPENS TO ME OR WHAT I DO, I WILL NOT AND CAN NOT Sue OR OTHERS FOR BEANS OR MONEY FROM ANYTHING RELATED TO BEAN COUNTERS BECAUSE SOMETHING UNEXPECTED HAPPENED TO ME.

X \_\_\_\_\_

# Pending Cases Before the Court: Class Action Waiver Issue

pp. 15-16

- **NLRB v Murphy Oil USA, Inc**
- Supreme Court: Ok, we will decide this later (in the 2017-2018 term)
- Hugely important to the ability of employers to control massive class action costs
  - BUT—be careful what you ask for...
- April 21, 2017 letter from Acting Solicitor General seeking delay in briefing schedule – possibly signaling intent not to defend the current NLRB position?



BEAN COASTER  
**WAIVER**

I HEREBY RELEASE ALL LEGAL RESPONSIBILITIES AND DUTIES PERTAINING TO ANY AND ALL ACCIDENTS, INJURY, DISEASE, FIRE, PHYSICAL ERRANDS, AND OTHER UNLAWFUL OCCURRENCES, WITHOUT EXCEPTION FROM ECONOMIC DAMAGES UNLIMITED, CLASS ACTIONS, TRADE WHO UNLOAD COFFEE, THE EMPLOYERS OF THE COFFEE SHOP, BEAN AND TRILL MANUFACTURERS, BLACKSMITHS, FLOORS, FINISHERS THE COFFEE SHOP ITSELF, BUDGET JACK BEARDS, AND ANY PARTY THAT HAS ANY INTEREST IN THE TRANSPORTATION AND UTILIZATION OF COFFEE, THE DISTRIBUTION AND DELIVERY THEREOF, OR THE PARTIES WHOSE WARE ARE PROHIBITIVELY THROWN FROM THE DELIVERY TRUCK, OR ANY PARTY IN CONNECTION WITH BEAN COASTER, WITHOUT EXCEPTION.

IN ADDITION, I HEREBY WAIVE MY RIGHT TO SUE, BRING DEMANDS, SUITS, REQUESTS, OR DEMAND COMPENSATION FOR ANY INJURY I MAY SUFFER DURING THE DURATION OF MY EMPLOYMENT AS A BEAN COASTER, EXCEPT THAT OF IMMEDIATE DEATH OR THE PRESENT OR THE PROPERTY OF THE COFFEE SHOP.

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# Potential Supreme Court Cases: Sexual Orientation and Title VII

pp. 16-17

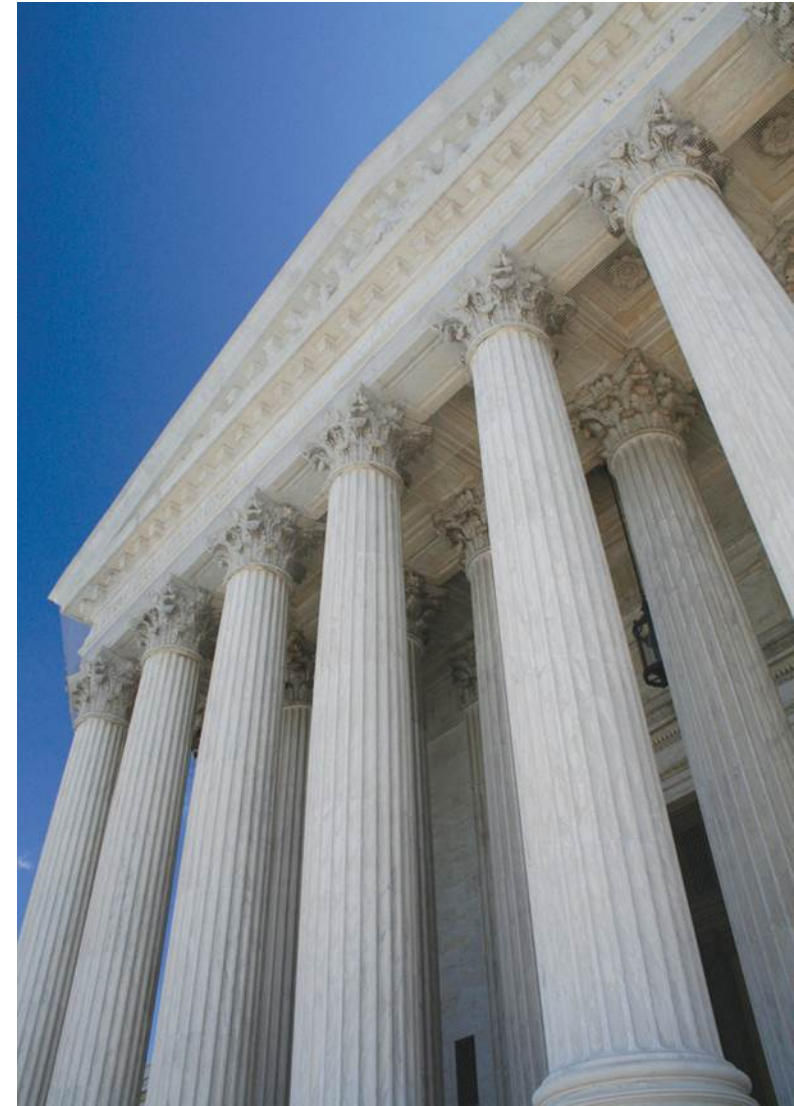
- **Hively v Ivy Tech Community College of Indiana**
- Title VII and Sexual Orientation Discrimination
- 7<sup>th</sup> Circuit recently held en banc that Title VII prohibits sexual orientation discrimination – in conflict with several other circuits
- 11<sup>th</sup> and 2<sup>nd</sup> in disagreement at present—en banc review being sought in both cases
  - **Evans v Georgia Regional Hospital**
  - **Philpott v State of New York**
- In **Zarda v Altitude Express** pending in 2<sup>nd</sup> circuit, DOJ recently filed briefing saying that “Title VII does not prohibit workplace discrimination based on sexual orientation” and *EEOC is not speaking for federal government....*
  - Open question as to whether EEOC may now switch their position given new administration
- **Why was ENDA proposed for 12 years to amend Title VII protection for sexual orientation?**





# Potential Supreme Court Cases: Joint Employer?

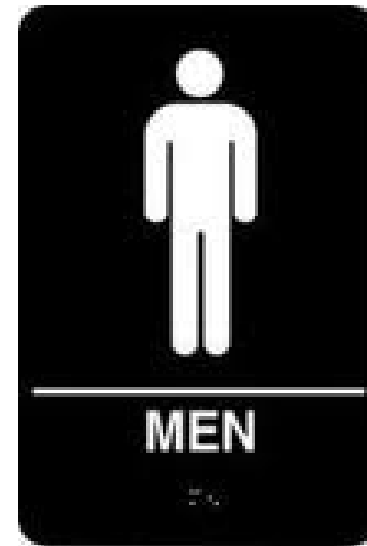
- **Joint Employer:**
  - ***Browning-Ferris v. NLRB***: Pending challenge to the fundamentally altered joint-employer standard under the NLRA. Significant liability issues affecting many industries. Currently under appeal before the DC Circuit, *could go to the Supreme Court soon*.
  - **See also *CNN v. NLRB***: August 7: DC Cir. struck down NLRB ruling based on loose meaning of joint employer...
  - **Late July**: New law proposed in House to take meaning of joint employer back to more narrow standard and amend NLRA and FLSA



# What the Court Will Not Hear... For Now

pp. 17 and 18

- Transgender Bathroom Access Case
- *Gloucester County School Board v G.G.*
- Court refuses to hear case
- Instead vacates Va. federal court decision enjoining the school from requiring students to use bathroom of their birth sex.
- **Prediction:** Will ultimately come before the Court



# Fifth Circuit and Other Decisions

Kathy Butler



Thank You!

