
FEDERAL LAW UPDATE

29th Annual Labor and Employment Law Institute
State Bar of Texas Labor & Employment Law Section
August 24-25, 2018

LITTLE, VENDELON, P.C.

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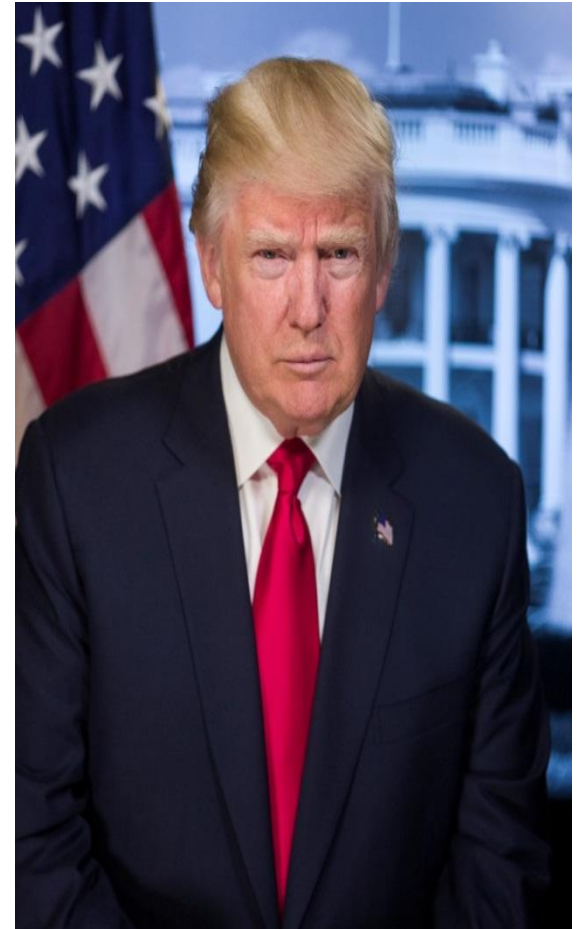


Part I: Washington D.C. and The United States Supreme Court

President Trump

What Has Actually Happened?

- **New Executive Orders rescinding Obama EOs**
- **Administration Claim in December 2017: they've have repealed 22 regulations for every new rule issued and cut regulatory costs by \$8.1 billion.**
- **DOL roll back of regulations/rules anti-business: Persuader Rule**
- **Wage and Hour division of DOL adopting pro-business rules and overturning anti-business regs/rules (and stalling of the new salary threshold)**
- **NLRB reinstating precedent previously overturned by Obama Board**
- **More judicial appointments**
- **Individual mandate of ACA eliminated**



The Common Theme



Still Have: Agency Gaps in Leadership

Open Federal Judge Positions

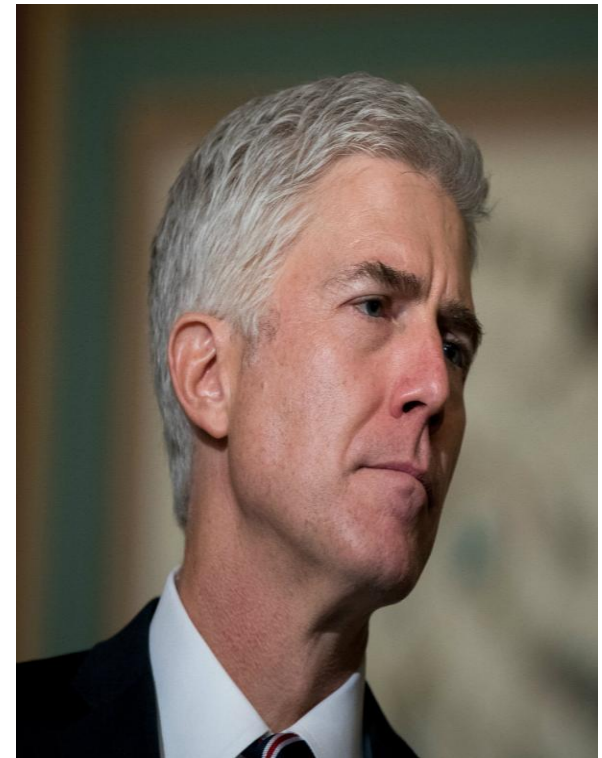
- **EEOC:**
 - Need two confirmed: Janet Dhillon nominated as Chair, and Daniel M. Gade nominated as Commissioner
 - And need EEOC General Counsel confirmed by Senate
 - Sharon Gustafson nominated
 - Problem: A few Republican, faith-based, social conservatives will not agree to re-confirm Chai Feldblum-D (due to her activism at EEOC), and as a result, the Democrats are refusing to approve the three other EEOC nominees without the 30 hours of hearing which Mitch McConnell will not grant
- **DOL:**
 - Wage and Hour Administrator;
 - Cheryl Stanton still awaiting confirmation
 - OSHA Administrator
 - Scott Mugno still awaiting confirmation
- **Judges: 86 nominees and 140 vacancies**

What the Justices Have Been Up To



First Term of SCOTUS With Justice Neil Gorsuch

- With 30+ decisions under his belt, Justice Gorsuch has shown he is a worthy successor to Justice Scalia
- Last term he was the second most conservative justice, after Justice Thomas
- Gorsuch voted with Thomas in every decision he participated in last term
- Comments are that he has proven to be “a forceful and dynamic presence” on the bench, and that he is “acting as if he has been sitting on the high court for years...”
- He talks a lot...not following the “new judge” rule of listening and not speaking...
- Conservatives love him... liberals hate him...



Union Fees in the Public Sector

- *Janus v American Federation of State, County and Municipal Employees Council 31, 16-1466* (June 27, 2018) (Alito)
- Held: states can no longer agree with public-sector unions to force public employees who are not union members to pay so-called “agency” or “fair share” fees because such requirements violate the First Amendment
- Huge blow to public sector unionization, overturning prior SCOTUS precedent in *Abood* (1977)

Class and Collective Action Waivers in Arbitration Agreements

- *Epic Systems Corp. v. Lewis*, 16-285, 584 U.S. ____ (May 21, 2018) (Gorsuch)
- Held: the FAA requires arbitration agreements to be enforced on the same grounds as any other contract, and the NLRA, which was enacted after the FAA, contains no contrary congressional command excluding class action waivers from the FAA's mandate (and that Section 7 of the NLRA does not grant employees the right to engage in class or collection actions)
- Decision consolidated *NLRB v. Murphy Oil USA, Inc.* (5th) and *Ernst & Young LLP v. Morris* (9th)
- Ended circuit split and overturned *D.R. Horton* (2012)—huge win for employers

The FLSA's "Narrow Construction"

- *Encino Motorcars, LLC v. Navarro*, 16-1362 (April 2, 2018) (Thomas)
- Held: the automotive sales exemption under the FLSA applies to service advisors, and in so holding, rejected the longstanding principle that FLSA exemptions are to be construed narrowly.
- Ginsburg dissent: the Court was overruling “half a century” of precedent
- Micro and macro win for employers—result = “fair reading” of a statute and pushback in every FLSA case

Employee Whistleblower Protections Under Dodd Frank

- *Digital Realty Trust, Inc. v. Somers*, 16-1276 (February 21, 2018) (Ginsburg)
- Held: individual must have actually reported concerns to the SEC in order to have Dodd Frank Whistleblower protections
- Relying on pure reading of statutory language over regulatory interpretation
- Multiple other whistleblower/anti-retaliation protections

Arbitration Agreements are to Be Interpreted Like All other Contracts

- *Kindred Nursing Centers L.P. v. Clark*, No. 16-32, 581 U.S. ____ (May 15, 2017) (Kagan)
- Held: the FAA requires states to treat arbitration agreements just like any other contract, and the Kentucky rule articulated by the Kentucky Supreme Court that a power of attorney could never grant authority to enter into an arbitration agreement unless the POA specifically said so was dismantled.
- Consumer case, but a precursor to *Epic Systems* nearly a year later, signaling the Court's willingness to protect and defend arbitration agreements from state laws or other interpretations that would run afoul of the FAA

Unresolved Issues: Cert Denied

- Religious discrimination boundaries
- Benefit plan issues
- Retaliation claims
- Legal standard for certification of an overtime collective action of cable installers
- Cat's paw and influence from a lower level employee
- Collective bargaining obligations
- Proceeding before a magistrate
- Scope of qualified immunity
- Sexual orientation discrimination under Title VII

**Part II: Dog Days of
Summer Case Update
2018—Fifth Circuit**

Thank
You!

