Wimberly Lawson
Wright Daves & Jones, PLLC
Attorneys & Counselors at Law

Briefly

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Edward H. Trent...

FEARLESS FORECAST AS TO TRUMP LABOR AND EMPLOYMENT INITIATIVES

1. **Immigration** – Allow DACA (Deferred Action for Childhood Arrivals) slowly to expire by allowing current work permits to continue but not issuing new ones. Durbin/Graham are proposing new bipartisan legislation for provisions protecting presence for three years to all immigrants in DACA program. Direct the Labor Department to investigate visa (such as H-1B) abuse without dismantling programs. Expand E-Verify. Possible reinstitution of workplace raids of illegal immigrants. Current focus is on those who have committed criminal offenses since entering the country illegally.

2. **The Affordable Care Act** – Maintain 26 years for dependents and barring exclusions for pre-existing conditions. Move to find eventual replacement moving slowly. Delete Cadillac Plan penalty and eventually other penalties as well. Already issued Executive Order delaying aspects of ACA pending repeal and replace.

3. **Salary Overtime Rule** – It is already subject to a federal injunction and may be dead. The rule may be killed by failing to defend it or using Congressional Review Act, but pro forma congressional sessions in December may cause problems to the latter and AFL-CIO attempting to intervene in the court litigation to defend the salary overtime rule.

4. **NLRB** – Two of the five seats are vacant, and so the President may fill those two seats with Republicans and create a 3-2 Republican majority, subject to Senate confirmation, during 2017. But NLRB general counsel position may not become vacant until November 4, 2017.

5. **EEOC** – Democrats may retain a majority on the five-member commission for the first half of 2017, but Republicans could bring about a new majority as early as July 2017. There is currently one vacancy on the five member commission and the position of General Counsel remains vacant. New acting chair is Victoria Lipnic, Republican. Comment period recently expired on new Enforcement Guidance related to harassment claims, but any new regulations are subject to delay pending further review pursuant to Presidential Memorandum issued January 20, 2017.

6. **New EEO-1 Form Requiring a Summary of Pay Data** – Obligations start March 31, 2018. Plenty of time for Republican majority to rescind or modify.

7. **LGBT Issues** – The Obama Administration took the position that a ban on sex discrimination extended to sexual orientation and gender identify, but whether they constitute sex discrimination under Title VII is unclear. Several United States Court of Appeals are reviewing this issue, most notably the Seventh Circuit. President Trump has indicated he will leave President Obama's Executive Order on this issue with regard to federal contractors in place. With regard to the "bathroom" issue, the Trump Administration has withdrawn the guidance issued by the Obama Administration requiring schools to allow students who identify as other than their biological sex to use the restroom and locker room facilities that match their gender identity. The Trump Administration wants the states to address the issue rather than the federal government. This issue in the context of secondary schools is pending on the current Supreme Court docket. This move is an indication that the guidance issued by other federal agencies such as the EEOC, OSHA, HUD, and the Department of Justice are likely to be revisited.

8. **GIG Economy Issues, Including Independent Contractor and Joint Employment** – The new Administration can issue new "guidance" on these issues, negating expansive interpretations made by the Obama Administration. NLRB issues will take more time, as current NLRB general counsel remains in office until November of 2017 and cases must arise dealing with these issues.

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Our Firm Wimberly Lawson Wright Daves & Jones, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville, and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.

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FEDERAL COURT ADOPTS MAGISTRATE'S RECOMMENDATION - OSHA INSPECTION WARRANT QUASHED

Mary Moffatt Helms

"This decision is significant because it invalidates OSHA's REP for Poultry Processing Facilities … as the basis for expanding an unprogrammed, incident-related inspection to a … 'wall-to-wall,' inspection covering the entire plant."

In a detailed Order published November 2, 2016, U.S. District Court Judge William C. O'Kelley of the Northern District of Georgia quashed (invalidated) a warrant OSHA wanted so that it could conduct a comprehensive inspection of a North Georgia poultry plant. In a 15-page opinion, the Judge approved and adopted Magistrate Judge J. Clay Fuller's August 5, 2016 Report and Recommendation, which found that the warrant should be quashed because OSHA failed to use Constitutional methods to select Mar-Jac Poultry for an intensified inspection after it reported an injury. This decision is significant because it invalidates OSHA's Regional Emphasis Program (REP) for Poultry Processing Facilities, announced in October 2015, as the basis for expanding an unprogrammed, incident-related inspection to a comprehensive, or "wall-to-wall," inspection covering the entire plant.

This case arose following a February 2016 accident involving a maintenance tecŸician working on an electrical panel. (The employee recovered, and has since returned to work.) Because a recent rule change requires employers to alert OSHA in the event of any workplace injuries that require hospitalization, the employer promptly notified OSHA. OSHA's REP called for all incident- or complaint-related inspections at poultry plants to be expanded to comprehensive investigations, subject only to "significant resource implications." On the strength of the REP, the Area Director sent a team of inspectors, equipped to examine every aspect of the plant's operations, not just the area surrounding the electrical panel where the accident occurred. When the employer pushed back, the Area Director secured a warrant authorizing the expanded inspection. Larry Stine of our Atlanta affiliated office, filed an emergency motion to quash the warrant on behalf of the employer, short-circuiting the proposed comprehensive inspection.

The Magistrate conducted a hearing, at which the Area Director testified that it was really up to his sole discretion to select targets for comprehensive inspections. The REP ordered Area Directors to expand all unprogrammed inspections, but the reality is that OSHA only has the resources to conduct one or two each year. This left the Area Director with no rules or guidance about which employers to select.

The Magistrate concluded that this was precisely the sort of "unbridled discretion" that the Supreme Court, in *Marshall v. Barlow's*, had found to violate the prohibition against unreasonable search and seizure in the Fourth Amendment to the U.S. Constitution. In his opinion, Judge O'Kelley examined, and rejected, each of OSHA's objections. For example, OSHA argued that the REP was a neutral plan, but the judge pointed out that it allowed the Area Director unbridled discretion to select targets, and therefore the purported neutrality was an illusion

The judge rejected OSHA's contention that the 300 logs of injury and illness were sufficient probable cause, noting (correctly) that those logs contain information about incidents, but nothing at all about causation.

The district court's ruling is important for all employers because it reminds OSHA that it is subject to the limits on search and seizure enshrined in the Fourth Amendment to the U.S. Constitution.

KNOW YOUR ATTORNEY - KATHLEEN J. LEWIS

KATHLEEN J. LEWIS, is an Associate in the Cookeville, Tennessee, office of Wimberly Lawson Wright Daves & Jones, PLLC, which she joined in December 2016. Kathleen's practice includes an emphasis in Workers' Compensation and Employment Law Defense. She received her Bachelor's Degree from Middle Tennessee State University and graduated in the top 20% of her class at Belmont University College of Law. During her time at Belmont Law, she was Symposium Editor for the *Belmont Law Review* and received Best Performance Awards in Legal Research and Writing, Pre-trial Litigation, Estate Planning, and Contract Drafting.

Howard B. Jackson

EMPLOYERS DO NOT HAVE TO GIVE PREFERENCE TO DISABLED WORKERS IN ASSIGNMENTS TO OPEN POSITIONS

A federal appeals court has ruled that employers do not have to reassign disabled workers into open positions ahead of other more qualified persons. *EEOC v. St. Joseph's Hosp.*, 2016 BL 406826 (C.A. 11, 12/7/16). In its analysis, the *St. Joseph's* court drew from the U.S. Supreme Court ruling in *U.S. Airways, Inc. v. Barnett*, that the ADA does not require employers to ignore established seniority systems in awarding reassignments when a disabled worker seeks reassignment as an accommodation. Similarly, the Court in *St. Joseph's* held that where an employee seeks a transfer as a reasonable accommodation, the employee must be allowed to compete for open positions on equal grounds, but need not be given a preference based on their disabled status. Citing a case from another court of appeals, the *St. Joseph's* court noted that the ADA is not an "affirmative action" statute.

The decision is contrary to the EEOC's position. The EEOC argued that disabled workers are generally entitled to reassignment free from competition from non-disabled workers. The courts have not accepted that view, particularly where the employer has an established selection system in place. In *Barnett*, the employer had a seniority system. In *St. Joseph's* the hospital had a "best qualified applicant" policy. In both cases the employer was not required to override its established policy in order to give a preference to a disabled individual who would not have otherwise received the position.

Interestingly, in *St. Joseph's* the hospital gave the employee thirty days to identify and apply for another job, and further indicated it would extend that period for any position for which the employee was being considered. Based on the facts of the case, the Court found that action reasonable as a matter of law.

Editor's Note - While this decision found that an employer need not give disabled workers "preferential treatment" in job reassignments, such situations can be complex and advice of counsel is often in order.

NEW OSHA ELECTRONIC INJURY REPORTING RULE STILL IN PLAY

Mary Moffatt Helms

"Some of the controversial portions of the anti-retaliation provisions that are to be tested in court include a provision dealing with the circumstances under which an employer may drug test an employee who reports an injury or illness."

On May 11, 2016, OSHA issued a final rule requiring employers to submit injury and illness data electronically on an annual basis. The rule also included in the preamble guidance for employers on the impact of the new anti-retaliation provisions on drug and alcohol testing and safety incentive programs in the workplace. Various trade associations filed suit challenging various provisions in the final rule, but a preliminary injunction was denied by a court ruling on November 28, 2016.

The "anti-retaliation" provisions of the new rule went into effect on December 1, 2016. The rule requires employers to inform employees of their right to report work-related injuries and illnesses without retaliation, and the notice requirement may be satisfied by posting the "OSHA Job Safety and Health - It's The Law" worker rights poster (from April 2015 or later).

Some of the controversial portions of the anti-retaliation provisions that are to be tested in court include a provision dealing with the circumstances under which an employer may drug test an employee who reports an injury or illness. In evaluating whether an employer has an objectively reasonable basis for such testing, the employer is supposed to determine whether it has a reasonable basis for believing that drug use by the reporting employee could have contributed to the injury or illness. Employers may continue to drug test in accordance with state workers' compensation laws or other state or federal laws.

The electronic reporting rule does not prohibit safety incentive programs in and of themselves, but OSHA takes a position that the safety incentive programs should not be applied in a way that penalizes employees for reporting injuries or illnesses. Additional guidance is available at: https://www.osha.gov/recordkeeping/modernization_guidance.html.

RIGHT-TO-WORK DOCTRINE TO EXPAND

Howard B. Jackson

"Passing right-to-work laws can impact union membership significantly."

Right-to-work laws prohibit mandatory union membership as a condition of employment. Currently, 28 states have right-to-work laws, and recent developments indicate that the doctrine of right-to-work is likely to spread.

Three additional states (Kentucky, Missouri and New Hampshire) have elected both Republican governors and legislators. Kentucky and Missouri have recently passed right-to-work laws. The New Hampshire legislature recently rejected a right-to-work proposal.

In addition, in *UAW v. Hardin County, Kentucky,* 207 LRRM 3561 (C.A. 6, 2016) the Court of Appeals for the Sixth Circuit unanimously ruled that right-to-work laws can be passed by county governments, as counties are subdivisions of the "state" for purposes of allowing right-to-work laws. Because of this decision county right-to-work laws are likely to spread to other parts of the country. Lincolnshire, Illinois passed a right-to-work law, and unions have sued to overturn it. Illinois is in the territory covered by the Seventh Circuit Court of Appeals. If that court reaches the same conclusion as the Sixth Circuit, there will be more support for local right-to-work rules. If not, there will be a split of authority and greater likelihood that the U.S. Supreme Court would take up the issue.

Passing right-to-work laws can impact union membership significantly. For example, Wisconsin passed right-to-work legislation in 2011. Since that time the percentage of union membership in Wisconsin has dropped from about 14% to about 8%. Proponents of right-to-work legislation also claim that its passage encourages economic development. According to the National Review, within six months of passing a county right-to-work ordinance, Warren County, Kentucky, which includes Bowling Green, received inquiries relating to forty-seven economic development projects, representing about five thousand jobs. One cannot know for sure the degree of correlation between passage of the law and the increased interest in economic development in that area. But in any event, right-to-work laws have increased recently and that trends appears poised to continue.

"FEARLESS FORECAST"

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9. **OFCCP (Government Contractor) Rules** – Possible review of 2014 changes regarding disabled individuals and military veterans, but new rule making procedures take one-two years. Most likely candidate for rescission is the Obama Fair Pay and Safe Workplaces Executive Order requiring disclosures of past labor and employment law violations, which are already the subject of a preliminary injunction from a federal court. Note that one portion of this rule requires businesses with contracts worth at least $500,000.00 to provide wage statements to certain workers, detailing their total and overtime hours, pay rates, gross wage and any itemized deductions, and also to inform independent contractors of their status as non-employees. This portion of the rule goes into effect January 1, 2017, and is not part of the court injunction. The new Administration could simply discontinue defending various rules in court. OFCCP under the new Administration will likely go back to more desk audits rather than lengthy on-site investigatory audits. Also, the government is likely to discontinue publishing violations and settlements with intent of "public shaming."

10. **New DOL Persuader Rule** Requiring Public Reporting of Payments to Consultants and Attorneys for Labor Advice – It is already subject to a federal injunction and likely dead.

11. **Presidential Executive Orders** – Prior Executive Orders can be overturned by the new Administration quickly, with the Fair Pay and Safe Workplaces Executive Order, the Executive Order on project labor agreements, and the Executive Order establishing paid sick leave for employees working on federal contracts as possible candidates. January 20, 2017 Presidential Memorandum put all pending regulations on hold pending further review and requested a delay in the effective day of any published regulations yet to take effect.

Editor's Note: In case of regulations the new Administration does not approve, options include issuing new regulations which take one-two years, passing legislation, or blocking new regulations via the Congressional Review Act, which gives Congress 60 days to pass a resolution to block any new regulations.