



Fargo Moorhead
Human Resource
Association

So Now What?

HR in Uncertain Times

Fargo, ND

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VOGEL
Law Firm

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- Policy Development
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- Litigation /Administrative Complaints
- Employment Mediation – Qualified Neutral

Today's Discussion

- 2016 – What we thought was going to happen and what really happened
- 2017 – What's ahead?
- Get out your crystal ball!



2016

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2016 Highlights



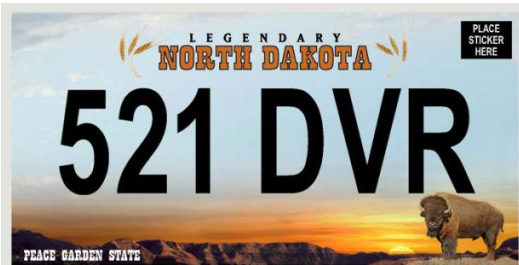
- **Justice Anton Scalia died**
- **LGBTQ advances/steps back**
 - EEOC Enforcement – pursuing transgender/sexual orientation discrimination under Title VII
 - Some courts – Title VII covers sexual orientation/transgender
 - But, state legislation resists (North Carolina/Indiana)
 - ACA – Non-discrimination regulations (Section 1557); 11th hour federal court injunction
- **FLSA Salary Basis Regulations** - we all worked hard on this; 11th hour federal court injunction is pending

2016 Highlights



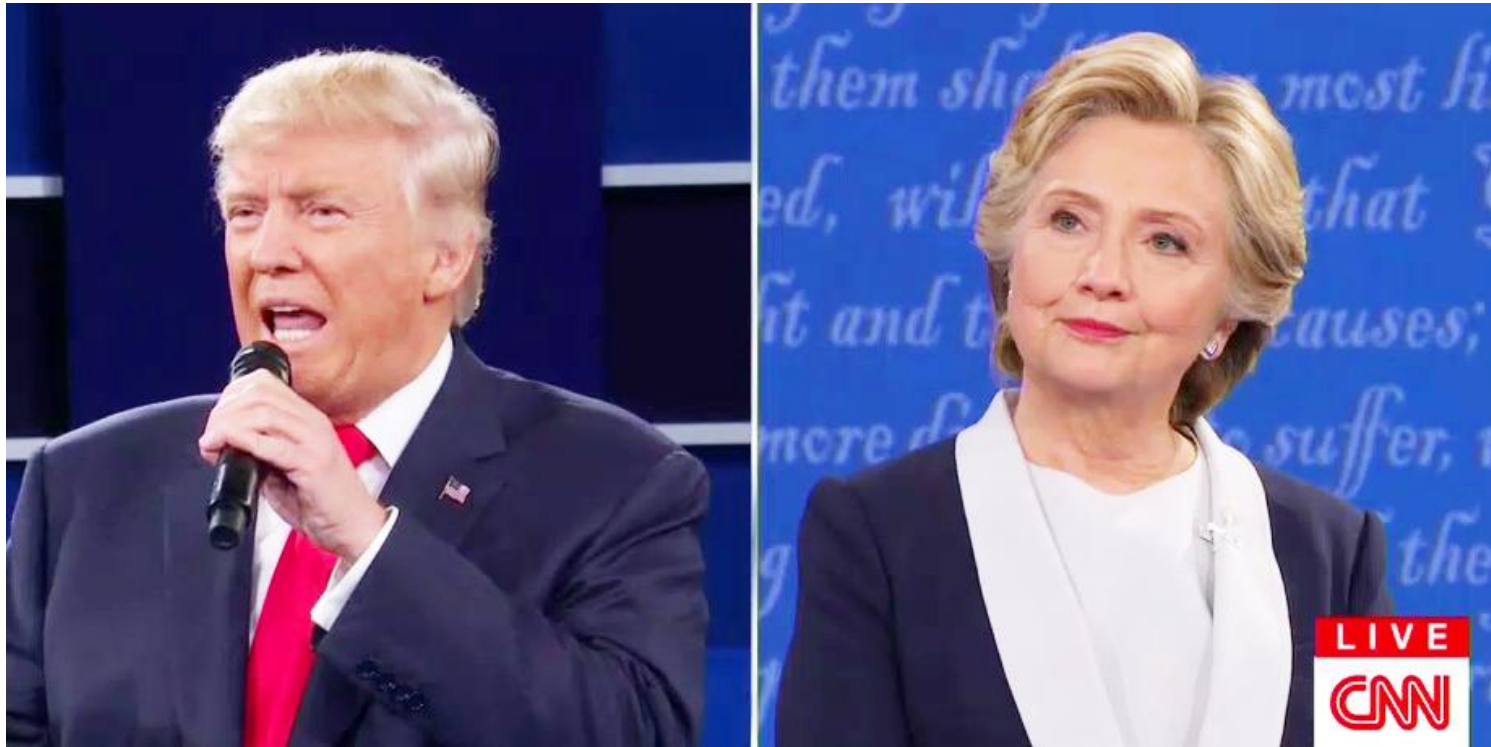
- **Other Federal Changes in Limbo**
 - **EEO-1 Pay Disclosure Rules** – due March 2018
 - **Executive Orders - Federal Contractor Rules**
 - 2009 E O Federal Contractors notice of right to organize
 - Minimum wage \$10.20 as of January 1, 2017
 - Sexual orientation/gender identity discrimination forbidden
 - Blacklisting (“Fair Pay and Safe Workplaces”)
 - Paid Sick Leave Accrual (effective 1-1-17)
 - **Other** – much other uncertainty with a change in political party in the White House and major change in philosophy in Presidents

On the State Level



- Minnesota – followed trend of “going local”
 - Msp/St. Paul – Sick Leave Ordinances
 - Minimal State Legislative Activity after busy previous session
- North Dakota – medical marijuana initiative passed (Measure 5)
- New Governor Burgum
 - Appointed new Labor Commissioner

In case you missed it . . .



There was a long, contentious election . . .



And to the Surprise of Many Donald Trump Won . . .





Trump's Promise



2017

2016

But what does that mean?

Supreme Court Update

- Justice Scalia died February 2016
- Republican Senate refused hearing for Obama pick, Merrick Garland
- Democratic filibuster?
- Unlikely to change balance on court
- But, future vacancies almost certainly would



Department of Labor Nominee

Andrew Puzder

- CEO of CKE Restaurants
- Critic of raising minimum wage
- Advocated – two tier system; entry level workers
- “Not a fan” of the increase in salary basis regulations
- May roll back Obama-era executive orders
- Focus on job creation likely



Crystal Ball Time

What to Expect under Trump



Wage and Hour Law

- New Overtime Rules – are effectively dead
- Likely be some sort of replacement rule
- Timing uncertain
- Talk of new classification for “dependent” contractors



Executive Orders



- VP Pence affirmed promise to repeal all of President Obama's Executive Orders on “day one”
- May Include – Orders for Federal Contractors
 - EO 12672 LGBT Protections
 - EO 13496 Notification of Employee Rights (to Organize)
 - EO 13658 Minimum Wage for Federal Contractors
 - EO 13673 Fair Pay and Safe Workplaces (Blacklisting/Pay Check)
 - EO 13706 Paid Sick Leave for Federal Contractors

Paid Leave

- **National Maternity Leave** – Ivanka Trump proposed six weeks paid leave for new mothers, funded by unemployment insurance
- **Includes Executive Order 13706** – 7 days Paid Leave for contractors , may also be repealed (effective 1-1-17)
- **Proliferation of state and local leave laws** – talk of adding a provision to preempt state and local paid leave laws



EEO



- **EEOC**– Currently 2 Republicans; 3 Democrats; new Chair and New Appointments; new General Counsel
- **Enforcement Priorities** – no indication of pull back on enforcement, but strategic plan and priorities may change; scrutiny of systemic cases where no person has filed charge
- **Tighter Budgets** - may mean further target of high impact cases; won't necessarily mean fewer charges
- **Procedural Changes** – proposals for “good faith efforts to conciliate” cause findings; resolve backlog of cases

NLRB



- **Two Open Seats** – Once appointments confirmed, Republican majority
- **General Counsel Richard F. Griffin, Jr.** – term expires November 4, 2017
- **May See Reversals of Obama Era Decisions -**
 - Quickie Election Rule
 - Joint Employer Status: Browning-Ferris Industries case
 - Class action waivers: Dr. Horton/Murphy Oil case
 - Expansion of Section 7 rights to non-union workplaces

ACA

- **At Least Partial Repeal** – “almost certain” under Trump Administration
- **Details are Uncertain** –
 - When?
 - What will replace?
 - Pre-existing conditions?
 - Children up to Age 26?
- **Unlikely to go back** - to any sort of pre-Obamacare health insurance setting



ACA

- **Section 1557** – Nondiscrimination rules
 - LGBT protections – gender identity/sex stereotypes
 - Prohibits most discrimination in health insurance for medically necessary care for transgender individuals
 - Federal court national temporary injunction in Texas recently delayed enforcement; status is uncertain



Affordable Care Act

Medical Marijuana



- North Dakota Measure No. 5
 - Compassionate Care Act; approved by 64%
 - Effective December 8, 2016
 - Creates a state-regulated medical marijuana program for patients with specified debilitating conditions and written certifications from their doctors. Registered patients can obtain medical cannabis from a licensed nonprofit compassion center, or, if they live more than 40 miles from one, they can securely cultivate a limited amount of cannabis for their medical use.

Medical Marijuana

- North Dakota Measure No. 5
 - Does NOT allow marijuana to be used in a public place or workplace
 - Are employers required to accommodate off site use?
 - Courts addressing issue in other states have said no
 - Against federal Controlled Substances Act
 - Because ADA does not allow illegal use of drugs, courts have found no duty to accommodate
 - Not lawful activity under NDHRA?



Keys for Employers

- Stay tuned for future updates
- Many rules scheduled to take effect January 1, 2017; in place until set aside
- Do NOT anticipate lesser employment law enforcement



Keys for Employers

- Recognize political flashpoints in the workplace; emphasize civility and respect
- Many pundits predicting MORE, not fewer claims due to volatile political climate



2016 Word of the Year

- *dumpster fire*, noun: an exceedingly disastrous or chaotic situation
- American Dialect Society
- “a metaphor for a situation that is out of control or poorly handled”



Let's Be Careful Out There!

- Expect the unexpected
- Avoid the “knee jerk” reaction
- Don't oversimplify
- Be prepared
- Create a culture of courtesy and respect



Love This Approach!



Questions & Answers



Thank You!

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