Ultimate SOFTWARE

People first.

Success comes from putting first things first.

To hear today's audio, please use your computer's speakers.

Eye on Employment Law 2016: A Review of Legal Developments for HR & Payroll Professionals

December 10, 2015

Keith Watts
Office Managing Shareholder of "The OC" — The Orange County office of Labor & Employment law firm Ogletree Deakins.

Our Value Proposition

Winning companies put people first. Ultimate Software is built on the profound belief that people are the most important ingredient of any business. So people management is ALL we do.

We seamlessly merge people and technology so that the HCM tools you use don't get in the way of the work you do. Because we believe that software should work for people — not the other way around.

Ultimate SOFTWARE

UltiPro

Ultimate Software: The Basics

FORTUNE 100 BEST COMPANIES TO WORK FOR 2015

#21 Ranking

- **Founded in 1990**
  Over 25 years experience exclusively focused on human capital management
- **Publicly traded 1998**
  (Nasdaq: ULTI)
- **2,700+ employees**
- **3,000+ customers in over 160 countries**
- A leading provider of unified HCM cloud-based solutions for global businesses

Our core principles:

Culture:	Product:	Service:
#21	20M	96%
Place to Work	Employee Records	Customer Retention

Ultimate SOFTWARE

Some of Ultimate Software's Customers

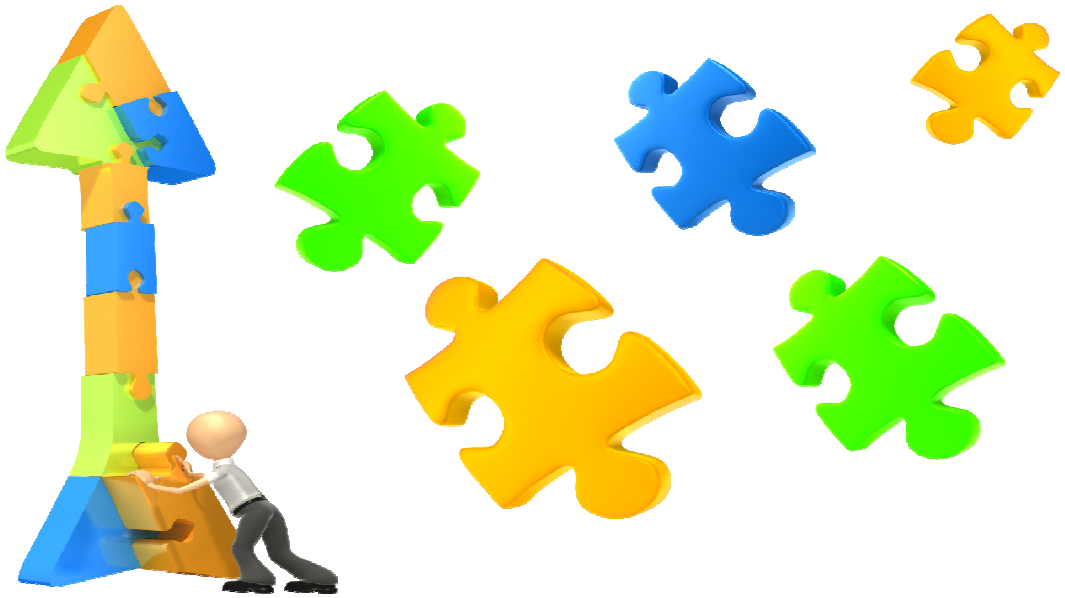
Ultimate SOFTWARE

Speakers

Keith Watts
Office Managing Shareholder of "The OC" — The Orange County office of Labor & Employment law firm Ogletree Deakins.

Office Managing Shareholder of "The OC" — The Orange County office of Labor & Employment law firm Ogletree Deakins. Keith is the managing and a founding shareholder of Ogletree Deakins' Orange County office. Keith exclusively practices labor and employment law and has handled a wide variety of matters, including sexual harassment, age discrimination, disability and wrongful termination claims. Keith's practice focuses heavily on the advice, counseling and "prevention side" of employment claims and positioning problem employment situations for the best possible defense.

Ultimate SOFTWARE



Ogletree Deakins

Best Lawyers LAW FIRM OF THE YEAR U.S.News & World Report EMPLOYMENT LAW – MANAGEMENT 2014

Best Lawyers LAW FIRM OF THE YEAR U.S.News & World Report LABOR LAW – MANAGEMENT 2014

Eye on Employment Law 2016:

A Review of Legal Developments for HR & Payroll Professionals

Presented by Keith A. Watts, Esq.

Agenda

- President's Executive Actions and Orders
- Supreme Court Update
- Significant Federal Employment Law cases
- Legislative Update
- EEOC Update
- NLRB Update
- OSHA Update
- What else to look for?

Ogletree Deakins

President Obama's Immigration Accountability Executive Action

- Offers legal reprieve to the undocumented parents of U.S. citizens and permanent residents who have resided in the U.S. for at least five years
- Expand 2012 Deferred Action for Childhood Arrivals (DACA) program
- Temporary injunction issued February 18, 2015

Ogletree Deakins

Executive Order 11246, Amended

- Adds Sexual Orientation and Gender Identity to list of protected categories
- Covers federal contractors and subcontractors
- No ***additional*** religious exemptions

Ogletree Deakins

Paid Sick Leave for Employees of Federal Contractors

- Executive Order requires companies that have federal contracts to allow workers to accrue up to seven days of paid sick leave each year
- Accrual rate of not less than 1 hour of paid sick leave for every 30 hours worked
- Includes leave to care for a family member
- Must allow for carry over from 1 year to the next
- Leave shall be reinstated for employees rehired by a covered contractor within 12 months after a job separation

Ogletree Deakins

Supreme Court Update

Ogletree Deakins

Obergefell, Windsor, & DOMA

- **Same Sex Marriage Lawful in all States**
- Employment and Benefit Implications
- FMLA
  - Following *Windsor* the DOL modified the definition of "spouse" to include same-sex spouses whose marriages were valid in the state in which they were celebrated
- Title VII
  - No direct impact
  - State and municipal ordinances

Ogletree Deakins

Obergefell, Windsor, & DOMA

- **Employment and Benefit Implications (cont.)**
- ADA
  - No direct impact
- Affirmative Action
  - Executive orders already address discrimination on the basis of sexual orientation
- Immigration
  - USCIS recognized same-sex marriages, where validly performed, for purposes of immigration following *Windsor*

Ogletree Deakins

Young v. United Parcel Service, Inc.

- **Facts:**
- UPS driver became pregnant and could not lift more than 2(
- UPS job required workers to be able to lift 70 pounds
    - Denied Young a light duty position

- Three other groups given light duty jobs
    - Persons who had sustained job-related injuries
    - Persons suffering from Americans with Disability Act conditions
    - Persons who had lost Dept. of Transp. Certifications

Ogletree Deakins

Young v. United Parcel Service

- The Supreme Court interpreted the second clause of the PDA as follows:
  - An individual pregnant worker may show disparate treatment through a special application of the *McDonnell Douglas* framework
- Employee must first establish prima facie case of pregnancy discrimination
- Employer can rebut this presumption by providing evidence of a legitimate nondiscriminatory reason for its actions
- Employee can still reach the jury by showing evidence that the employer's policies impose a "significant burden on pregnant workers . . ." and the employer's reasons "are not sufficiently strong to justify the burden."

Ogletree Deakins

Impact of *Young* and EEOC Guidance

- Pregnancy is hot topic for EEOC
- Business judgment rule may not apply to pregnancy claims
- Pregnancy claims can be successful absent any discrimination by the employer
- Employers' obligations under the PDA remain unclear. The decision does not offer guidance on how employers should interpret the clause "other persons" who are "similar in their ability or inability to work."

Ogletree Deakins

Impact of *Young* and EEOC Guidance

- Pregnancy as Disability/Reasonable Accommodation?
- Part of EEOC drive to expand definition of disability to include temporary impairments
- Dual aspects of *Young* and EEOC Guidance
  - Renewed focus on application of <u>current</u> policies to pregnant employees
    - Light Duty
    - Access to Light Duty
    - Modified Duty
    - Leave Rules
    - Other Rules

Ogletree Deakins

Impact of *Young* and EEOC Guidance

- Some good news for employers:
- The Court did not follow EEOC's July 2014 guidance regarding pregnancy discrimination
  - Rejected EEOC's position that employers may not rely on policies that make a distinction as to the "source of the employee's limitations"
  - Employers have a good basis to argue the guidance is entitled to no deference on a going-forward basis.

Ogletree Deakins

Impact of *Young* and EEOC Guidance

- Supreme Court didn't offer a definitive answer to the question of whether and when employers had to accommodate pregnant employees under the PDA
  - Do not have to accommodate pregnancy itself under *Young*
  - Pregnancy impairments must likely be accommodated under ADAAA
  - Duty to accommodate pregnancy-related lifting restrictions?
  - In light of *Young*, UPS is making temporary light-duty available to pregnant workers with medically-certified restrictions

Ogletree Deakins

EEOC v. Abercrombie & Fitch

- Decided June 1, 2015, in favor of EEOC
- Held that employee does not need to expressly notify employer that a religious accommodation may be needed
- Court found that employer's motive of avoiding an accommodation, not it's knowledge of need for accommodation, was the key

Ogletree Deakins

EEOC v. Mach Mining

- Supreme Court decided in April 2015 whether – and the extent to which – courts may review efforts made by the EEOC to resolve discrimination claims before filing suit
    - Courts may review whether the EEOC has fulfilled its mandatory statutory duty to attempt to conciliate discrimination claims before litigation, however, scope of review is narrow
- A handful of District Court decisions since Supreme Court ruling have interpreted the scope of review – both for and against EEOC

Ogletree Deakins

Petition to Watch

- ***Green v. Donahoe*** **(No. 14-163)**
  - **Issue**
    - When does the filing period on a constructive discharge claim begin to run?
  - **Potential Impact**
    - Each year, thousands of employees bring constructive discharge claims under federal employment statutes such as Title VII
    - Possibility to expand or contract time period in which these claims can be brought
    - Eliminates unpredictable legal environment

Ogletree Deakins

Federal Cases

Ogletree Deakins

EEOC v. Ford Motor Company

- Employee had irritable bowel syndrome
  - Ford had made numerous accommodations, including moving cubicle closer to restroom
- Addressed whether on-site attendance was an essential function of resale buyer job
  - Plaintiff requested to work from home on "as needed" basis
  - Used other telecommuting arrangements as evidence that accommodation was reasonable
- Telecommuting not found to be a reasonable accommodation
- Summary judgment required when employer's judgment regarding essential job duties is "job-related, uniformly enforced, and consistent with business necessity."
  - **But not** blind deference to employer's judgment; interactive process still key

Ogletree Deakins

Second Circuit Intern Cases

- *Glatt v. Fox Searchlight Pictures Inc.*
  - 2nd Circuit overturned district court's grant of partial summary judgment which held that two unpaid interns were employees subject to minimum wage requirements of FLSA
  - Set forth primary beneficiary test to be used in analyzing intern's employment status
    - Outlined 7 "considerations" courts should use in the analysis
    - Non-exhaustive
  - No one factor dispositive
    - Application of the factors requires weighing and balancing of all the circumstances
  - 2nd Circuit also invited courts to analyze additional evidence and factors as appropriate on a case-by-case basis
    - Factors are merely a guide to aid in the primary beneficiary analysis

Ogletree Deakins

Primary Beneficiary Test – 7 Factors

1. Understanding between employer and intern.
2. The extent that internship training mirrors an educational environment.
3. Intertwinement with formal education.
4. Correspondence with academic calendar.
5. Internship limited in duration to period in which intern gains “beneficial learning.”
6. Intern compliments, not displaces, paid employees.
7. Understanding that there is no entitlement to paid job upon completion.

Ogletree Deakins

Second Circuit Intern Cases

- *Wang v. The Hearst Corp.*
  - Decided in conjunction with *Glatt*
  - Vacated district court's denial of the intern's partial summary judgment motion and remanded for the district court to decide the employee issue *de novo* based on the primary beneficiary standard
- 8th Circuit has implicitly applied primary beneficiary test in determining who is an employee
- 7th Circuit applies "economic realities" tests espoused by DOL
  - *See Callahan v. City of Chicago*, 78 F. Supp. 3d 791, (N.D. Ill. 2015)

Ogletree Deakins

Key Takeaways

- 2nd Circuit's primary beneficiary test is less rigid and more employer friendly than the DOL's six-factor test
- 2nd Circuit gave weight to whether the internship is tied to an academic program
- Primary beneficiary test may prove more difficult for plaintiffs attempting to gain class certification

Legislative Update

Ogletree Deakins

Weed in the Workplace

- 23 states and D.C. have legalized medical marijuana
  - Illinois has legalized medical marijuana, but Missouri has not
- 4 states have legalized the recreational use of marijuana
  - Alaska, Colorado, Oregon, Washington, D.C.
- Other states considering legislation or ballot measures each year

Ogletree Deakins

Weed in the Workplace

- **Implications for employers:**
  - Cases involving an employee's use of medical marijuana have all been decided in favor of the employer
  - Employers have been successful in defending against disability discrimination claims
  - In the unemployment context, courts have concluded that use or possession of marijuana can constitute misconduct resulting in the denial of unemployment benefits

Ogletree Deakins

EEOC Update

Ogletree Deakins

EEOC's Systemic Initiative

EEOC's Systemic Goals:

(1) to have a broad impact in reducing employment discrimination at the national and local levels; and

(2) to remedy discriminatory practices and secure meaningful relief for victims of discrimination

Ogletree Deakins

EEOC's Systemic Initiative

Cards are stacked for EEOC:

- Likely to receive $365.5 million for FY 2015
- EEOC's "Systemic Watch List" Software tracks charges against employers and notifies other offices
- Doubled the number of Lead Systemic Investigators in 2014 and hired 300 new staff at the end of FY 2014
- Individual charges not required but can pursue Commissioner's Charge
- EEOC offers monetary incentives to its investigators to "find" systemic discrimination.
- The EEOC is exempt from Rule 23's rigorous class action certification process

Ogletree Deakins

EEOC Statistics

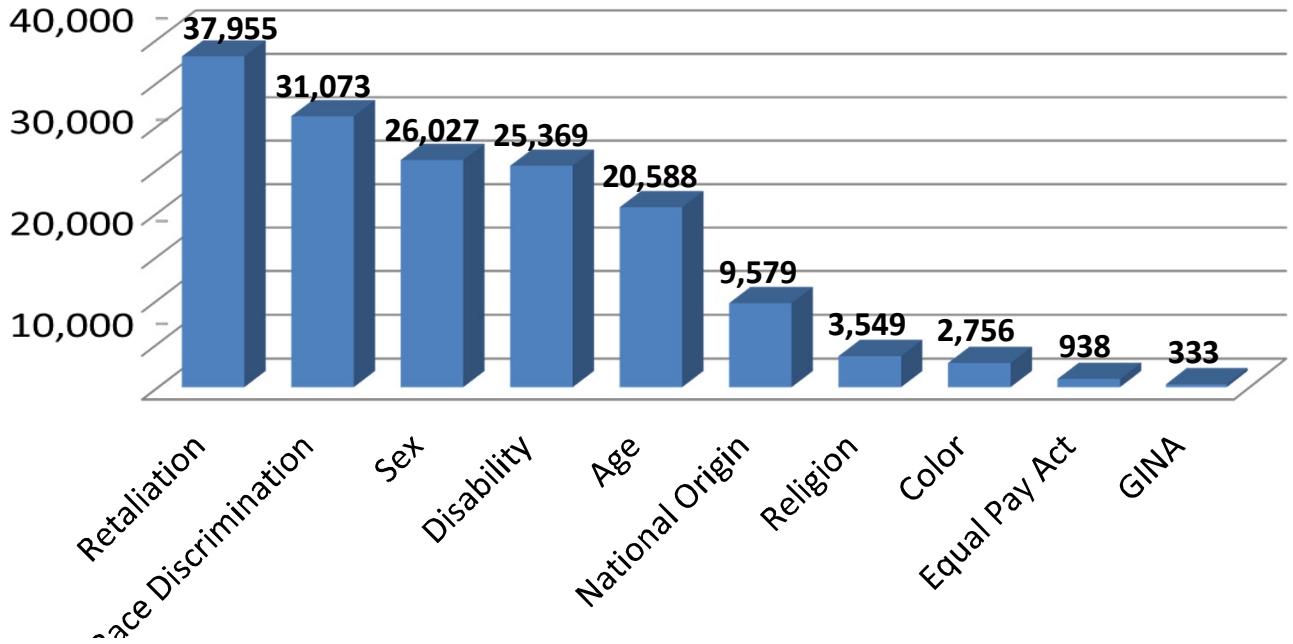
EEOC is nearly profitable

- Recovered $296.1 million for private sector and government employees in FY 2014
- Recovered $22.5 million from EEOC lawsuits in FY 2014
- And trend will continue:
  - Nearly 89,000 EEOC charges filed in FY 2014
  - EEOC had 228 active cases pending at end of FY 2014, a quarter of which are systemic

Ogletree Deakins

EEOC Charges of Discrimination (FY 2014)

- **88,778 EEOC charges filed (↓4,949 from FY 2013)**
- **87,442 EEOC charges resolved (↓294 from FY 2013)**



Ogletree Deakins

EEOC's Systemic Initiative:
TRENDS IN INVESTIGATIONS & LAWSUITS

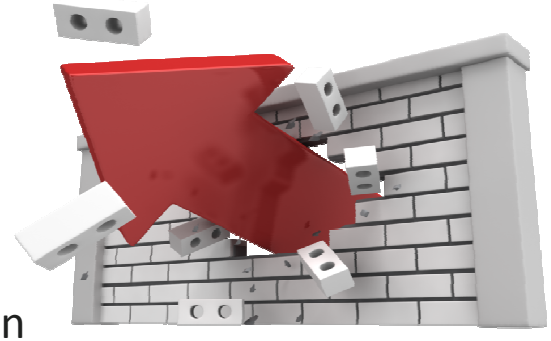
EEOC'S SYSTEMIC INITIATIVE	2013	2014
Number of Systemic Investigations Completed	300	260
Settlements/Conciliation Agreements	63	78
Monetary Recovery	$40 million	$13 million
Individuals Benefited	8,300	Not Reported
Reasonable Cause Findings	106	118
Percentage of "Reasonable Cause" Findings	35.3%	45.4%
Systemic Lawsuits Filed	21	17

YEAR	NEW SINGLE PLAINTIFF CASES	NEW MULTIPLE VICTIM & SYSTEMIC LAWSUITS	SUBPOENA ENFORCEMENT ACTIONS	TOTAL NUMBER OF NEW EEOC LAWSUITS
2013	89	42	17	131
2014	105	28	34	133

EEOC Strategic Enforcement Plan

Priorities for Fys 2013-2016:

- Systemic barriers in hiring
- Immigrants, migrants and vulnerable workers
- ADA Amendments Act
- Lesbian, Gay, Bisexual and Transgender discrimination
- Pregnancy and forced unpaid leave
- Compensation & gender
- Access to the legal system – releases
- Harassment



Ogletree Deakins

EEOC Trends – Litigation

- ***EEOC suffers setbacks in hiring and background cases***

- ***EEOC v. Kaplan Higher Educ. Corp.***, 748 F.3d 749 (6th Cir. 2014) (rejecting EEOC's "homemade methodology" of "race rating").
- ***EEOC v. Freeman***, 2015 WL 728038 (4th Cir. Feb. 20, 2015) (blasting EEOC's statistician for "sheer number of mistakes and omissions").
- ***EEOC v. BMW Mfg. Co., LLC***, 2014 U.S. Dist. LEXIS 169849 (D. S.C. Dec. 8, 2014) (ordering EEOC to produce its own criminal background policy).
- ***State of Texas v. EEOC*** *(*suit against EEOC to block its 2012 enforcement guidance on criminal background checks; on appeal before the Fifth Circuit).

Ogletree Deakins

EEOC Trends – Litigation

EEOC Goes After Separation Agreements

- ***EEOC v. CVS Pharm., Inc.***, 2014 U.S. Dist. LEXIS 142937 (N.D. Ill. 2014) (EEOC's claim that standardized separation agreements interfere with employees' ability to file charges was dismissed for failure to conciliate) (appeal pending).
- ***EEOC v. CollegeAmerica Denver, Inc.***, 2014 U.S. Dist. LEXIS 167055 (D. Colo. 2014) (dismissed for failure to conciliate but retaliation claim pending).
- More challenges to follow.

Ogletree Deakins

EEOC Trends – Litigation

EEOC pursues Wellness Programs

- **EEOC v. Orion Energy Systems**
- **EEOC v. Flambeau, Inc.**
- **EEOC v. Honeywell International, Inc.**
  - Challenging employers wellness programs, alleging:
    - Medical questionnaires and medical exams are not voluntary because of penalty.
    - Meeting and termination = interference with right to refuse medical exam.
    - Disparate treatment in cost and/or coverage based upon refusal to submit to biometric screening.
    - Inducement to obtain genetic information; violation of GINA.

Ogletree Deakins

NLRB Update

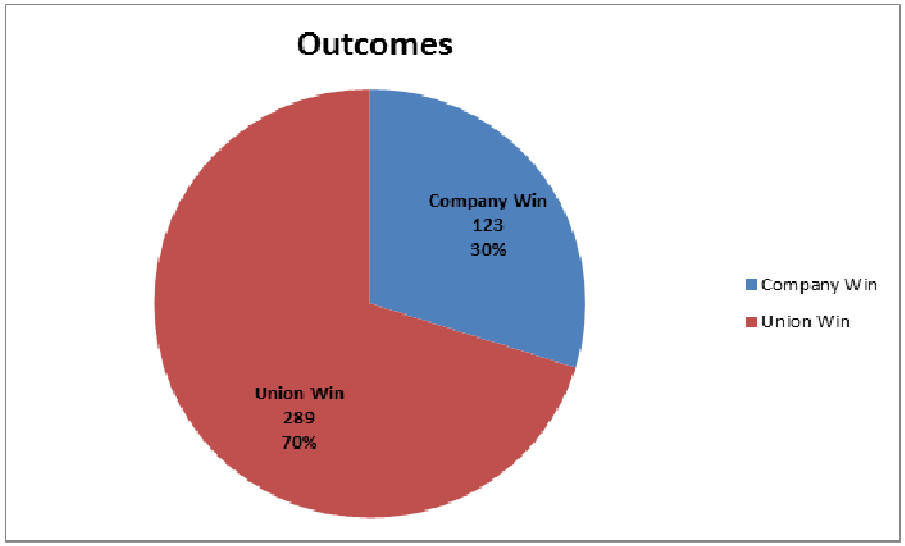
Ogletree Deakins

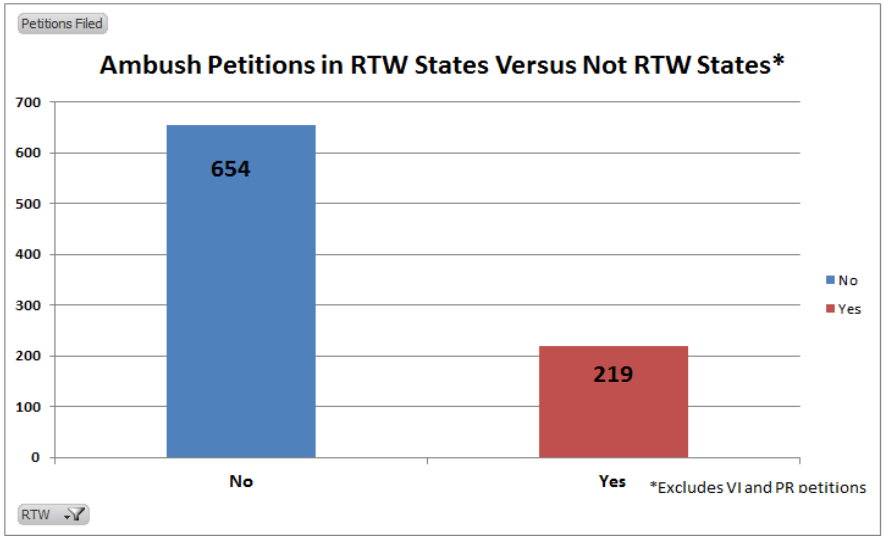
“Ambush Election” Rules

- Union elections likely to occur in just 10 to 21 days after the union requests a vote
- Disputes over voter eligibility and bargaining unit inclusion/exclusion deferred to after the election
- Pre-election hearings eight calendar days after the date the petition is filed
- Employers must provide unions with additional employee information

Ogletree Deakins

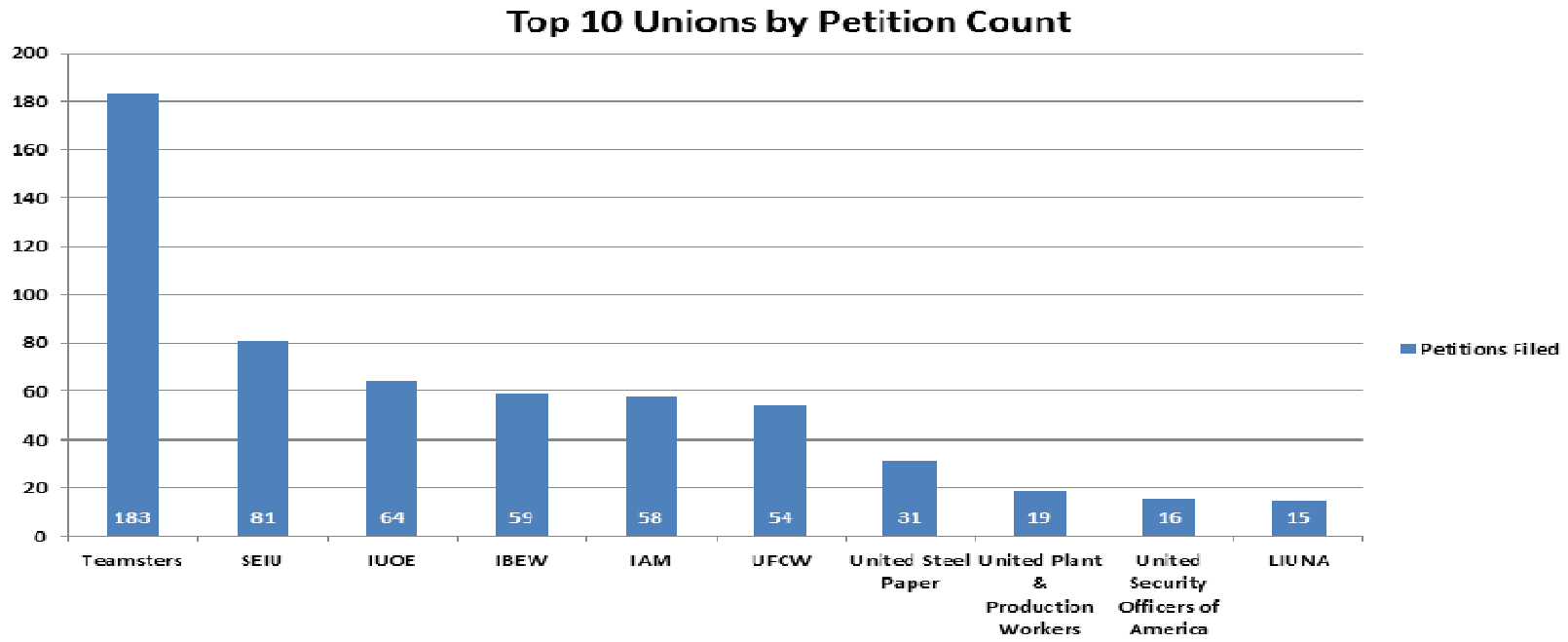
Ambushed: Union Election Statistics





Ogletree Deakins

Ambushed: Union Election Statistics



Ogletree Deakins

NLRB Joint Employer Litigation

- Browning- Ferris
  - Facts:
    - BFI (employer) owned and operated a recycler
    - Utilized subcontractor (Leadpoint) for sorting line operations
    - Leadpoint employed supervisors and managers to manage its employees
      - However, BFI set hours and staffing numbers
    - The contract between BFI and Leadpoint reserved a variety of rights to BFI, but BFI did not exercise them.

Ogletree Deakins

NLRB Joint Employer Litigation

NLRB Decision - the Board relied on the following facts:

1. The contract included hiring standards set by BFI
2. The contract provided BFI with the "unqualified right: to discontinue the use of any Leadpoint employee
3. The contract required compliance with BFI safety policies and allowed BFI to enforce those policies
4. BFI and Leadpoint utilized a "cost-plus" contract for the employees provided by Leadpoint
5. BFI exercised day-to-day control over Leadpoint employees through its control of production speeds and standards

Ogletree Deakins

NLRB Joint Employer Litigation

- New test:
  - "Share or codetermine" employment matters
- This standard eliminates many of the requirements previously necessary to find that an employer exercised sufficient control over the employee
  - Employers need only possess the authority to control terms and conditions of employment (e.g. contractual rights)
  - Control exercised indirectly may establish joint-employer status

Ogletree Deakins

NLRB Joint Employer Litigation

- Impact of Browning-Ferris
  - Broad expansion of joint-employer status
  - Bad news for McDonald's and other franchisors
  - Precedent for other state and federal agencies to rewrite historical understandings of employment relationship

Ogletree Deakins

NLRB Dues-Checkoff

- *Lincoln Lutheran of Racine* (August 27, 2015)
  - Another case changing years of precedent
  - Employers are now obligated to continue to check off dues following the expiration of a CBA
  - Board analyzed under 8(a)(5) lens
    - Dues-checkoff is a matter related to wages
  - Status quo rule should apply
    - Dues-checkoff is unlike no-strike, arbitration, and management rights clauses
  - New rule applied prospectively

Ogletree Deakins

National Labor Relations Board

- Increased scrutiny on social media
- Some Good News
  - NLRB Affirmed ALJ's decision rejecting NLRB General Counsel's challenge to a portion of employer's social media policy in Landry's Inc. and its wholly owned subsidiary Bubba Gump Shrimp Co. Restaurants, Inc. *and* Sophia Flores. Case 32–CA–118213 (2015)
    - Policy regulated manner of posting information, not content, and helped with employee morale
- Acceptable Social Media Policy Restrictions

Ogletree Deakins

National Labor Relations Board

- Greater scrutiny placed on confidentiality rules
  - *Banner Health, 358 NLRB No. 93 (2012*)
  - Must show legitimate business justification
    - Protect witness
    - Preserve testimony
    - Prevent a cover-up
    - Another legitimate business interest

Ogletree Deakins

Class and Collective Action Waivers

- NLRB's *D.R. Horton* decision (2012).
  - Class action waivers violate labor law

- 5th Circuit's Reversal/NLRB's Rehearing Petition.
  - FAA takes precedent over the policy choices of NLRB
  - 5th Circuit denied NLRB's petition

Ogletree Deakins

Class and Collective Action Waivers Supreme Court Decisions

- *AT&T Mobility* (2011)
- *AMEX v. Italian Colors Restaurant* (2013)
- *Oxford Health Plans v. Sutter* (2013)
- All support employers' ability to enforce class action waivers

Ogletree Deakins

Class and Collective Action Waivers Current Status

- NLRB's position:
  - Will continue to apply *DR Horton* until US Supreme Court says no
- Most federal courts have rejected NLRB's *DR Horton* analysis

Ogletree Deakins

Purple Communications, Inc.

- 361 NLRB No. 126 (2014); appeal from ALJ finding denied (March 4, 2015)
- 3-to-2 decision
  - Employees can utilize employer email to communicate about workplace issues
- Impact: Employers must reconsider "business-use-only" policy for email systems

Ogletree Deakins

OSHA Update

Ogletree Deakins

OSHA's Reporting Requirements

- New Rule (Effective January 1, 2015)
  - In-patient hospitalization of one-or-more employees within 24 hours
  - Amputations and the loss of an eye must be reported within 24 hours
  - Motor vehicle accidents in construction work zones on public streets or highways
  - Reporting can be made to OSHA office, toll-free number or OSHA's website

OSHA

Ogletree Deakins

What Else Should You Be Looking For?

Ogletree Deakins

Pending Legislation…

- The Employment Non-Discrimination Act (ENDA) has been re-introduced
  - Add sexual orientation and gender identity as protected classes
  - Senate passed ENDA in November 2013

Ogletree Deakins

Family And Medical Insurance Leave Act

- Would create a national paid family and medical insurance leave program
  - Would cover more workers than FMLA
  - Re-introduced March 18, 2015 – assigned to committee

Ogletree Deakins

Social Networking Online Protection Act

- Would protect individuals who use social networking sites
- Would prevent employers from requiring applicants or employees to divulge their personal "profile" information, passwords, or online accounts
- Reintroduced in February 2013, and pending in a House of Representatives Committee
- Could be re-invented and re-introduced

Ogletree Deakins

Pay Equity May Resurface

- Paycheck Fairness Act was reintroduced this year
  - Would have amended the Equal Pay Act, requiring employers to demonstrate that any pay disparity complained of is related to job performance and not gender.
  - Prohibits retaliation and allows for punitive damages
  - Failed in the Senate in 2014 (for the third time)

Ogletree Deakins

Class & Collective Action Developments

- Significant trends in workplace class & collective action litigation
  - Waiting time continues to be a high focus
  - Collective actions triggered by volunteers and interns
  - Collective actions triggered by obscure exemptions example: 7(i)
  - "Trial by formula" proof from *Wal-Mart v. Dukes*

Ogletree Deakins

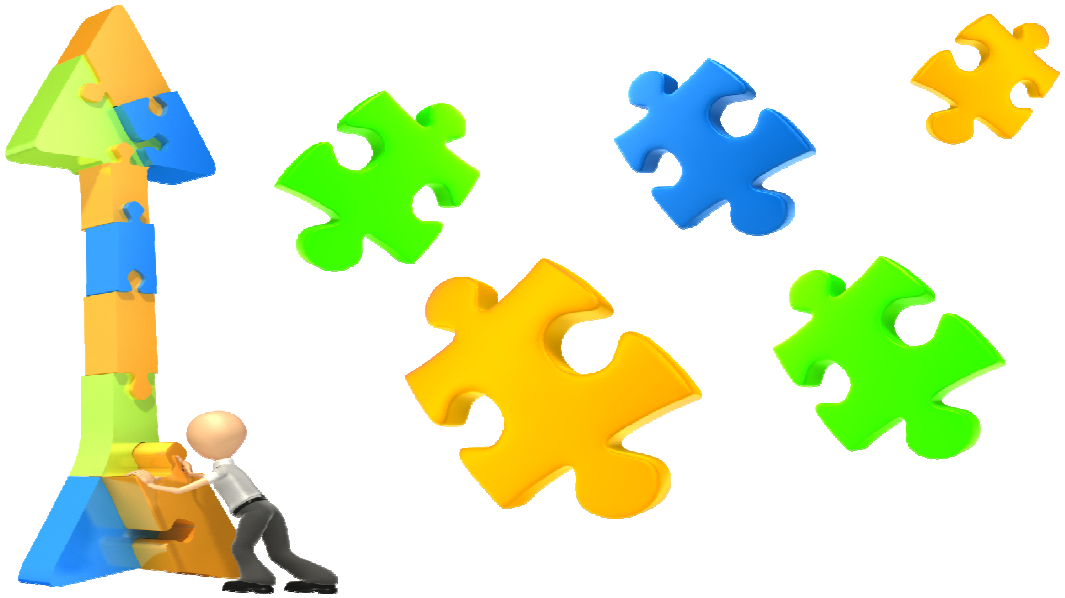
Class & Collective Action Developments

- *Tyson v. Bouaphaekeo*
  - FLSA case in which plaintiffs are claiming that they were not fully compensated for time spent donning and doffing PPE
  - 2 Issues to be decided by U. S Supreme Court:
    1. The validity of using expert-averaged evidence to satisfy certification requirements
    2. Whether a class may remain certified when it includes uninjured class members
  - Supreme Court's decision likely to provide answers to key evidentiary questions on how class plaintiffs can prove their claims

Ogletree Deakins

Any Questions?

Ogletree Deakins



Ogletree Deakins

Best Lawyers LAW FIRM OF THE YEAR U.S.News & World Report EMPLOYMENT LAW – MANAGEMENT 2014

Best Lawyers LAW FIRM OF THE YEAR U.S.News & World Report LABOR LAW – MANAGEMENT 2014

Eye on Employment Law 2016:

A Review of Legal Developments for HR & Payroll Professionals

Presented by Keith A. Watts, Esq.

Interactive Dialog with US

Go to twitter.com/UltimateHCM

Then click "Follow."

Go to linkd.in/UltimateHCM

Click "Join Group." Once approved, a message will be sent to your inbox.

Go to pinterest.com/ultimatehcm

Then click "Follow All."

Go to facebook.com/UltimateSoftware

Click "Like" button at the top of the screen.

Subscribe to Ultimate's YouTube channel for the latest videos: youtube.com/user/ultimatesoftware

Share your favorite Ultimate videos on social media from the links below each video.

UltiSocial

For more info on how to connect with US, go to ultimatesoftware.com/Social

Ultimate SOFTWARE