Buchanan Ingersoll & Rooney PC

Labor and Employment Legislation and Regulations 2019: What to Expect and How To Manage

PACAH Spring Conference 2019
April 24, 2019

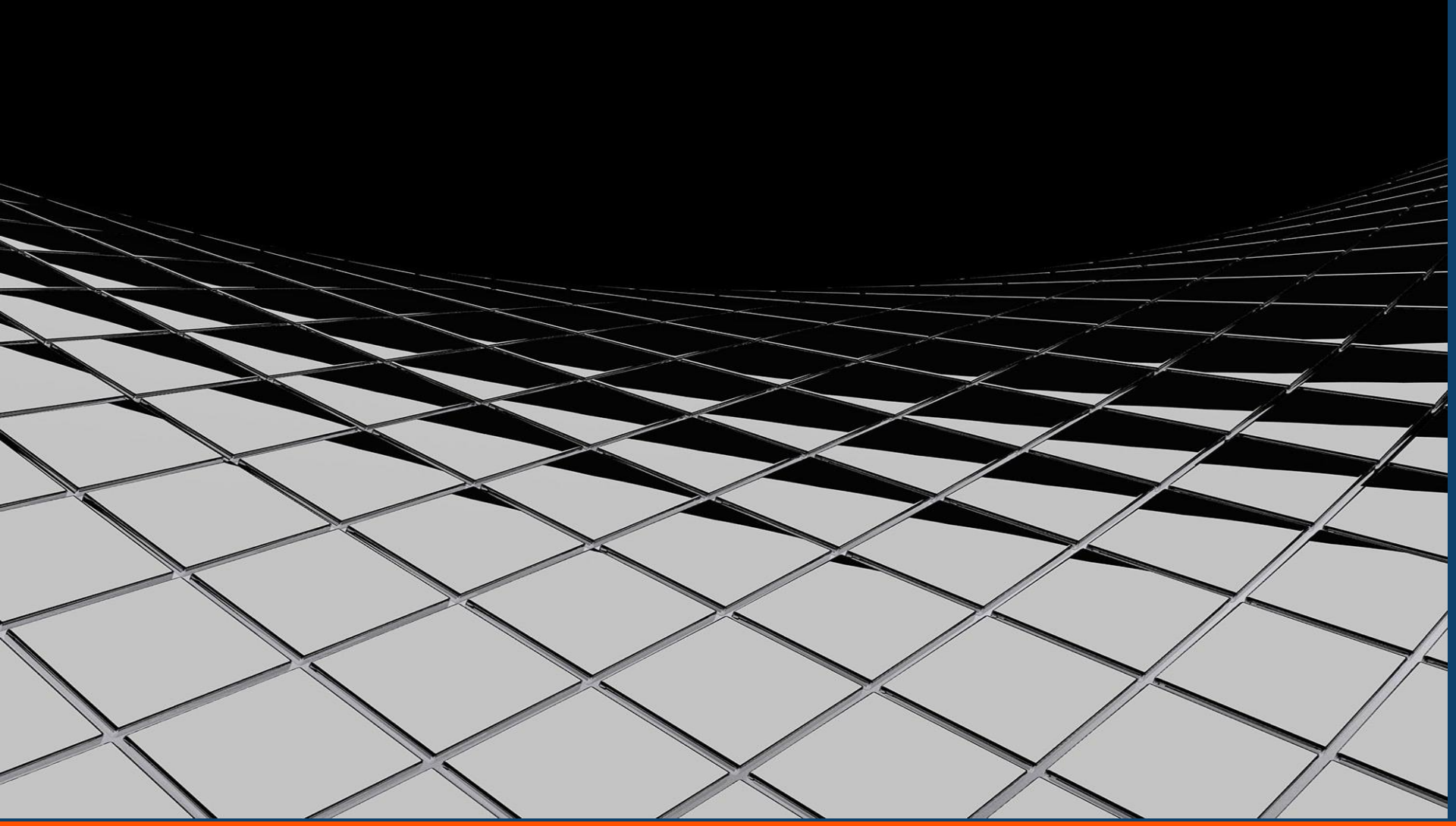
What We Will Discuss…

- Wage & Hour
- Equal Pay Act
- OSHA Activity
- NLRB Changes
- EEOC Activity
- Proposed Leave Laws

L&E Issues Generally – What to Expect

- Trump Administration's continued attempts to roll back or "right size" Obama Administration actions.
- More activity at the state and local levels, including:
  - Wage & hour laws/regulations;
  - Family-leave requirements;
  - Sick-leave laws;
  - Policies arising out of the #MeToo movement; and
  - Regulations related to medical marijuana legalization.

We Will Touch On A Few Highlights Today…



Wage & Hour Developments

2019 Proposed Changes to FLSA Salary Basis

- In March 2019, the DOL issued its Notice of Proposed Rulemaking.
- A "redo" of the blocked 2016 Rule
- The DOL's Proposed Rule includes:
  - Increasing the salary threshold for workers to qualify for one of the exemptions to **$679** per week (**$35,308** annually)—a substantial increase from the current salary level of **$455** per week (**$23,660** annually), which was set in 2004;
  - Updating the annual minimum compensation for highly compensated employees from **$100,000** to **$147,414**; and
  - Allowing employers to use nondiscretionary bonuses and incentive payments (including commissions) that are paid annually or more frequently to satisfy up to 10 percent of the standard salary level. This payment may be made during the course of the year or, if needed, in one final payment during the next pay period after the end of the year, but will count only toward the prior year's salary.

Department of Labor: Notice of Proposed Rulemaking: Overtime Update (March 7, 2019)

The Fair Labor Standards Act

- The Fair Labor Standards Act (FLSA) is administered by the Wage and Hour Division (WHD) - Enacted in 1938
- The Act establishes standards for minimum wage, overtime pay, recordkeeping, child labor, and equal pay protection.
- Specifically:
  - sets statutory minimum wage of not less than $7.25/hour (effective July 24, 2009),
  - requires 1½ times regular rate of pay for all hours worked over 40 in a workweek, and
  - requires employer to keep track of hours worked.

FLSA Exemption Basics

- FLSA provides an ***exemption*** from minimum wage and overtime requirements for certain "white collar" workers who meet three tests:
  - Salary Level: Employee must be paid a predetermined and fixed salary that is not subject to reductions or fluctuations because of variations in the quality or quantity of work performed
    - No pay-docking rule
  - Salary Basis: The amount of salary must be a minimum of **$23,660 ($455/week)**
  - Job Duties: Must involve primarily executive, administrative, or professional duties
    - Regularly directs work of other employees, authority to hire/fire;
    - Perform office or non-manual work related to business operations, exercise direction and independent judgment; and,
    - Primary work requires advanced knowledge acquired by prolonged specialized study.

How 2019 Proposals Compare to Current FLSA Regulations

The Current Regulations	The 2019 Rule
Annual salary threshold for exempt positions is **$23,660**	Annual salary threshold for exempt positions could be **$35,308**
Annual salary threshold for highly compensated employees is **$100,000**	Annual salary threshold for highly compensated employees could be **$147,414**

2019 Proposed Changes to FLSA Salary Basis: Economic Consequences

- The Department estimates average transfers to employees to be approximately $429.4 million per year over the first ten years.
- The Department estimates that average annualized direct employer costs will total approximately $120.5 million per year over the first ten years, including regulatory familiarization costs, adjustment costs, and managerial costs.
  - (Note: direct costs for employers under this proposed rule are expected to be $224 million less per year than under the 2016 rule.)

DOL, Frequently Asked Questions

2019 Proposed Changes to FLSA Salary Basis: What Should We Do?

- No action required at this juncture
  - 60-day period for public comment, then the DOL will be processing those comments
- But, employers would be wise to:
  - Examine pay practices to identify whether any currently exempt employees might lose that status if the proposed salary thresholds are adopted;
  - Consider whether to increase the salaries of affected employees to preserve their exempt status and/or reclassify them as non-exempt;
  - Examine pay practices to confirm that non-exempt employees continue to meet the duties test (which is not changing, but remains essential to exempt status); and
  - Consider whether to submit comments to the DOL expressing opinions regarding possible changes to the Proposed Rule.

2019 Proposed Changes to FLSA Salary Basis: What Should We Do?

- Self Audit
  - Review current employee classifications, existing jobs and job descriptions.
  - Make sure each position is properly classified as exempt or non-exempt.
  - Analyze impact of new salary level on:
    - Budgets
    - Possible job restructuring
    - Time keeping systems (manage “hidden OT”)
    - Whether a management position is both exempt and non-exempt
  - It is critical to communicate with those who know the job and understand what the job actually entails. What’s the OT?
  - Be careful with questioning exempt employees about past OT.

2019 Proposed Changes to FLSA Salary Basis: What Should We Do?

- Look closely at each position's "primary duty" and make sure any reclassification falls within the guidelines.
- If an employer decides to make changes to employees' classifications, clearly communicate those changes to the impacted employees.
- Shifting employees from salary to hourly or from overtime-exempt to overtime-eligible will have a wide range of operational and legal implications.

2019 Proposed Changes to FLSA Salary Basis: What Should We Do?

- Decide how to treat classifications that will not meet the new salary threshold.
  - Increase salary or re-classify position.
  - Financial impact of salary increases over time.
  - Workforce morale.
  - Limit hours worked if position can be performed in 40 hours.

Post-Audit: Reclassification from Exempt to Non-Exempt

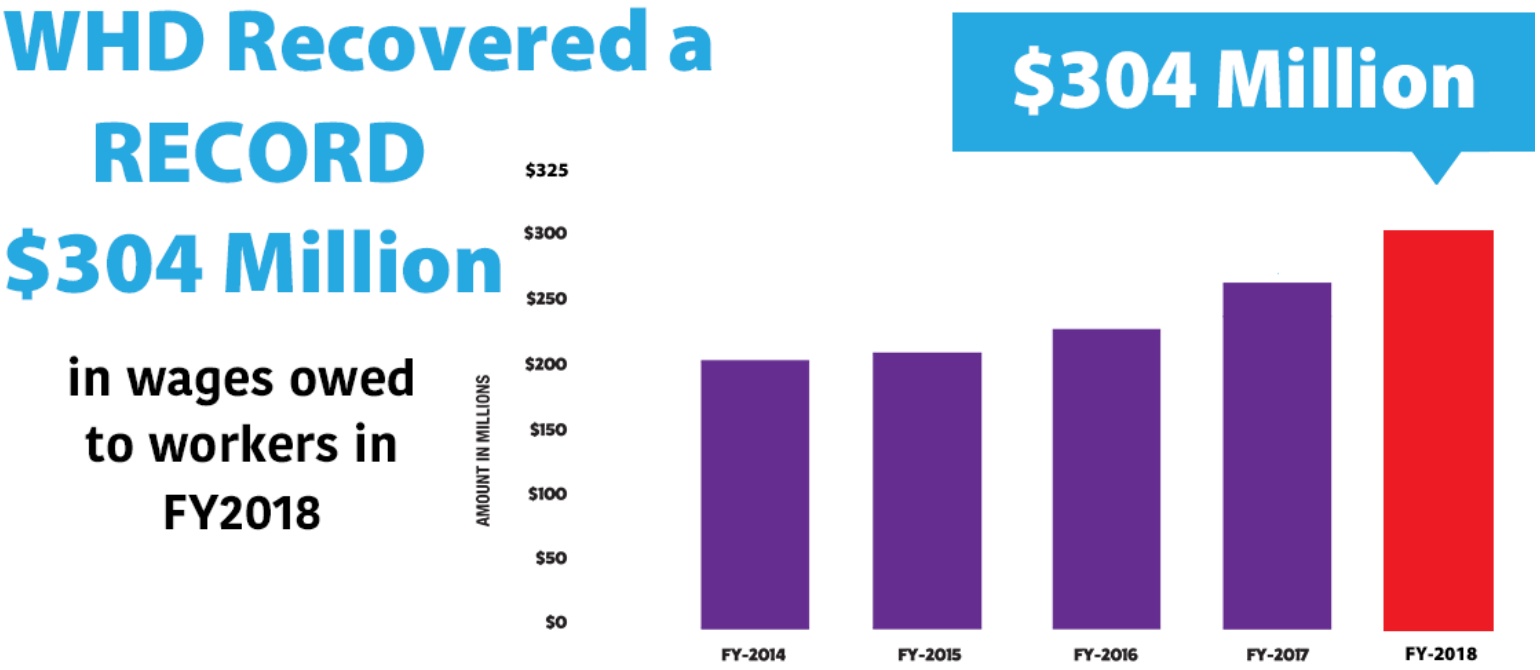
- With legal counsel, reclassification may be necessary
- First step is communication – often and at various levels
  - Need to educate the senior team.
  - General communication of what is to come.
  - Individual communications with affected employees with or without appeal opportunity.
- Administrative aspects of reclassification
  - Ensure accurate time keeping with no off-the-clock work.
  - Monitor and control hours worked.
  - Confirm supervisors understand the concepts.

Best Practices

- Regardless of reclassification, have employees review and sign off on their job descriptions.
- Make sure employees comply with job descriptions, as the DOL may focus more on what an employee actually does, rather than how that employee's job is described in determining compliance.

Why Should You Care?

- More than $1.3 billion in back wages were recovered by the Wage and Hour Division in the last five years



https://www.dol.gov/whd/data/

Recent Wage & Hour Activity

WHD Enforcement Statistics: All Acts	FY 2017	FY 2016	FY 2015	FY 2014	FY 2013	FY 2012	FY 2011	FY 2010
Back Wages	270,403,906	266,566,178	$246,780,891	$240,831,606	$249,954,412	$280,697,546	$224,844,870	$176,005,043
Employees Receiving Back Wages	240,608	283,677	240,340	270,570	269,250	308,846	275,472	209,814
Complaints Registered	19,808	20,522	21,902	22,557	25,628	25,420	27,112	31,824
Enforcement Hours	1,202,442	1,112,939	1,154,373	1,188,531	1,339,029	1,377,441	1,213,182	1,066,188
Average Days to Resolve Complaint	114	121	125	116	110	145	177	142
Concluded Cases	28,771	28,589	27,914	29,483	33,146	34,139	33,295	26,486

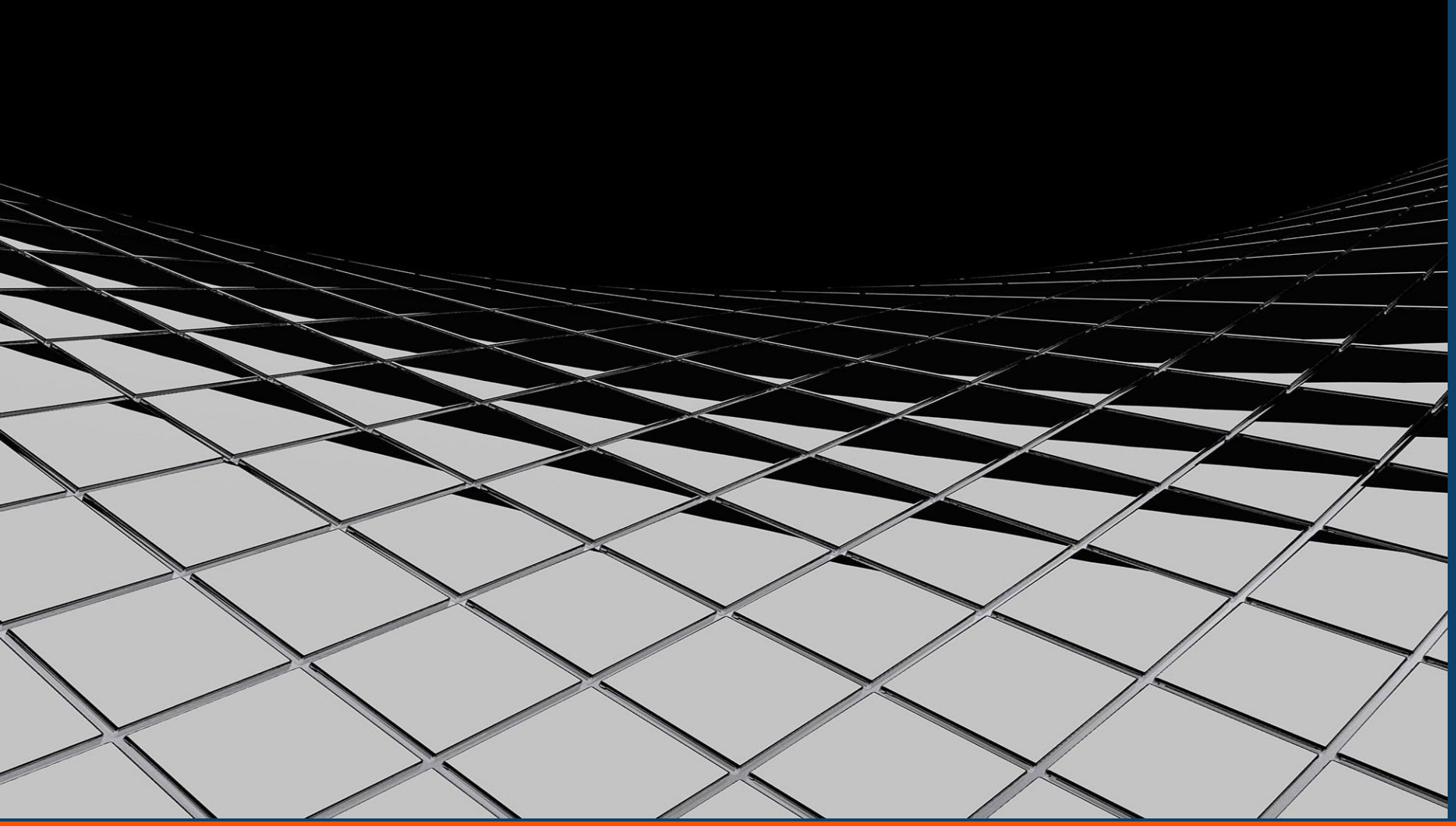
Source: U.S. Department of Labor, Wage and Hour Division

FLSA Civil Money Penalties Have Increased

- Effective January 23, 2019, the U.S. Department of Labor published increases in the civil money penalties it can impose for certain violations of the federal Fair Labor Standards Act.
- These new levels apply to any penalties assessed after January 23rd, including predicate violations that have already occurred.

The Months Ahead: Raising the PA Minimum Wage

- Governor Wolf has proposed an increase of the Pennsylvania minimum wage to **$12/hour**
- Proposal set to increase wages beginning **July 1, 2019**
  - With gradual $0.50 increases each year
  - Will ultimately reach $15/hour in 2025



Equal Pay Act – The Perfect Storm?

Federal Equal Pay Act

- Equal Pay Act ("EPA") passed in 1963
  - "No employer . . . shall discriminate. . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions..."
- Exceptions
  - Seniority system
  - Merit system
  - System that measures earnings by quantity or quality of production
  - Differential based on a factor other than sex
- Employer cannot lower another's salary to achieve parity.

Federal Equal Pay Act

- EPA applies to salary/hourly pay, bonuses, benefits, perks etc.
- Note EPA language focuses on *the work* versus *the person*,
  - Jobs that require different levels of experience
  - NOT as between people that qualify for the same job and have different levels of experience

The Perfect Storm

- Equal Employment Opportunity Commission's Strategic Enforcement Plan for Fiscal Years 2017-2021 lists pay equity as one of six major priorities
  - Still represents a relatively low number of suits (11 in FY2017 vs. 5 in FY2016) and relatively low recovery ($200,000 in FY2017)
- Meanwhile, White House Office of Information and Regulatory Affairs "immediately and indefinitely" halted pay-data-collection updates to EEO-1.

The Perfect Storm

- Recent political unrest
- #MeToo Movement
- Headlines →

Forbes

MEDIA & ENTERTAINMENT #BoxOffice

The Cruel Reason Michelle Williams Earned 0.07% Of Mark Wahlberg's Pay For 'All The Money In The World' Reshoots

Jan 10, 2018, 11:00am

Scott Mendelson
Contributor

Recent State and Local Legislation

- Most recent trend is to adopt legislation regulating how, if at all, employers can use prior salary information.
- These statutes and ordinances tend to:
  - Prohibit employers from requesting prior salary information (or delay the inquiry until after an offer); and/or
  - Prohibit employers from relying on prior salary information they've already obtained.

The Philadelphia Wage Equity Ordinance

As written:

Prohibitions	Exceptions
▪ Employers cannot ask a job applicant, **in writing or otherwise**, about his or her wage history (the "inquiry provision"); ▪ Require disclosure of wage history; ▪ Condition employment/consideration for an interview on the disclosure of wage history; ▪ Retaliate against a job applicant for failing to disclose his or her wage history; or ▪ Rely on a job applicant's wage history from a current or former employer to determine the wages for that individual at **any stage** of the employment process (the "reliance provision").	▪ Employers may utilize wage history if an applicant **knowingly and willingly** discloses his or her wage history; or ▪ Where a federal, state or local law specifically authorizes the disclosure or verification of wage history for employment purposes.

The Philadelphia Wage Equity Ordinance

- Shortly after its adoption, the Chamber of Commerce for Greater Philadelphia filed suit alleging the Ordinance was unconstitutional.
- On April 30, 2018, the Court issued its ruling.
  - The "inquiry provision"
    - The Court held that the inquiry provision was in violation of the First Amendment.
      - The City of Philadelphia failed to establish banning inquiries about wage history which would achieve the intended purpose of reducing the wage gap and promoting wage equity.
  - The "reliance provision"
    - The Court held that the reliance provision was not in violation of the First Amendment.

The Philadelphia Wage Equity Ordinance

- What do Philadelphia employers need to know now?
  - Best case? Refrain from asking about wage history.
- *Otherwise, proceed with caution.*
  - Prior to searching for potential candidates, employers should:
    - Independently determine fair market price range;
    - Internally document the anticipated salary (or range) for the position;
    - Internally document other factors that may impact an applicant's salary.
  - If an employer does ask an applicant about wage history, the applicant should certify, in advance and writing, their understanding that doing so is voluntary;
  - Confirm whether a federal, state or local law permits the disclosure or verification of wage history for employment purposes.

Pittsburgh "Ensuring Wage Equity" Ordinance

- Prohibits City of Pittsburgh, its divisions, departments, agencies and offices from:
  - Inquiring about an applicant's wage history;
  - Requiring disclosure of wage history;
  - Conditioning employment or consideration for an interview on disclosure of wage history;
  - Retaliating against an applicant for failing to comply with any wage history inquiry; and
  - Relying on wage history received from any current or former employer in determining the wages for an individual at any stage in the employment process, unless the individual knowingly and willingly discloses the wage history.

Proposed Paycheck Fairness Act

- On March 27, 2019, the U.S. House of Representatives voted to pass the *Paycheck Fairness Act* - to amend and strengthen the existing federal Equal Pay Act ("EPA") – which provides that the "bona fide factor" justifying gender-based pay disparities would only apply where "the employer demonstrates that such factor:
  - is not based upon or derived from a sex-based differential in compensation;
  - is job-related with respect to the position in question;
  - is consistent with business necessity; and
  - accounts for the entire differential in compensation at issue."

Proposed Paycheck Fairness Act

- The Paycheck Fairness Act would also:
  - Prohibit retaliation against employees who discuss their pay, file EPA claims or initiate pay equity investigations;
  - Prohibit employers from relying on the salary history of a prospective employee when considering that prospective employee for employment;
  - Require the EEOC to begin collecting pay data from employers;
  - Require the DOL to study and distribute pay equity statistics derived from the data collected by the EEOC;
  - Provide grants to train women and girls regarding salary negotiation; and
  - Establish a "National Award for Pay Equity in the Workplace," to be issued to an employer that has made a "substantial effort" to eliminate gender-based pay disparities.

What Should Employers Do At Hiring?

- Review hiring laws in every state and locality where it has (or is seeking) employees.
- Practical steps:
  - Investigate and understand current process (where is information collected from, how is it used…)
  - Review application to ensure it does not elicit “off limits” information
  - Train interviewers on specific interview techniques/questions

What Should Employers Do With Their Job Descriptions?

- Job descriptions are often the starting point for EPA claims
- How do employers articulate what is (and is not) "equal work"?
- Practical steps
  - Clarify how similar jobs (or job titles) differ
    - Assistant, coordinator, administrator
    - Manager, team leader, director
  - Clarify how experience will impact the hiring and compensation analysis
    - "Required" versus "preferred"
  - Identify any differences in travel, location, environment or work duties
    - Avoid the temptation to overgeneralize ("lead" versus "assist")
    - But watch for impact on wage & hour exemptions!

What Should Employers Do With Their Compensation Policies?

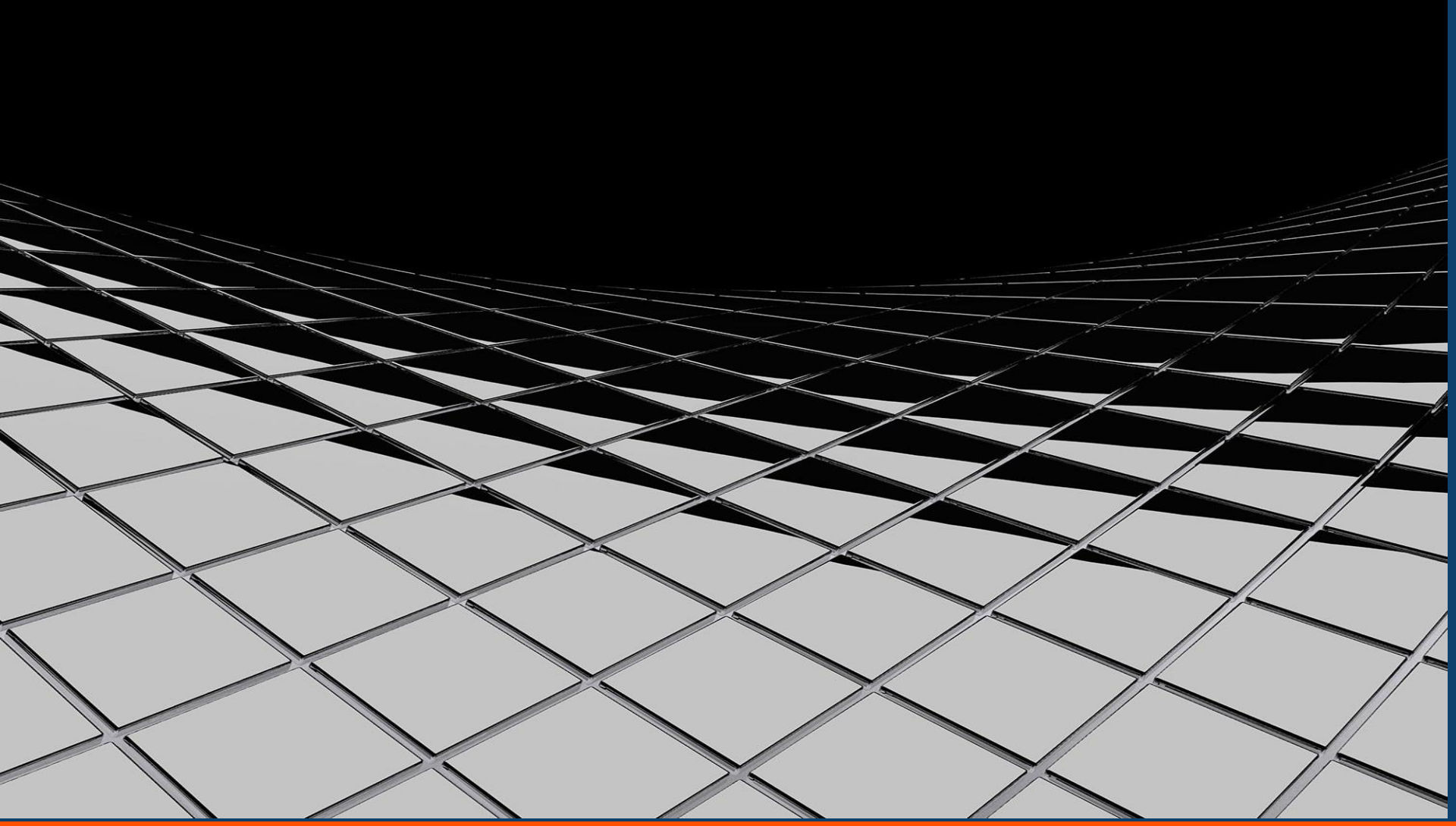
- Review laws in every state and locality where it has (or is seeking) employees.
- Practical steps:
  - Investigate and understand current process
  - Require explanations (and documentation) justifying differences in pay at the time of hire – it is easier to defend a well-reasoned decision than to back into one at the time of litigation
  - Consider minimizing the portion of pay that can be awarded based on qualitative factors (and tying the majority of compensation to quantitative factors) so as to limit potential damages in the event an EPA case

How Should Employers Handle Current Employee Pay?

- Recent court decisions suggest employers need to routinely analyze pay across the organization, comparing employees to other employees, applicants, and predecessors.
- Practical steps
  - Audit (at minimum) once per year
  - Review (at minimum) gender, title, rate of pay, tenure and reporting structure
  - Review legacy (predecessor) data
  - Develop a plan/get prospective buy-in with regard to
    - What level of risk the company is willing to accept
    - How and when the company will address disparities

Performance Reviews

- EPA analysis goes beyond initial hire and – when pay is tied to performance or annual reviews – it is important that the review tool justify any disparities.
- Practical steps
  - Require explanations (and documentation) justifying differences in pay/bonus/raises.
  - Train supervisors on how to draft useful performance reviews that will support defenses against discrimination claims.
    - Avoid vague, qualitative terms (abrasive, aggressive, harsh)
    - Avoid rating everyone “acceptable”



EEOC Actions

EEOC Removed Incentive Programs

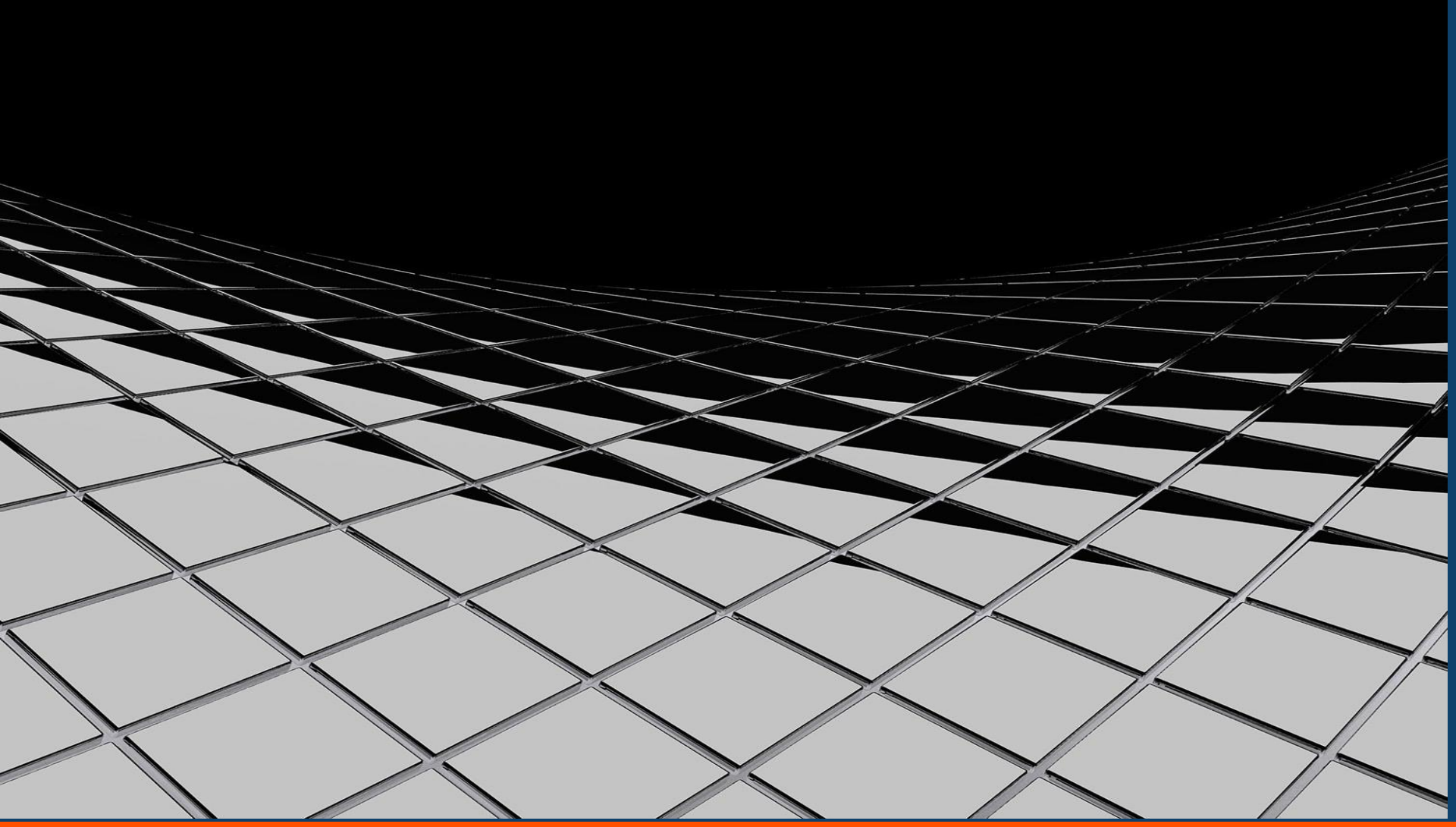
- Effective January 1, 2019 the incentive portions of the EEOC's wellness rules under the Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA) were removed.
- The prior rules permitted employers to offer employees up to 30% off insurance premiums if the employee participated in an employer-sponsored wellness program.
- The EEOC removed these incentive provisions in response to a decision from the U.S. District Court for the District of Columbia which held that the incentives could render the wellness program involuntary and in conflict with the ADA and GINA.

EEOC Charges Were Down in 2018

- Workers filed less total discrimination cases in FY2018 than they have in a decade.
  - 76,418 in FY2018
  - Down 8,000 from FY 2017
  - Just over what was filed in 2006 (at 76,000)
- Retaliation continued to be the most frequently filed charge filed with the agency, followed by sex, disability and race.
- #MeToo cases increased by 13.6% from FY2017 (7,609 sex harassment charges) and the EEOC obtained $56.6 million in monetary benefits for victims of sexual harassment.

EEOC Charges Were Down in 2018

- EEOC Charges for FY2018 breakdown as follows:
  - Retaliation: 39,469 (51.6 percent of all charges filed)
  - Sex: 24,655 (32.3 percent)
  - Disability: 24,605 (32.2 percent)
  - Race: 24,600 (32.2 percent)
  - Age: 16,911 (22.1 percent)
  - National Origin: 7,106 (9.3 percent)
  - Color: 3,166 (4.1 percent)
  - Religion: 2,859 (3.7 percent)
  - Equal Pay Act: 1,066 (1.4 percent)
  - Genetic Information: 220 (.3 percent)
- Note: The total is greater than 100% because some charges allege multiple bases.



Changes at the NLRB

The NLRB Has Been Busy in 2019!

- As of the end of the 2019 Q1, the National Labor Relations Board has:
  - issued a decision limiting the definition of what constitutes "protected, concerted activity“,
  - issued a decision broadening the standard for who is considered an independent contractor under the National Labor Relations Act, and
  - dealt a punch directly to union ability to use fees for political lobbying.

NLRB Limits What Complaints Are Protected Under the Act

- In a 3 to 1 decision, issued on January 11, 2019, the NLRB issued a decision in *Alstate Maintenance, LLC* which had the effect of making it harder for employees to successfully claim that their workplace complaints constitute protected concerted activity.
- This reverses a 2011 Obama-era decision that was widely condemned as favoring employees.
- Under that Obama-era precedent, essentially any employee complaint made to management in the presence of coworkers was sufficient to qualify as protected concerted activity under the National Labor Relations Act (NLRA).
- Under *Alstate Maintenance*, the NLRB has returned to the more stringent standard where only the complaints that seek to initiate group action, or that involve truly "group" complaints, will now be considered protected concerted activity.

NLRB Tackles the Hot Issue of Independent Contractors

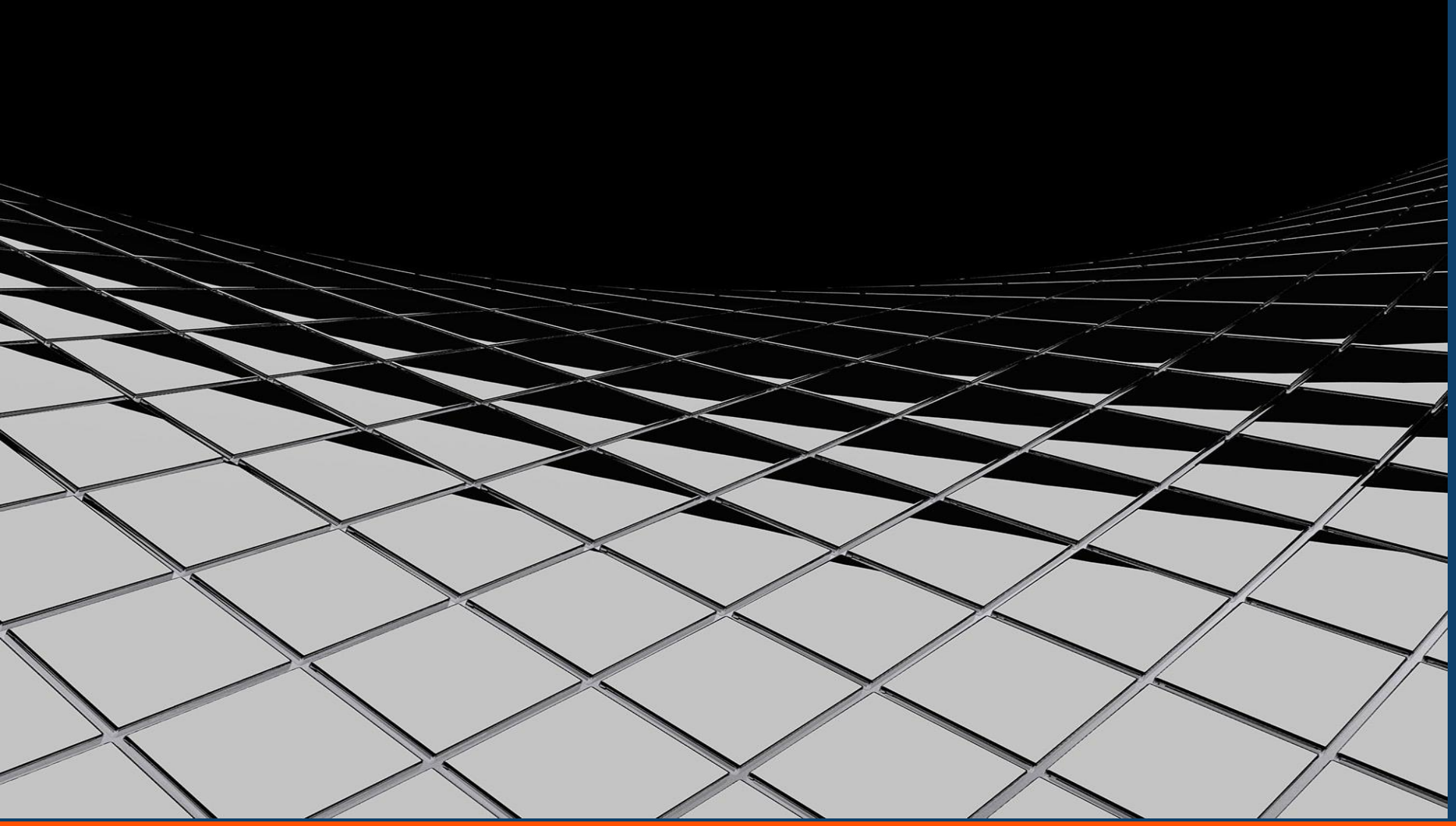
- On January 25, 2019, in a significant and long overdue ruling, the NLRB revised the test it uses for determining whether workers are employees or independent contractors by making it easier for entities to classify them as contractors.
- In the *SuperShuttle DFW, Inc.* decision, the NLRB took action – which labor unions contend – created a roadblock into unionization efforts involving such independent contractors because federal law does not allow such contractors to unionize or join forces with employees in organizing efforts.
- Management views this decision as a return to a more reasonable analysis of what is/is not an independent contractor.

Limits on Fees To Fund Lobbying

- On March 1, 2019 the NLRB issued a decision in *United Nurses & Allied Professionals (Kent Hospital)* that private sector unions cannot use fees paid by nonmembers to fund their lobbying efforts.
- When considered together with the U.S. Supreme Court's 2018 *Janus* decision, union's are arguing that their lobbying activities have been significantly undercut.

What Should Employers Do In Response to All These NLRB Decisions/Positions?

- If an employer made substantial revisions to align its policies with memoranda and case decisions from the Obama Administration's NLRB, a review of those policies/handbooks is recommended.
  - One recommendation is to look at the NLRB general counsel's 2018 guidance on employee handbooks, which rolled back the Agency's prior guidance on a number of fundamental policies.



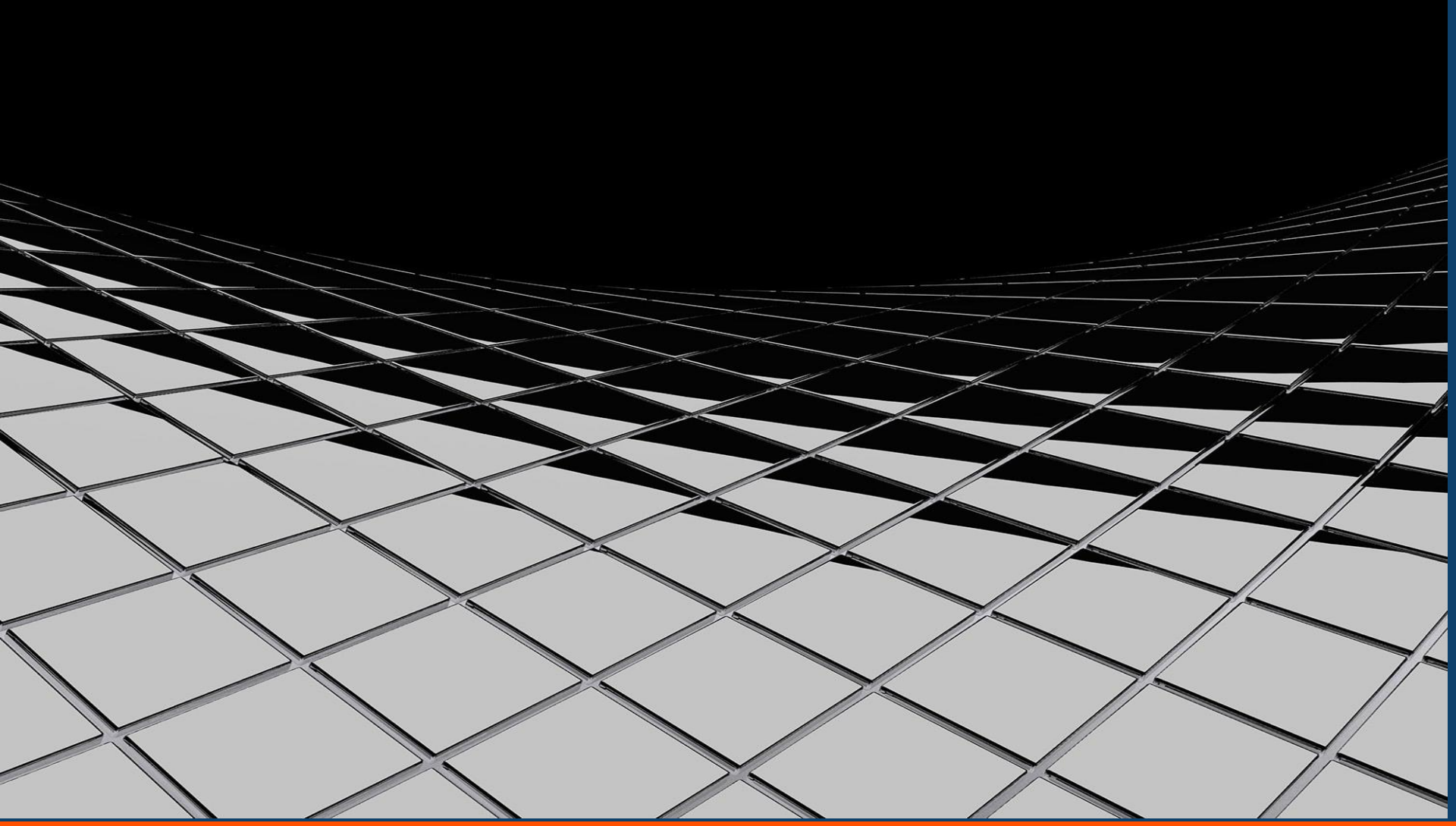
OSHA Activity

Part of Electronic Recordkeeping Requirements Rolled Back

- OSHA recently issued a final rule rescinding its the prior requirement for companies with 250 or more employees to electronically submit the OSHA 300 log and OSHA Form 301.
- These companies will still be required to submit the OSHA Form 300A (the annual summary), along with its Employer Identification Number (EIN).
- The deadline to submit the Form 300A was March 2, 2019.
- The final rule does not change the requirement for employers to maintain the OSHA 300 log and Form 301 on site for OSHA to review.

Maximum Penalties Increase In 2019

- Employers will be facing higher penalties from the federal Occupational Safety and Health Administration in 2019.
- On January 15, 2019 OSHA announced that it plans to increase the maximum penalty an employer can be issued for serious and other than serious citations to $13,260, and the highest amount that can be issued for repeat and willful violations to $132,598.



Proposed Leave Laws

What to Expect: Proposed Leave Laws

- The Healthy Families Act
  - Proposed on March 14, 2019 by Senator Patty Murray (D-Wash.) and Representative Rosa DeLauro (D-Conn.)
  - Workers at businesses with 15 or more employees would receive up to seven job-protected paid sick days each year, while those employed at smaller businesses would receive seven job-protected unpaid sick days each year.
  - Workers would accrue one hour of paid sick time for every 30 hours of work beginning at the time they are hired, and could start using their earned sick time after 60 days of employment.
  - Workers would also be able to carry over unused time to the following year, so long as they don't exceed the seven-day (56-hour) limit.

What to Expect: Proposed Leave Laws

- The Healthy Families Act
  - Would allow employees to earn up to a week of paid leave for a variety of reasons;
  - Would allow workers to use sick days to recover from their own illnesses, access preventive care, attend meetings related to the health or disability of a child, or care for a sick family member;
  - Would also allow employees recovering from or seeking assistance related to an incident of domestic violence, stalking, or sexual assault to use their paid leave allotment.

What to Expect: Proposed Leave Laws

- Family and Medical Insurance Leave Act (FAMILY Act)
  - Proposed in February 2019 by Representative DeLauro and Senator Kirsten Gillibrand (D-N.Y.)
  - Would create a national insurance fund to provide 12 weeks of paid family and medical leave to workers for pregnancies, the birth or adoption of a child, to recover from a serious illness, or to care for a seriously ill family member.
  - Would be funded by both employers and employees.
  - If passed, the benefits would be completely portable and not tied to any single employer.

What to Expect: Proposed Leave Laws

- Child Rearing and Development Leave Empowerment (CRADLE) Act
  - On March 12, 2019 Senator Joni Ernst (R-Iowa) and Senator Mike Lee (R-Utah) championed legislation which would enable new parents to receive up to three months of paid parental leave in exchange for agreeing to postpone access to Social Security Benefits for a certain period of time in order to fund the benefit.
  - Workers would need to have worked either four out of the previous four quarters, five out of the previous six quarters, or at least 20 total quarters before they request access to the benefits.
  - The level of benefits would be determined by Social Security's primary insurance amount to allow for more generous monthly benefits for those beneficiaries with lower income levels.

Confusion with the FMLA! What Else is New?

- On March 14, 2019 – in an opinion letter, the U.S. Department of Labor (DOL), Wage & Hour Division advanced the position that once an employer knows that a leave of absence qualifies under the Family and Medical Leave Act (FMLA), it must designate it as such, even if the employee wants to first exhaust paid-time-off benefits.
- This opinion conflicts with *Escriba v. Foster Poultry Farms Inc., (9th Cir. Court of Appeals* 2014), which held that an employee may decline to designate time off as FMLA leave, even if the reason for the leave qualifies for such job-protected time off.

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Questions?

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