Littler Survey Reveals Employers Caught in a Tangled Web of Federal, State and Local Laws

The Littler law firm has released the results of its sixth annual survey, completed by 1,229 in-house counsel, human resources professionals and C-suite executives. The Littler Annual Employer Survey, 2017 reveals that the change occurring in Washington, D.C., and in local governments – combined with technological advances and shifts in how work is performed – is creating an unprecedented level of uncertainty in the workplace.

A release from the firm continues:

A Complex Patchwork of State and Local Laws, Deep Uncertainty at Federal Level

The vast majority of employers expect the Trump administration to prioritize reforming healthcare and employee benefits law (89 percent) and immigration policies (85 percent) in 2017. However, for most regulatory issues, the percentage of respondents who anticipate an impact on their workplace over the next year remains relatively unchanged from last year's survey. That includes the Affordable Care Act (85 percent in 2016 to 83 percent in 2017) and enforcement by the Equal Employment Opportunity Commission (78 percent to 76 percent), National Labor Relations Board (56 percent to 55 percent) and Department of Labor (82 percent to 81 percent). Immigration reform was the exception as 63 percent said they expect an impact in 2017, up from 40 percent in 2016.

“With the profound changes in Washington, D.C., it may be initially surprising that respondents do not anticipate more of a near-term impact on their businesses,” said Michael Lotito, co-chair of Littler’s Workplace Policy Institute. “However, given the general climate of uncertainty and delays in appointments to government agencies, employers likely expect it to take time before they start to see how the president’s agenda is carried out and personally feel an impact in their workplaces.”

The host of new or amended labor and employment requirements at the state and local levels is creating compliance challenges for the majority of respondents (79 percent). In an effort to keep up, employers are updating their policies, handbooks and HR procedures (85 percent); providing additional employee training (54 percent); and conducting internal audits (50 percent).

“As states and municipalities continue to propose and enact a dizzying array of rules and regulations, it is no wonder employers are struggling with the increasingly fragmented landscape,” said Lotito. “With the Trump administration working to reduce federal regulations, employers can expect a growing patchwork of employment regulations as states and municipalities look to fill a perceived void at the federal level.”

Of the array of changes at the state and local levels, respondents have been most impacted by paid leave mandates (59 percent), background check restrictions (48 percent) and minimum wage increases (47 percent).

Uncertainty Surrounding Healthcare Reform

Even though survey responses were collected before Republicans withdrew the American Health Care Act in late March, more than a quarter (27 percent) were already uncertain about the impact of repealing the ACA’s employer mandate. And another 28

percent said they did not anticipate an impact at all.

“Employers face even more questions about the future of the ACA, as well as the extent to which the administrative process can and will be used to change aspects of the law, than when they responded to our survey,” said Ilyse Schuman, co-chair of Littler’s Workplace Policy Institute. “In this environment, employers can continue to expect a certain level of uncertainty surrounding employer-sponsored health coverage in the months ahead.”

Only 4 percent of respondents anticipate dropping coverage for some full-time employees if they are relieved of the ACA’s employer mandate, but 18 percent said they would allow more employees to work more than 30 hours a week.

“The responses indicate that employers are committed to providing health insurance for their full-time employees,” said Steven Friedman, co-chair of Littler’s Employee Benefits Practice. “However, they also suggest that a repeal of the mandate would give employers more flexibility to set work schedules based on the needs of their businesses, without fear of triggering a requirement to provide health insurance.”

EEOC Expected to Prioritize Hiring Practices, LGBTQ Rights and Pay Equity

Hiring practices – including the consideration of criminal or credit histories in the hiring process and pre-employment testing or screening practices – was the area where most respondents (51 percent) expected an increase in EEOC workplace discrimination claims over the next year, closely followed by LGBTQ rights (46 percent) and equal pay (46 percent).

“The transitions in Washington, D.C., appear to have curtailed employers’ expectations for EEOC enforcement activity around LGBTQ rights and equal pay, which rose sharply in the 2016 survey, when 74 percent and 61 percent of respondents,

respectively, expected increased enforcement around those issues," said Barry Hartstein, co-chair of Littler's EEO & Diversity Practice. "Nonetheless employers continue to expect substantial enforcement over the next year as pay equity and discrimination based on sexual orientation remain priorities not only for the EEOC, but for the courts, state and local governments, the plaintiffs' bar and the general public."

FMLA Leave Presents Headaches

Among the employee requests that are most difficult to accommodate, leaves of absences under the Family and Medical Leave Act emerged as the presenting the greatest challenges. The majority of respondents indicated difficulty with managing intermittent FMLA leave (65 percent) and leaves that extend beyond FMLA requirements (55 percent), followed by remote or work-from-home arrangements (37 percent) and modified or reduced schedules (36 percent).

"Nothing is more disruptive to the operation of a business than unpredictability. When employees are repeatedly and unexpectedly off work, employers have to scramble to cover their responsibilities and manage potential resentment from employees who are inevitably asked to do more," said Hartstein. "The increasingly common practice of requesting flexible work arrangements is also creating a whole new layer of legal and practical challenges for employers."

Data Privacy and Breach Prevention Top of Mind

As the volume of data breaches originating with employees continues to grow, 63 percent of respondents said their HR and IT departments are collaborating on information security policies. Just over half (51 percent) said they were providing additional training to employees, and a smaller percentage said they were utilizing cyber-incident response plans (29 percent) and updating employee contracts to cover confidentiality obligations (23 percent).

“It is encouraging to see HR collaborating with IT to reduce the risk of data breaches that originate with employees. Information security policies prepared only by IT often focus on technical safeguards, whereas involving HR in the process helps to address the human elements of information security,” said Philip Gordon, co-chair of Littler’s Privacy and Background Checks Practice. “However, our results suggest that employers can take additional steps to guard against and prepare for employee-initiated data breaches, including ensuring all employees are trained on policies and know how to recognize and then report a security incident.”

Among respondents from large-cap organizations, the majority (56 percent) said global data privacy was a key area of concern in doing business outside of the U.S. “This concern likely stems from the significant restrictions on sharing personal data of employees in Europe and in the many countries that impose stricter rules than the U.S.,” noted Philip Berkowitz, U.S. co-chair of Littler’s International Employment Law Practice.

The survey results were released at Littler’s 34th annual Executive Employer Conference held May 10-12, 2017, in Phoenix, Arizona, and attended by many of the employers who completed the survey.

Click here for The Littler® Annual Employer Survey 2017 Report

Click here to view the survey infographic

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House Republicans Just Voted to Change Overtime Rules for Workers

Image by NY Photographic

The U.S. House of Representatives voted to pass a bill that Republicans have promoted since the Newt Gingrich era, one that would allow private-sector employees to exchange overtime pay for "compensatory time" off, electing to accrue extra hours off rather than extra pay in their wallets, ***The Washington Post*** reports. The bill passed 229 to 197, largely along party lines.

"Under the proposed changes, eligible employees – if their employer decides to offer the option – would be able to voluntarily choose to receive comp time they can bank and use at a future date in lieu of immediate overtime pay in their paychecks," reporter **Jena McGregor** explains. "If they change their minds and want the pay after all, employees would have the option of 'cashing out,' with the employer required to pay the overtime within 30 days.

Some opponents of the legislation say they worry that employers will feel pressured to choose comp time.

Read the *Washington Post* article.

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Restrictive Covenants Can Swing Both Ways: A 3-Step Plan To Avoiding Legal Risks When Onboarding New Employees

Employers have been using restrictive covenant agreements – contracts that contain non-compete, customer non-solicitation, employee non-solicitation, or non-disclosure of confidential information – with increasing frequency in recent times, writes **Michael Elkon** with **Fisher Phillips**.

"Increased media attention on the practice of forcing lower-level employees to sign non-compete covenants, combined with the widely publicized report on non-compete restrictions issued by the Obama White House in its waning days, has led to an increase in the number of reported cases. Further, several states are passing new laws or considering changes to existing laws on the subject," he explains.

He describes three basic steps a company can take to reduce

the chances of a lawsuit from a competitor, or at least put the company in a favorable position if litigation is threatened.

These include “Ask questions on the front end,” “Structure the job on the front end to ensure compliance,” and “Emphasize the importance of purging all former employer materials.”

Read the article.

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Ruling Against Acting NLRB GC Offers Opportunity for Employers

Employers who want to challenge their unfair labor practice complaints may want to delay their cases from being heard, if possible, until after November, recommends a labor lawyer, in light of a recent U.S. Supreme Court ruling that limits powers of acting presidential appointees.

Allen Smith, writing for the **Society for Human Resource Management**, explains implications of the ruling, which found that the acting National Labor Relations Board general counsel did not have the authority to continue in that role once the president nominated him to be confirmed by the Senate to be

general counsel.

That means that companies that have objected to the authority of Acting GC Lafe Solomon after he was nominated can challenge any unfair labor practice charge issued against them following his nomination January 2011, according to Phil Wilson, president and general counsel with the Labor Relations Institute in Broken Arrow, Okla.

Read the SHRM article.

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8th Circuit: No Contracting Out of WARN Act Obligations Where Sale of Business is 'Going Concern'

The 8th U.S. Circuit Court of Appeals issued an opinion reminding employers that they cannot contract out of the Worker Adjustment and Retraining Notification Act (WARN) obligations requiring employers to provide 60 days' written notice to employees of a plant closing or mass layoff, according to a post on the website of **Winston & Strawn LLP**.

In *Day v. Celadon Trucking Services, Inc.*, the circuit court held that the purchaser of a business, Celadon Trucking Services Inc., was responsible under the WARN Act for providing notice of a mass layoff to more than 400 employees, even though Celadon never hired or fired those employees, the

sales agreement characterized the transaction as a sale of assets, and stated that the seller, Continental Express Inc., was solely responsible for providing the WARN notices.

Steve Sheinfeld and **Jeffrey Salomon** wrote the article.

Read the article.

Houston Janitorial Service Wins $7.8 Million from Union Over Disparagement

A Harris County jury has delivered a $5.3 million verdict against the Service Employees International Union (SEIU) for wrongly disparaging Professional Janitorial Service of Houston when the company refused to recognize the union without a secret ballot by its employees. The judge added $2.5 million in prejudgement interest for a total of $7.8 million owed to the company.

According to a **post on the website** of **Zavitsanos, Anaipakos, Alavi & Mensing P.C.**, the law firm representing Professional Janitorial Service:

> The case was filed 10 years ago by Professional Janitorial based on claims that SEIU issued an onslaught of false statements to try to harm the company for refusing to give in to the union's demands. In the four-week trial, jurors heard evidence that SEIU officials systematically lied about

the janitorial service to its customers and caused the company to lose millions of dollars in business. The evidence showed union members rejoiced and took credit for causing the janitorial business to lose some of its customers.

Attorneys **Nathan Campbell**, **Adam Milasincic** and firm co-founder **John Zavitsanos** of Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing P.C., or AZA, represented Professional Janitorial. Mr. Zavitsanos told the jury that SEIU is "an evil, evil organization that used an intimidating campaign of extortion to try to run the janitorial service out of business."

See a video on AZA's website.

On-Demand: Managing Workplace Harassment: Trends and Objectives in 2017

Navex Global and Bloomberg have posted an **on-demand webinar** discussing discuss discrimination regulations applicable to the workplace, from what constitutes discrimination to what limits employers can put on the words and actions of employees.

The 60-minute webinar is available free of charge.

“After the 2016 election, multiple studies have noted an increase in workplace harassment, through discrimination remarks and actions, from both sides of the campaign,” Navex says on its website. “This has resulted in divisive and sometimes hostile work environments. HR, Compliance and Ethics officers must take action to create a welcome environment that is harassment-free.”

The video covers strategies for developing policies and plans for training departments and employees to minimize and manage workplace harassment, and understand when disciplinary actions should – or must – be taken.

Educational Objectives:
Program participants will learn:
• What actions constitute discrimination in the workplace, including sexism, racism, and homophobia;
• Limits on how employers can approach and manage workplace harassment;
• Strategies for developing training plans for leaders as well as employees to minimize and avoid workplace harassment;
• What types of disciplinary measures might be taken by employers.

Who would benefit most from attending this program?
Human Resources leaders; compliance officers; ethics officers; anyone responsible for employee training within their organizations.

Watch the on-demand webinar.

Gorsuch Often Sided With Employers in Workers' Rights Cases

Worker's rights opinions written by Judge Neil Gorsuch, President Donald Trump's pick for the Supreme Court, are often sympathetic but coldly pragmatic, and they're usually in the employer's favor, according to a review conducted by the **Associated Press**.

"A review of dozens of employment cases he heard in his decade on the U.S. 10th Circuit Court of Appeals reveals a focus on texts and a fondness for scrutinizing definitions of words in legislation and the Constitution. Conservatives herald his strict approach. Many liberals say it too often results in workers losing out," write AP reporters Denise Lavoie and Michael Tarm.

The federal appeals court judge has sided with employers 21 out of 23 times in disputes over the U.S. pensions and benefits law, the Employee Retirement Income Security Act, or ERISA. He sided with the majorty in all 21 cases.

Read the AP article.

Investigating Discrimination Complaints: Some Special Considerations

Although there should certainly be some consistency in the pursuit of any workplace investigation, the investigation of discrimination complaints requires sensitivity to some special considerations that will not always apply to other complaints, according to **an article** published by **Lynch Service Company**.

The articleoutlines some of those considerations and encourages the reader to become knowledgeable of the unique challenges that discrimination investigations present.

Three common legal theories may apply to a workplace complaint: (1) disparate treatment, (2) disparate impact, and (3) hostile work environment. The article also explains the importance of understanding how a discrimination lawsuit unfolds, investigating properly, and, after concluding the investigation, re-evaluating the evidence in light of the guiding legal theory.

Read the article.

Disparate Treatment and Disparate Impact Are Tests for Discrimination

Disparate treatment and disparate impact are two very different types of employment discrimination that use two very different tests to determine if illegal discrimination has occurred and if an employer may be liable for such discriminatory conduct, according to an article published by Lynch Service Company. Having a better understanding of these terms and the potential liability they may impose on a business can help HR professionals and CEOs prevent expensive litigation.

The article covers anti-discrimination laws, disparate treatment, legal test for disparate treatment, disparate impact, and the legal test for disparate impact.

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Read the article.

Last-Minute Block of Overtime

Rule Means Uncertain Future for Many Businesses

Image by NY Photographic

Many employers received a last-minute reprieve from new federal overtime rules that would have gone into effect Thursday, Dec. 1, entitling thousands of previously "exempt" workers to overtime pay. But the Texas federal judge's temporary injunction creates uncertainty for businesses preparing for the employment compliance playing field going forward, according to a post on the website of **Androvett Legal Media & Marketing**.

In a **client alert**, employment attorney **Audrey Mross** of Dallas' **Munck Wilson Mandala** notes that many employers had already revised workers' pay to comply with the Department of Labor's overtime rule. Businesses that have not yet implemented changes now have breathing room to wait for a final ruling from the courts. However, those that have already altered employee pay should think carefully before reversing already announced pay changes.

"If a pay increase was already announced or implemented, and you are considering putting it on hold, there are further considerations that may not apply such as employee relations, an angry or confused employee seeking legal counsel, state laws requiring written notice prior to reducing pay, and

collective bargaining on pay issues," Mross says.

Read the Munck Wilson client alert.

Employers: Don't Make Promises You Can't Keep

Laura Bartlow of **Zelle LLP** writes in a **post on JDSupra** that the very first item on her list of rules for employers is this: Don't make promises to your employees that you can't or won't keep.

"Employers' promises include those set out in employment contracts, of course, but there are others promises made by employers that can create legal liability and that are worth regular attention," she explains. "And it works both ways – employees, related businesses, and vendors may also be obligated by the agreements that they have made with you."

She discusses some of the most important points to consider, including: obligations in written employment contracts' obligations in written policies and handbooks; obligations of employees, related organizations, and vendors; and obligations created by government contracts.

Read the article.

NLRB Administrative Judge Finds Employee Facebook Post Was Protected Speech

A recent decision by the National Labor Relations Board attempts to define further the boundaries of protected speech under the National Labor Relations Act, reports Seyfarth Shaw in its **Employment Law Lookout** blog.

Writers **Erin Dougherty Foley** and **Craig B. Simonsen** explain that the initial question in *Laborers' International Union of North America and Mantell* was whether the union restrained or coerced Frank Mantell in the exercise of a Section 7 right. The union member posted comments on a Facebook page that criticized the Union for allowing a Niagara Falls city councilman, running for mayor, to obtain a journeyman's book.

The union tried Mantell and fined him $5,000, as well as suspending his membership for 24 months. After an appeal, the International Union directed the local to dismiss charges against Mantell.

An NLRB Administrative Law Judge found that Mantell's Facebook posts were protected under the National Labor Relations Act.

Read the article.

Littler Adds Two Shareholders to Kansas City Office

Littler, which bills itself as the world's largest employment and labor law practice representing management, has added Jeffrey D. Hanslick and Curtis R. Summers as shareholders in the Kansas City office. The addition of Hanslick and Summers, who were previously partners with Husch Blackwell, follows the arrival of shareholder Anthony Romano who made the move to Littler's Kansas City office in August.

"Jeffrey and Curt have developed a strong reputation locally and nationally for advising clients on critical issues impacting the workplace, including discrimination and harassment claims and wage and hour litigation," said Daniel B. Boatright, office managing shareholder of Littler's Kansas City office. "Their extensive industry knowledge and diverse experiences will enhance our services to clients and expand our presence in the region. We are excited to welcome them to the firm."

The firm's release continues:

> Hanslick has extensive experience defending clients in employment litigation matters, including wage and hour class and collective actions, employment discrimination and harassment claims, and contract and commercial disputes. He regularly serves as lead counsel in traditional labor arbitrations, counsels employers on the protection of trade

secrets and enforcement of restrictive covenants, and conducts human resources audits and training sessions for clients on labor and employment matters.

Summers balances his practice between litigation and human resources counseling. On the litigation side, he has defended employers at the administrative agency, trial court and appellate court levels against a variety of discrimination, harassment and retaliation claims. Summers also has experience pursuing claims for violations of restrictive covenants. On the counseling side, Summers focuses his practice on human resources compliance and litigation avoidance strategies, including policy development, training, workplace investigations, and guidance on best practices in the employer-employee relationship.

“Littler has an exceptional reputation and we are excited to join its growing Kansas City office,” said Hanslick and Summers in a joint statement. “We look forward to leveraging the firm’s innovative products and services, geographic reach and network of talented attorneys to expand our offerings to clients.”

Hanslick earned his J.D., cum laude, from Northwestern University School of Law and his B.A., with highest honor, from DePaul University. Summers earned his J.D. from the University of Kansas School of Law and his B.S. from Kansas State University.

Newly Organized Employer Must Bargain Discretionary Employee Discipline Pre-First Contract

Jackson Lewis reports that, prior to entering into a first contract, an employer has a statutory obligation to bargain with the union that represents its employees before imposing discretionary "serious discipline" (such as suspension, demotion, or discharge) on any of those employees, the National Labor Relations Board again has held.

In its ruling in Total *Security Management Illinois 1, LLC*, 364 NLRB No. 106, the board found that discretionary discipline, like pay rates and benefits, is a term and condition of employment, and, thus, a mandatory subject of bargaining. The board also held bargaining is required about less serious degrees of discipline, such as oral or written warnings, but may occur after the discipline is imposed, write **Philip B. Rosen** and **Howard M. Bloom**.

"Despite this decision, employers and unions in the midst of first contract bargaining may continue to agree on the employer's unilateral right to impose discipline or on a procedure for bargaining over discipline that is less cumbersome than that imposed by the Board," they conclude.

Read the article.

Webinar: How to Comply with New FLSA Requirements

NAVEX Global will webcast a **free webinar** outlining updates to FLSA requirements, presented by Scott M. Nelson, a national labor and employment law authority from Baker & McKenzie, on Thursday, Sept. 22. The hour-long webinar will begin at 10 a.m. PDT (1 p.m. EDT).

New Fair Labor Standards Act (FLSA) regulations will go into effect on Dec. 2, updating the salary and compensation levels for exempt employees, impacting millions of salaried workers.

Wage and hour cases represent the most significant exposure to employers under workplace laws, NAVEX Global says on its website. This webinar will explain responsibilities and options for complying with the FLSA's overtime provisions.

Register for the webinar.

U.S. Appeals Court Strikes

Down Ernst & Young Class Action Waiver

Ernst & Young LLP cannot require its employees to give up their rights to pursue work-related claims together, a federal appeals court has ruled, giving a major boost to the U.S. National Labor Relations Board's campaign against so-called class action waivers, **reports Reuters**.

"Companies have increasingly included provisions in employment contracts forcing workers to arbitrate claims individually as a way to avoid the cost of litigating class actions," writes **Robert Iafolla**. "The NLRB has struck down such requirements imposed by dozens of companies, including American Express Co, Citigroup Inc and Domino's Pizza Inc."

The court found that the arbitration agreement violated the National Labor Relations Act by making workers arbitrate work-related claims as individuals in separate proceedings.

Read the article.

Peter Asaad Joins Quarles & Brady's Labor & Employment

Practice Group

Quarles & Brady LLP announced that **Peter F. Asaad** has joined the firm's Washington, D.C. office, concentrating on immigration in its Labor & Employment Practice Group.

Asaad focuses on representing corporate clients and individuals on all business-related and employment-based visa matters. He represents U.S. companies and multinational corporations in helping manage their employees' employment eligibility needs and develop effective streamlined immigration and compliance programs. He also specializes in the needs of immigrant entrepreneurs, start-ups, and foreign investors in creating U.S. subsidiaries and affiliates as well as new U.S. businesses. He has additional expertise in advising individuals with employment and family-based immigration, asylum, deportation, and other immigration matters.

He received his law degree, cum laude, from the American University, Washington College of Law and his bachelor's degree, cum laude, from the University of Rochester.

Labor & Employment Partner

Frederick Schwartz Joins Barnes & Thornburg

Barnes & Thornburg has added partner Fred Schwartz to its Chicago office as a member of the Labor & Employment Department. Schwartz joins from Littler Mendelson, where he was a founding member of the Chicago office and once served as managing shareholder.

Schwartz is the seventh partner and 12th attorney overall to join the firm's Chicago office this year, the firm announced.

Schwartz concentrates his practice on labor and management relations and regularly handles proceedings before the National Labor Relations Board, including representation elections and unfair labor practice charges, as well as collective bargaining and arbitrations. On the other side of the coin, he regularly counsels employers that wish to maintain a union free workplace, and is engaged to perform workplace audits and training for members of management.

Schwartz counts among his clients many leading manufacturers, wholesalers, retailers, healthcare providers, and construction and transportation companies, for whom he conducts management and union avoidance training and provides compliance counsel.

"When it comes to the most complex matters facing employers, Fred is among the best and is a relentless advocate on behalf of his clients," said Mark Rust, managing partner of Barnes & Thornburg's Chicago office. "He joins the firm's deep bench of labor and employment practitioners and is the latest example of our significant growth trajectory in Chicago."

He received his J.D., cum laude, from the University of Minnesota Law School and his B.S. from Cornell University's School of Industrial and Labor Relations. He is admitted to

practice in the state of Illinois and before the U.S. Supreme Court, the U.S. Court of Appeals for the Fourth, Sixth and Seventh Circuits, and the U.S. District Courts for the Northern District of Illinois and the Eastern District of Wisconsin.

Unions, Ledbetter Warn of Supreme Court Implications of Election

Image by Gage Skidmore

Donald Trump's power to nominate Supreme Court justices if elected to the White House is a threat to women workers, equal pay advocate Lilly Ledbetter and two union officials said, according to a **report by Bloomberg Law**.

Ledbetter was a former Goodyear tire plant supervisor who sued her employer after she discovered she was making less than her male colleagues after 20 years on the job. She lost that pay discrimination case at the Supreme Court in 2007. Congress responded by passing the Lilly Ledbetter Fair Pay Act to allow more time for claimants in federal pay bias claims.

“Ivanka Trump said during the Republican Convention that her father would likely look at the the pay bias issue,” reports Bloomberg’s Chris Opfer. “The AFL-CIO’s Shuler blasted the GOP nominee, however, for later saying on the campaign trial that he would expect his daughter to leave her job if she was being discriminated against.”

Read the article.