Littler Survey: Employers Reeling from Regulatory Shifts, New Forces Impacting Workplace

Employment and labor law firm **Littler** has released the results of its seventh annual survey, completed by 1,111 in-house counsel, human resources professionals and C-suite executives. The Littler Annual Employer Survey, 2018 analyzes the impact that sweeping regulatory changes and other factors, including the #MeToo movement, are having on employers.

The firm summarized its findings:

Following a year that brought several changes to workplace policy, the survey shows employers feeling some regulatory relief with the change in administration, while cautiously anticipating less of an impact from key regulatory issues over the next year. The portion of respondents expecting a significant impact from the Affordable Care Act dropped from 33 percent in the 2017 survey to 15 percent in 2018, with similar drops in significant concern around enforcement by the U.S. Department of Labor (25 percent to 16 percent) and the National Labor Relations Board (13 percent to 8 percent).

At the same time, employers feel buffeted by the burdens created by abrupt and dramatic regulatory changes, slow-moving confirmations to key government agency positions and the growing patchwork of state and local labor and employment requirements. The majority of respondents (64 percent) said that reversals of workplace policies and regulations between presidential administrations put a strain on their businesses

and 75 percent said they faced challenges as states and localities work to fill perceived policy vacuums at the federal level.

“Companies want certainty more than anything,” said Michael Lotito, co-chair of Littler’s Workplace Policy Institute. “The vast majority of employers want to comply with the law and the continuous reversals of federal workplace policy, as well as the increasingly fragmented and sometimes contradictory rules at the state and local level, is an enormous distraction for them. Uncertainty means inability to plan, budget and anticipate, and it requires constantly retraining employees and reformulating employment policies.”

Of the changes that occurred during the first year of the Trump administration, respondents identified the rollback of wage-and-hour policies (62 percent) and the new tax bill (62 percent) as the areas that have most significantly impacted their businesses.

Immigration Reform Focuses on Visas and Enforcement

Amid tightening regulation and enforcement of both legal and illegal immigration, employers expect a range of immigration-related changes to significantly impact their workplaces over the next year.

Tighter restrictions on visa adjudications, such as those for employees with specialized skills and temporary workers, was the top concern selected by 48 percent of respondents. More than a third (36 percent) expressed concern with increased workplace immigration enforcement by U.S. Immigration and Customs Enforcement and associated agencies.

“It’s not surprising that the visa process and immigration enforcement emerged as employers’ top concerns,” said Jorge Lopez, chair of Littler’s Global Mobility and Immigration Practice Group. “The increased scrutiny being applied to employment visas and rule changes impacting visa programs,

which often come mid-stream and without prior warning, make it difficult for employers to plan ahead and manage their workforces. In addition, the increase in worksite enforcement and raids have naturally heightened employers' focus on worksite compliance issues and properly addressing those concerns."

Continued Workplace Discrimination Enforcement Expected Amid Focus on Harassment

The survey showed virtually no change in the impact employers anticipate from enforcement by the Equal Employment Opportunity Commission (EEOC) over the next year, with 76 percent anticipating an impact in the 2017 survey and 77 percent in 2018. This aligns with a key finding from Littler's Annual Report on EEOC Developments – that the Commission actually filed more lawsuits in fiscal year 2017 than it has since 2011.

Employers surveyed expect the EEOC's top enforcement priorities in the near-term to be harassment claims (64 percent), hiring practices (53 percent) and retaliation against employees who file discrimination or harassment claims (48 percent).

"Employers are right to expect the EEOC to continue to vigorously investigate workplace discrimination claims, particularly harassment claims and other EEOC priorities, regardless of upcoming changes at the Commission with an expected new chair, commissioner and general counsel," said Barry Hartstein, co-chair of Littler's EEO & Diversity Practice Group. "With the #MeToo movement and the EEOC's focus on stemming the tide of harassment in the workplace, taking steps to minimize the risk of harassment claims should be a top priority for employers. We also should expect an active plaintiffs' bar threatening and initiating private lawsuits during the coming year based on these developments."

Sexual Harassment and Pay Equity Rank as Top Concerns for Employers

Among the many headline-grabbing issues swirling through the workplace, the majority of survey respondents (66 percent) ranked sexual harassment as the most or second-most concerning issue on their radar.

In the wake of the cultural shift sparked by the #MeToo movement, 55 percent of respondents have added training for supervisors and employees, and 38 percent have updated human resource policies or handbooks. However, only 13 percent have implemented new tools or investigation procedures to manage employee complaints and 24 percent have not made any changes over the past year.

“No company can afford to ignore this issue, and while many already have a good foundation, the past several months have shown the importance of reevaluating and reinforcing policies and procedures,” said Helene Wasserman, co-chair of Littler’s Litigation and Trials Practice Group. “While the law governing harassment in the workplace hasn’t changed much, employee expectations have. In addition to providing training and updating policies, it’s critical that companies have effective complaint procedures in place and that employees feel confident that reports of potential misconduct will be taken seriously and acted upon.”

Gender pay equity followed sexual harassment as the second-most concerning issue in the headlines for employers, with 41 percent placing it among their top two concerns. Companies reported taking action as a result, including conducting audits of current pay practices and salary data (61 percent) and revising hiring practices, such as updating job applications and ceasing the practice of asking candidates about prior salaries (34 percent). However, only 14 percent have modified compensation policies or taken steps to facilitate advancement of female and minority employees.

“Conducting audits is a critical first step to identifying pay disparities among employees, but with continued attention to this issue and an evolving legal landscape, an audit is just the beginning of addressing pay equity in the workplace,” said Denise Visconti, a shareholder heading the Littler Pay Equity Assessment. “As time goes on, pay disparities only become more intractable, so proactively addressing this issue helps companies mitigate risk and reinforce their commitments to treating employees equally and fairly.”

Employers Start to Embrace Data Analytics and Artificial Intelligence

Recruiting and hiring is the most common use of advanced data analytics and artificial intelligence, adopted by 49 percent of survey respondents. Employers also said they were using big data to guide HR strategy and employee management decisions (31 percent), analyze workplace policies (24 percent) and automate tasks previously performed by humans (22 percent). The smallest group of participants (5 percent) are using advanced analytics to guide litigation strategy.

“It is encouraging to see employers starting to embrace the many benefits provided by big data in helping manage their most important asset, their people,” said Aaron Crews, Littler’s Chief Data Analytics Officer. “However, it appears that many employers are not aware of the significant potential to use advanced data techniques to guide litigation strategy. The ability to leverage data early in a case, to tease out insights before you ever take a deposition or begin evaluating the credibility of witnesses, is revolutionary.”

The survey results are being released at Littler’s 35th annual Executive Employer Conference taking place May 2-4, 2018, in Phoenix, Arizona.

Federal Court Dismisses Non-Compete Claim Based on Facially Overbroad Activity Restraint

A federal district judge in Chicago has dismissed a non-compete case—at the pleading stage—finding that the non-competition covenant at issue was overbroad, as a matter of law, according to **Winston & Strawn**.

The firm's post says that the judge ruled because the covenant restricted the employee from taking any position with another company that engaged in the same business as the employer, without regard to whether that position was similar to a position the employee held with the employer, or was otherwise competitive with the employer.

The case is *Medix Staffing Solutions, Inc. v. Dumrauf.*

Read the article.

Collective Bargaining Agreements Must be Interpreted According to 'Ordinary Principles of Contract Law'

The U.S. Supreme Court has emphatically reaffirmed the requirement that collective bargaining agreements must be interpreted according to "ordinary principles of contract law" when deciding whether retired employees are entitled to health care benefits, according to a post by **Foster Swift Collins & Smith PC**.

Richard C. Kraus and Mindi M. Johnson discuss *CNH Industrial N.V. v. Reese*.

"The case involved a dispute over union retiree health benefits. In 1998, CNH entered into a CBA which provided group health care benefits to certain employees set to retire under the company's pension plan. After the CBA expired, a class of CNH retirees and surviving spouses initiated a lawsuit in federal court asking for declaratory judgment that they were entitled to health care benefits for life and seeking to enjoin CNH from modifying those benefits."

Read the article.

Ruling on Union Pensions Could Affect Hundreds of Companies

The Washington Post **reports** that the U.S. Court of Appeals for the Fourth Circuit ruled that Just Born Quality Confections, the firm that makes the candy known as Peeps, could not unilaterally stop enrolling new employees in a pension without paying a penalty, something it had tried to do since 2015.

Reporter **Damien Paletta** explains possible consequences: "The appeals court decision could have a major effect on hundreds of other companies that are trying to determine whether to continue making payments to their own multi-employer pension plans. A number of multi-employer plans have weak balance sheets, exacerbated by a wave of aging workers and new retirees. This dynamic has forced some firms to pay higher premiums to their pensions in an effort to boost solvency."

The case arose when Just Born announced three years ago that it would no longer enroll new employees in the multi-employer pension it had participated in for decades and would instead divert money into a 401(k) plan for those workers.

Read the *Post* article.

Trump Labor Board Member Forgot About Conflict of Interest, Watchdog Says

National Labor Relations Board member William Emanuel violated a White House ethics pledge by participating in a closely watched case involving his former law firm, the NLRB's inspector general concluded in a report obtained by **Bloomberg Law**.

Bloomberg reporters **Chris Opfer** and **Hassan A. Kanu** write that Emanuel told Inspector General David Berry that he didn't realize former firm Littler Mendelson represented a business in the seminal Browning-Ferris Industries case, although he previously flagged the litigation for lawmakers as one that he might need to sit out, according to Berry's report. Emanuel then joined the rest of the five-member board in directing its top attorney to ask an appeals court to drop the case.

They report that Berry said the inconsistency in Emanuel's statements to Congress and the IG "is not sufficient to show that" Emanuel "intentionally lied."

Read the Bloomberg article.

Former Jones Day Attorney Tapped For Position at the EEOC

The Trump administration has nominated Sharon Fast Gustafson to fill the vacant position of general counsel of the Equal Employment Opportunity Commission.

Above the Law **reports** that Gustafson spent four years at Jones Day before becoming a solo practitioner in 1995.

The GC's position at the EEOC has been vacant since December of 2016.

"The top litigator position has broad discretion in deciding what Title VII cases to pursue, and, as such, will take the lead in determining the Trump administration's stance on such hot button issues as sexual harassment and the gender pay gap," writes Above the Law editor **Kathryn Rubino**.

Read the Above the Law article.

Trump Labor Board Scrambles to Avoid Pro-Worker Ruling,

Lawyers Claim

Image by Annette Bernhardt

Bloomberg **is reporting** that the National Labor Relations Board is ignoring its own guidelines and rushing to settle a major workplace action involving McDonald's Corp., lawyers for employees involved in the litigation alleged.

Reporter **Josh Eidelson** writes that, if the workers win at trial, the case could have a profound effect on how major corporations are held liable for workplace wrongdoing.

A trial on the matter was set to resume this week.

"Faced with a potential landmark decision in favor of franchise employees, NLRB lawyers have secured a deal with McDonald's Corp. and are now racing to settle employee claims by Monday, attorneys for the workers contend," Eidelson writes. "In doing so, the lawyers claim NLRB officials are wrongfully circumventing them and going straight to the workers with take-it-or-leave-it offers."

Read the Bloomberg article.

Workplace Monitoring Gets Personal, and Employees Fear It’s Too Close for Comfort. They’re Right.

Companies are increasingly tapping into new technology designed to keep a close eye on employees. This monitoring goes beyond traditional security cameras to include portable devices worn by workers, reports the ***Chicago Tribune***.

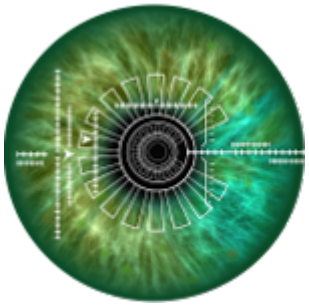
Reporter **Robert Reed** writes that some employers are getting really high-tech with following their workers, such as using time clocks that can an employee’s fingerprint, retina or iris.

“Some workers are ticked off about it and fighting back. Up to 30 class-action lawsuits were filed by late 2017 accusing companies of violating the Illinois Biometric Information Privacy Act, which governs how such sensitive information is collected and used,” according to Reed.

Reed also raises the possibility that employers could even provide Fitbits or another portable health monitor as part of a corporate wellness program. “Can the personal data gleaned be used to alter, or deny, access to employer-provided insurance plans?,” he asks.

Read the *Tribune* article.

Collection of Employee Biometric Data: Privacy and Compliance Issues



Businesses are increasingly using biometric data (i.e., measurements of a person's physical being) for a variety of identification purposes, such as to provide security for the financial transactions of their customers and for the tracking of work hours of their employees, points out the Fisher Phillips **Employment Privacy Blog**.

Partner Jeffrey Dretler discusses the privacy concerns for employees and the compliance issues for employers related to collection of biometric data.

He suggests that employers should establish safe practices and be on the lookout for new developments. And he concludes with five suggested steps employers should take to be in compliance.

Read the article.

Morgan Lewis Scolded for Possible Conflict in Hotel Wage Case

A U.S. district judge in California concluded that Morgan Lewis "plainly violated" California attorney professional conduct rules by representing "both sides of the case" in a hotel workers' class action suit, **Bloomberg Law reports**.

Sheraton workers in San Francisco won class action status for their claim that their employer created a culture that encouraged staff to work through breaks without pay.

Reporter **Jon Steingart** writes that Judge William Alsup criticized the way lawyers from Morgan, Lewis & Bockius LLP obtained statements from three former employees that were used to argue against certification of the class. The same lawyers also represented the former workers in depositions conducted later.

A Morgan Lewis lawyer responded to a show cause order with an apology and a pledge that the firm wouldn't repeat the conduct in any court.

Read the Bloomberg Law article.

Tackett Redux: Ordinary Principles of Contract Interpretation Mean No Inference of Vesting

The U.S. Supreme Court recently reaffirmed that collective bargaining agreements (CBAs) must be interpreted according to "ordinary principles of contract law," according to **a post** in the Proskauer Rose Employee Benefits & Executive Compensation Blog.

The ruling again rejected the Sixth Circuit's inference from silence that CBAs vested retiree benefits for life.

Three years ago, the Supreme Court held in *M&G Polymers USA, LLC v. Tackett* that CBAs must be interpreted according to ordinary principles of contract law, and the court rejected the Sixth Circuit's so-called "*Yard-Man*" inference that if a CBA did not specify that retiree medical and other welfare benefits had a limited duration, the benefits were presumed to be vested.

The article's authors explain: "The Supreme Court unanimously reversed the Sixth Circuit, holding that the Sixth Circuit's inference of vesting could not be squared with *Tackett* because it did not comply with *Tackett's* direction to apply ordinary contract principles."

Read the article.

Conflict of Interest Causes NLRB to Vacate Pro-Corporation Ruling

The National Labor Relations Board threw out its most important ruling of 2017 – a 3-2 victory for major U.S. corporations – following an internal agency report that found that a potential conflict-of-interest had tainted the vote, reports Bloomberg, via the ***Chicago Tribune***.

Bloomberg reporter explains that the discarded ruling, called *Hy-Brand*, had reversed a controversial Obama-era "joint employer" decision empowering workers to pursue claims against, or seek collective bargaining with, major corporations that don't sign their paychecks, such as franchisors or clients of contractors.

"The vote overturning that 2015 case included support from Trump-appointed William Emanuel, whose former law firm had represented one of the companies in the original case, Browning-Ferris," Eidelson reports.

Read the *Tribune* article.

For the Third Time, Supreme Court to Hear Mandatory Union Dues Arguments

Next week the Supreme Court will hear oral argument on whether to reverse a 41-year-old ruling that allows states to require government employees to pay union dues even though they don't want to be union members.

"It's a familiar question for eight of the nine justices, who have already heard oral argument on the issue twice," writes **Amy Howe** in **SCOTUSblog**. "The court did not resolve the issue the first time; the second time, in the wake of the death of Justice Antonin Scalia, they deadlocked. This means that the outcome in [petitioner Mark] Janus' case could hinge on the vote of the court's newest justice, Neil Gorsuch."

The case, appealed by Janus, an employee of the state of Illinois, comes after the U.S. Court of Appeals for the 7th Circuit rejected his argument that the agency fee violated his rights under the First Amendment.

Read the SCOTUSblog article.

Attempting to Insert New Term into Collective Bargaining Agreement Not Agreed to in Negotiations Violates the Law

A case heard by the National Labor Relations Board discusses the law concerning the legal duty to reduce a collective bargaining agreement to writing, and then sign it, according to **a post** on the Proskauer Labor Relations Update.

Partner **Mark Theodore** explains:

"Among other things, a signed agreement serves as an absolute bar to employees filing a decertification petition during the term of the agreement (with some timing limitations), while an unsigned agreement does not bar such a petition. A signed agreement also, obviously, is more easily enforced as it signifies to the entire world that this is the deal, and that the parties signed it after evaluation of its terms."

Read the article.

Hunton & Williams Adds Team to National Labor and Employment Practice

Hunton & Williams LLP announces the expansion of its national labor and employment practice with the addition of partners Michele J. Beilke and Julia Y. Trankiem and two associates in Los Angeles.

“As employment laws become increasingly complex, we are focused on growing the capabilities of our national practice, especially in geographic regions that are important to our clients,” said Emily Burkhardt Vicente, co-chair of Hunton & Williams’ labor and employment group and a partner in the Los Angeles office. “Michele and Julia are exceptional lawyers who bring a wealth of experience to our already robust employment practices in Los Angeles and San Francisco. Their team’s strong commitment to client service mirrors our own, and we are excited to have them join our team in California.”

Rafael Tumanyan and Sonya Goodwin are also joining the firm as associates in the Los Angeles office. All four came to the firm from Reed Smith LLP.

Beilke has nearly two decades of experience representing employers in California. Her practice focuses on the defense of state and national wage and hour class and collective actions, and single- and multi-plaintiff discrimination and harassment claims. She also counsels and trains employers on a wide range of employment law issues, including compliance with state and federal leave laws, accommodation requirements for workers with disabilities, sexual harassment prevention and managing reductions in force. Beilke has successfully tried numerous cases to verdict in both state and federal court and in arbitration. Beilke received both her undergraduate and law

degrees from the University of Southern California.

“Our experience is a perfect match for Hunton’s practice and growing footprint in Los Angeles and the San Francisco Bay area,” Beilke said. “We have all spent our careers in California litigating many of the same types of cases Hunton’s practice is known for, so we are thrilled to be part of the team here with a national platform,” Trankiem added.

Trankiem has represented employers in class, collective, representative and hybrid actions brought under the Fair Labor Standards Act and state wage and hour laws. She also has defended employers in countless single- and multi-plaintiff discrimination, harassment and retaliation claims. Trankiem advises and counsels her clients regarding every facet of the employment relationship. She is active in local and national organizations, including the California Minority Counsel Program and the National Employment Law Council. She received her undergraduate degree from University of California, Los Angeles, and her law degree from University of Michigan Law School.

“Michele’s and Julia’s practices align with Hunton’s strengths in several leading industries, including financial services, retail and consumer products, and real estate development and finance,” said Ann Marie Mortimer, managing partner of the firm’s Los Angeles office and head of the energy and environmental litigation practice.

The firm’s national labor and employment practice has successfully litigated thousands of high-profile, high-risk matters in federal and state courts, hearings before federal and state law enforcement agencies, and mediations and arbitrations. The lawyers in the group represent clients in nearly every form of traditional and emerging labor and employment disputes, concerning issues at the forefront of new employment class and collective litigation trends across the country.

Will the Supreme Court Deal a Blow to Trade Unions?

Of all the blockbuster cases at the Supreme Court this year, *Janus v American Federation of State, County and Municipal Employees (AFSCME)* is expected to hold the fewest surprises, according to ***The Economist***.

Janus, which is due to be argued on Feb. 26, asks whether public employees who choose not to join their designated union may nevertheless be charged "agency fees" to support collective bargaining. Non-members of a union may be required to subsidize contract negotiations over salary, benefits and working conditions. But those workers can't be charged fees for a union's political efforts, such as lobbying.

The Economist explains: "*Janus* is at bottom a bid to undermine America's labour movement. The case is not presented that way; it arrives at the Supreme Court in First Amendment wrapping by express invitation from Justice Samuel Alito in a pair of recent cases."

Read *The Economist*'s article.

Employer's Notice of Mandatory Arbitration Program May Be Insufficient to Compel Arbitration

A Sixth Circuit ruling in a recent case shows that an employer's notice of its institution of a mandatory arbitration policy or program is, without more, insufficient to compel an employee to arbitrate a subsequent dispute, writes **Gilbert Samberg** in Mintz Levin's **ADR: Advice From the Trenches** blog.

He explains that something more is required in order to be able to infer the employee's knowing assent to the new term of employment. The new "Employment Dispute Resolution Process" (EDRP) was promulgated after the plaintiffs had commenced employment.

Samberg writes that the appellate court "determined that the employer's failure to notify the employees expressly that 'they would accept the terms of the EDRP by continuing their employment' was a critical omission, and thereupon held that the employees had not manifested knowing assent merely by continuing to work at FCA."

Read the article.

Tech Start-Up Fires Engineers Amid Union Organizing Effort

Bloomberg **is reporting** that a group of Lanetix Inc. software engineers in San Francisco and Washington, D.C., were laid off for trying to join a union, according to organizers working with the group and a complaint obtained by Bloomberg Law.

"The move came less than two weeks after the workers filed a petition to join a CWA unit and days before a union election hearing scheduled for Jan 31," according to the report by Hassan A. Kanu and Josh Eidelson. "The workers said the company told them the layoffs were due to lackluster fourth quarter performance last year, Fiedler said."

A CWA executive director told the reporters the company said it was "looking at moving their engineering operations overseas."

Read the Bloomberg article.

Workplace Litigation Report: The Good and the Bad

Image by [Alpha Stock Images]

Employers can find good news and some bad news in Seyfarth Shaw's 14th Annual Workplace Class Action Litigation, which analyzes 1,408 rulings.

The firm has posted the **57-page report** on its website and has created a **microsite** that provides a brief overview of the survey's findings.

David Shadovitz of Human Resource Executive also has written **a summary** of the report.

Shadovitz offers the good news for employers from the report: "Legal precedents and new defense approaches resulted in better statistical outcomes for employers in opposing class-certification requests for the second straight year. For instance, in wage-and-hour litigation—one of the more active categories of employment law—employers won 63 percent of decertification rulings, a success rate of nearly 20 percent from the year before."

On the other side of the coin, he writes, the monetary value of the top workplace class-action settlements jumped more than $1 billion to a record high of $2.72 billion.

[Read the Seyfarth report](#).

New Labor Board GC's Restructuring Plan Worries Senior Officials

Senior officials with the National Labor Relations Board have expressed concern over a plan outlined by the board's new general counsel to demote the senior civil servants who resolve most labor cases, reports ***The New York Times***.

Peter B. Robb, the agency's general counsel and a Trump appointee, outlined the proposal this month in a conference call with the civil servants

"Under the proposal, those civil servants – considered by many conservatives and employers to be biased toward labor – would answer to a small cadre of officials installed above them in the National Labor Relations Board's hierarchy," explains **Noam Scheiber**.

The result could be result in a system friendlier to employers named in complaints of unfair labor practices or facing

unionization drives.

Read the *Times* article.