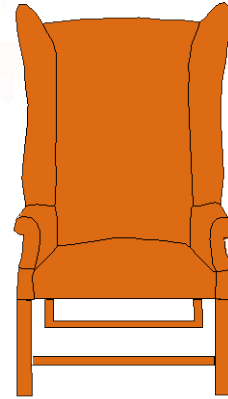
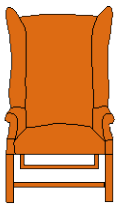


# FIRST CHAIR



UNITING LEGAL COMMUNITIES TO RECOGNIZE EXCELLENCE



# Wage & Hour: What We Are Monitoring

- Department of Labor (DOL) opinion letter activity
- Independent contractors and joint employers in the workplace
- Enforceability of class action waivers
- Equal pay laws
- Minimum wage hikes
- Paid leave laws

# The Trump Factor

- Impact of executive orders
- “Not your Father’s Republican Party”
  - Pro-business
  - Base includes union members/working class
- Recent developments leading to disbanding of task forces



## Department of Labor (DOL)

- Labor Secretary R. Alexander Acosta
  - Described as bright, thoughtful, consensus builder
- DOL short term:
  - Will take months to fill positions
  - Few changes expected in terms of enforcement activities
- DOL long term:
  - Not predicting massive “deregulation”
  - Business friendly but receptive to unions and employee advocacy groups
  - Field positions and wage and hour division career employees are not enamored with Trump and are likely to operate “business as usual”



# Impact of Mid-term Elections

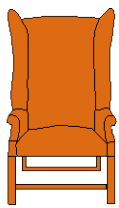
- In 2018: 33 Senators up for re-election
  - 8 are Republicans – 7 in red states
  - 25 are Democrats – many in states turned red in 2016
- Possible outcome at federal level
  - Deregulation and repeal of laws impacting workforce management
  - Will be cumbersome and slow process





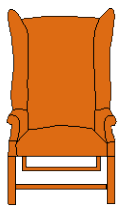
# DOL Resumes Issuing Opinion Letters

- In 2010, the DOL stopped issuing opinion letters and offered only administrative interpretations
- In June 2017, Secretary of Labor Alexander Acosta announced that the DOL will resume issuing opinion letters
- Welcome development for employers
  - Guidance on issues under the FLSA and the FMLA in response to fact-specific inquiries from employees and employers
  - Good faith reliance defense
- Wage and Hour Division webpage collects opinion letters and allows employees and employers to submit requests for new opinion letters



# Independent Contractor and Joint Employer Guidance Revoked

- In June 2017, the DOL withdrew two Obama-era Administrator Interpretations Letters
  - Administrator’s Interpretation No. 2015-1 suggested most workers should be classified as employees
  - Administrator’s Interpretation No. 2016-1 took an expansive approach to the entities that potentially could be held liable for wage and hour violations
- Both letters stressed “economic realities” of the time
- Signal that Trump Administration may take a much narrower view of what constitutes an employer-employee relationship
- Although the DOL stated that the withdrawal of the letters “does not change the legal responsibilities of employers”



# Class Action Waivers

- U.S. Supreme Court has granted consolidated review of three cases to determine the enforceability of class action waivers; will hear case next term
- Circuit split
  - Fifth and Eighth circuits upheld class action waivers
  - Seventh and Ninth circuits found class action waivers violate the NLRA
- U.S. Supreme Court has demonstrated favor towards arbitration
  - In a 5-4 majority, the Court held that any state law that “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . is preempted by the FAA. . . . [Arbitration agreements may not be invalidated by] defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)
- Judge Neil Gorsuch may cast the deciding vote





# State and Local Governments Fill Potential Gaps

- Some states will enforce/add protections the federal government rolls back
  - Equal pay laws
  - Minimum wage hikes
  - Paid leave laws
- Result: challenges posed by patchwork of laws



## Equal Pay Laws

- States are moving toward improving pay equality and enforcing equal pay laws
  - California Fair Pay Act: 1/1/2016
  - New York Achieves Pay Equality: 1/19/2016
  - Maryland Equal Pay for Equal Work Act: 10/1/2016
  - Massachusetts Equal Pay Act: effective 7/1/2018
- Variations in protected classes (sex only or sex and gender), comparison group, and permitted factors to explain pay differences



# Minimum Wage Hikes

- Federal minimum wage: \$7.25 per hour
- 29 states and District of Columbia have higher state minimum wage
- Minimum wage hikes have taken effect across cities, counties and states
  - Chicago - \$13 by 2019
  - New York - \$15 by 2021
  - California - \$15 by 2023
  - San Francisco - \$15 by 2018
  - Massachusetts - \$11 as of January 1, 2017
- Fight for 15 Movement



## Paid Leave Laws

- Sick Leave
  - Arkansas, California, Connecticut, Illinois, Massachusetts, Oregon, Vermont, District of Columbia, Puerto Rico
  - New York City
  - Philadelphia, Pittsburgh
  - Montgomery County
  - San Francisco, Los Angeles, San Diego, Berkeley, Oakland, Emeryville, Long Beach, Santa Monica
  - Seattle, Tacoma, SeaTac, Spokane
  - Chicago, Cook County
- Executive Order 13706: 56 hours of paid sick leave for federal contractors

# QUESTIONS?



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