It's fair to say that two of the most heated topics in 2016 were the Supreme Court vacancy left by the death of Justice Antonin Scalia early in the year and the ongoing struggle over what to do about a U.S. immigration system widely considered as broken for many years. The challenges spawned by these problems cut across many practice areas, including labor and employment. Undoubtedly, the vacancy on the High Court, even (or especially) after it's filled, and immigration issues will continue to figure prominently in 2017.

To better understand the most important developments in 2016 and what's on the horizon in 2017 at the Supreme Court and on the immigration front, Employment Law Daily turned to a reliable group of experts who share their insights in this Special Briefing.

High Court roundup

Attorney Chris Bourgeacq (The Chris Bourgeacq Law Firm) saw the Supreme Court’s 2016 docket as “somewhat a yawner for labor and employment attorneys”—not for lack of labor and employment decisions, but because “none really seemed to cause much of a commotion from either side of the docket.” Indeed, compared to some other years, the labor and employment rulings were less historic, in part because two important cases resulted in a tie among the eight-Justice Court and were effectively non-decisions.

One Justice short

Six weeks into 2016, the iconic conservative Justice Antonin Scalia passed away, leaving a vacancy on the nine-Justice Supreme Court that Republicans immediately pledged not to consider filling while the Obama Administration was in power. On March 16, President Obama nominated D.C. Circuit Chief Judge Merrick Garland to fill the vacancy, but Republicans declared that they would not vote on a Supreme Court nominee until after the November general election. Throughout 2017, the Republican-controlled Congress refused to consider Judge Garland’s nomination, leaving the Court vulnerable to equally split decisions that would leave important questions unresolved. That vacancy remains, although President Donald Trump has nominated Tenth Circuit Judge Neil Gorsuch to fill the seat.

Public-sector union agency fees. The first impact of the vacancy rebounded on the labor and employment landscape on March 26, in a case that had promised to resolve the very contentious question of whether state employees may be compelled to pay so-called “fair share” fees to public-sector unions—a question that could affect the very survival of public-sector unions. As Jackson Lewis attorneys Howard Bloom and Philip Rosen saw it, the “non-decision” in Friedrichs v. California Teachers Association was the...
only important High-Court ruling last year in the labor relations realm.

Bourgeacq saw the “non-decision” in Friedrichs as the “biggest disappointment” at the Court in 2016. “Sidestepping the issue of compulsory dues for federal unionized employees, the Court continues to leave that issue on life support,” he said.

Why was that case so important? Because 10 California teachers had requested the Supreme Court to overrule Abood v. Detroit Board of Education, 431 U.S. 209 (1977), in which the Court upheld a state law authorizing unions and government employers to enter into agency-shop (or fair share) agreements, Bloom and Rosen explained. “Under these arrangements, a union can levy a fee on employees who are represented by the union in collective bargaining but who object to becoming union members,” they noted. When given the opportunity to overturn Abood in 2014, in the Harris v. Quinn case, the Court had declined.

“Prior to the death of Justice Antonin Scalia, the Supreme Court appeared headed toward outlawing these ’agency-shop’ or ’fair share’ provisions in public sector collective bargaining agreements requiring non-members to pay union fees,” Bloom and Rosen pointed out. “Indeed, at oral argument in Friedrichs, it became clear that Justice Scalia sided with the plaintiffs.” But because of Scalia’s passing, the Court issued a 4-4 ruling which, because of the equal split, left in place the lower court’s decision that fair share provisions are lawful.

What was at stake for unions? “Had the Court reversed the lower court’s decision, public-sector unions stood to lose millions of dollars in fair share fees as public-sector employees exercised their new right to decline to pay an agency fee,” Bloom and Rosen suggested. The attorneys noted that after Wisconsin in 2013 prohibited unions that represented state employees from charging mandatory agency fees, AFSMCE Council 24’s revenue in the state dropped from $5 million in 2010, before the law changed, to $1.5 million.

Impact on employers. Bloom and Rosen observed that the “non-decision” affects only public-sector employers. “If fair share provisions had been invalidated, public-sector unions may have been weakened as a result of the union’s loss of revenue,” they suggested. “On the other hand, public-sector unions may have increased their aggressiveness and advocacy as a way of proving to represented employees that they, the union, deserve to be paid for their services.”

On the employee side of the equation. The “non-decision” also had an impact on employees. “Where an agency shop provision exists in a collective-bargaining agreement, public-sector employees will continue to have to pay their “fair share” of the union representation, whether they want the union or not, and whether they agree with the union or not, until such time as the Supreme Court hears another case involving the Friedrichs issue and rules that fair share provisions are unconstitutional,” the Jackson Lewis lawyers said. “Employees who do not like these provisions will continue to challenge them in court.” Bloom and Rosen noted anecdotally that there are currently several cases challenging fair share provisions making their way through the court system.

How might a Trump nominee affect the Court? Last month, President Donald Trump nominated Tenth Circuit Judge Neil Gorsuch to fill the vacancy left by Justice Scalia’s death. Prior to Gorsuch’s nomination, our experts weighed in on what the likely impact of a Trump pick would have on the High Court going forward. Particularly because Gorsuch has not yet been confirmed, we think these insights remain timely and relevant.

“We can expect a President Trump to appoint a business-oriented justice, and therefore, to make it more likely that Supreme Court decisions will favor employers,” Bloom and Rosen predicted. “For example, if a case that raises the Friedrichs issue comes before a full Supreme Court, it is likely the Court will rule, 5-4, that fair share requirements are unconstitutional. However, as we have seen in the past, Supreme Court justices do not always vote the way they are expected to when they are appointed.”

Bourgeacq offered a similar forecast. “Once the Court is back up to its full strength, and with a conservative nominee likely from President Trump, we should expect a decision by 2018 or 2019 striking down compulsory union dues for public employees,” he said. “And that will be an earthquake of a decision with union and political consequences that will drastically change future elections at all levels of government.”

What are labor practitioners advising clients? Bloom and Rosen are advising their clients to continue to follow existing rulings. “The vagaries of the confirmation process and the fact that the way a court or a judge will rule cannot be guaranteed make this the prudent course of action,” the attorneys observed. “We also are discussing strategies and possible changes in approach for employers to consider in anticipation of future decisions.”

Executive immigration action. A second “non-decision” by the Court had consequences not just in the labor and employment community, but also
The potential for the injunction against the Obama guidance to come before the Court is not quite dead, however. There are at least two current lawsuits in which the plaintiffs assert that the federal government relied on the injunction to wrongfully revoke three-year work permits that had been issued to them, as well as to

“The ruling effectively shut down the expansion of DACA (Deferred Action for Childhood Arrivals) and the creation of the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) Programs.”

—Jackson Lewis attorneys Michael Neifach and Amy Peck

far beyond. Jackson Lewis lawyers Michael Neifach and Amy Peck pointed to the Court's 4-4 deadlock in United States v. Texas, which dealt a setback to the Obama Administration's executive actions on immigration. "The ruling effectively shut down the expansion of DACA (Deferred Action for Childhood Arrivals) and the creation of the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) Programs," the attorneys observed. "The deadlock left the lower court’s ruling blocking these plans in place for the time being. The programs were meant to keep families together in the United States, grant work authorization, and protect upwards of 4-5 million undocumented individuals from deportation."

Guidance enjoined. Below, the Fifth Circuit upheld a district court injunction that blocked the executive enforcement guidance that would have allowed the Department of Homeland Security to halt deportation proceedings and issue work permits and other benefits to the specific class of undocumented immigrants affected by DAPA. The program sought to implement immigration reform measures proposed by President Obama in November 2014 after immigration reform had stalled in Congress. The preliminary injunction also blocked a proposed expansion of DACA, which was initially implemented in 2012.

The Obama Administration was unsuccessful in its assertion that the states that challenged the immigration guidance were not objects of the policy, and therefore, the Fifth Circuit's ruling on the injunction barring implementation of the guidance was contrary to Article III of the U.S. Constitution. In refusing to remove the injunction, the appeals court also got it wrong as to the often-asserted discretion in providing deferred action for certain aliens already living in the United States, the Obama Administration asserted.

What's ahead? President Trump clearly has immigration reform in his crosshairs. At press time, he had already taken action on immigration that has prompted widespread protests and several lawsuits, including one that made it to the Ninth Circuit, where the lower court injunction blocking Trump's so-called "Muslim ban" was upheld. On March 6, 2017, Trump issued a new executive order on immigration that replaces the earlier enjoined one; it has been revised with the aim of removing legal obstacles.

Department of Homeland Security Secretary John Kelly on February 20, 2017, also issued two memoranda on immigration enforcement, one of which exempted the DAPA and DACA programs from its provisions. Thousands of DACA recipients across the country. The plaintiffs in Batalla Vidal v. Baran and Lopez v. Richardson seek reinstatement of their three-year work permits, alleging that revocation of the permits based on the overbroad injunction was unlawful. They also challenge the Texas injunction, which applies nationwide, arguing it should not apply to millions of families in states that are not part of the Texas lawsuit. The Batalla Vidal suit, pursuant to a joint motion, has been stayed to await determination of how the Texas v. United States litigation will proceed. The Lopez suit has also been stayed, presumably for the same reason.

Precedent-setting decisions

While Friedrichs v. California Teachers Association and United States v. Texas frustrated labor and employment lawyers, employers, and employees, the Court did hand down several rulings that set important precedent. Five 2016 Supreme Court decisions stand out for employers, according to Sherman & Howard attorney William Wright.
Government enforcement. Wright noted that two of the important rulings in 2016 concerned the Court’s reaction to government enforcement efforts.

Agency deference. The Sherman & Howard attorney pointed first to the Court’s June 20 ruling in Encino Motorcars, LLC v. Navarro, which addressed whether a Department of Labor regulation deserved the courts’ deference. “Usually, courts will defer to regulations issued by executive departments in furtherance of statutes granting the agency authority to interpret the law,” he explained. “But in this case, the Court decided that the DOL had failed to explain a shift in its interpretation and that, therefore, the new regulation was not entitled to the courts’ deference.”

The issue was whether service advisors employed in automobile dealerships were exempt from overtime premium pay. “The applicable part of the FLSA provided that only mechanics, parts clerks, and those engaged in sales of vehicles were exempt,” Wright noted. “But, for decades, the DOL had extended the exemption also to service advisors. In 2008, the DOL issued a proposed regulation to confirm that service advisors were exempt and invited public comment. Then, in 2011, the DOL dropped its proposed rule and issued a contradictory rule instead,” he said, outlining the flip-flop that prompted the case to end up before the Supreme Court. The Justices ruled that “in issuing this regulation, the DOL had failed to explain such a dramatic reversal in its interpretation and, therefore, courts had no obligation to defer to the DOL’s new rule,” Wright recounted.

Employers and employees unaffected. The Court’s ruling had no effect on the employer and employee involved, however, according to Wright. “Recently, the Ninth Circuit took the case up on remand and, without deferring to the DOL’s regulation, reached the same conclusion,” he explained. “Based only on the text of the statute, service advisors are not engaged in vehicle sales and are not exempt.”

All about the regulatory process. Wright said that rather than affecting the rights and responsibilities of the parties, the significance of Encino Motorcars ruling is its effect on the regulatory process. “Employers and employees alike develop fixed expectations based on agencies’ interpretations of the law,” he observed. “When the agencies change course, the Court held, they owe those affected an explanation. That lesson was particularly clear in this case, because the DOL had reversed its interpretation without issuing a different proposed regulation or inviting comment on the new proposal.”

Attorneys’ fee awards to employers. The Court’s ruling in CRST Van Expedited, Inc. v. EEOC was another one that put government enforcement in the spotlight. Issued on May 19, it too affects employers’ relationship with enforcing agencies. “Here, the EEOC had brought claims on behalf of 250 women,” Wright explained. “Over the course of the litigation, the employer had argued that the EEOC had not exhausted administrative procedures for some of the women and had no basis for the claims on behalf of others. The EEOC dismissed a number of claims and settled a claim on behalf of one woman. The district court then awarded the employer millions of dollars in fees.”

The case went to the Supreme Court on the narrow issue of whether the courts could award fees to the employer when there had been no ruling on the substantive merits of the claims, Wright explained. Instead, the agency had dismissed some claims (and settled one). The Court ruled that for purposes of a fee award, the employer can “prevail” without a ruling on the merits.

No impact on the parties. “Again, the Court’s ruling gave the parties no immediate relief,” Wright observed. “The EEOC advanced an alternative argument—asserting that to ‘prevail’ the employer had to at least reach the stage at which the claims could not be reasserted in a court of law. The employer and the EEOC have now briefed that issue in the district court.”

Less aggressive agency action as a result? The significance of the CRST ruling, according to Wright, “is the boost it gives to the morale of employers who have been contending with aggressive and confrontational agency enforcement tactics in cases that the courts have determined to lack merit.” The ruling affects employees’ interests only insofar as the agency may retreat from its most aggressive litigation positions in light of the district court’s explicit rebuke, he suggested.

Recordkeeping practices. Wright also found important the Court’s March 22 ruling in Tyson Foods, Inc. v. Bouaphakeo, which he said “may have taken some wind out of employers’ sails and certainly changed the landscape for employers’ recordkeeping practices.” The employer in this case had not maintained records of how long employees took to don protective clothing and how long they took to doff it. “Instead, the employer had relied on its general policy of paying for four to eight minutes to select employees for donning and doffing, and at trial, it argued that the donning and doffing were non-compensable, preliminary and postliminary activities,” he explained.

A question of proof. “The issue that eventually occurred the Supreme Court arose when the plaintiffs had to prove the amount of donning and doffing
time they claimed should have been paid,” Wright noted. “On behalf of the entire class of affected employees, the plaintiffs produced expert testimony. Based on video-taped donning and doffing, the expert concluded that employees in one trim department took 18 minutes, on average, for donning and doffing and employees in a second department took 21.25 minutes, on average.”

Wright said the big issue was the underlying fairness or unfairness of relying on the expert’s averaging. “By relying on averages, the court would necessarily underpay some employees and overpay others,” he observed. “Some might receive pay although they had not worked any unpaid time.” How did the Court answer the question? “The averages were admissible in a class action if they would be admissible in cases brought by the individuals and, where the employer failed to maintain accurate records of worked time, the remedial purposes of the FLSA supported any evidence sufficient to support a just and reasonable inference of the unpaid time,” Wright recounted, noting that here, the expert opinion was sufficient.

Real world impact. “This decision is likely to change the way employers record time,” Wright predicted. “Employers are more likely to track the employees’ time, even when the employees are engaged in non-compensable activities. Employers might track how much time employees spend in locker rooms or how long they take to check out equipment.” The Sherman & Howard attorney said that employers will need these accurate records to defend themselves against later possible claims that the time is actually compensable. “Without the records, only statistical and other expert testimony will be available at trial, and the employers will be unable to match time worked and awarded compensation,” he suggested.

As to employees, Wright said they “will find themselves more closely tracked throughout the time they spend at the workplace, and they will no doubt feel the employer has become Big Brother, watching their every move.”

Window into future claims developments? Wright suggested that two other 2016 Court decisions both clarify possible claims against employers and potentially indicate further legal developments to come.

Constructive discharge. The first is the Court’s May 23 ruling in Green v. Brennan, where the Justices re-visited the concept of “constructive discharge.” As Wright laid it out, in using “constructive discharge,” the employee alleges that the employer made working conditions so intolerable that any reasonable person would have resigned. The issue before the Court was when does a claim first arise if the plaintiff alleges discrimination or retaliation that resulted in constructive discharge? “The Court reasoned that statutes of limitations begin to run when the plaintiff ‘has a complete and present cause of action,’” Wright observed. “In a claim based on constructive discharge, the cause of action is complete only when the employee gives notice of his or her resignation. Consequently, the

“The Court reasoned that statutes of limitations begin to run when the plaintiff ‘has a complete and present cause of action.’”

—Sherman & Howard attorney William Wright
Wright recounted. “Arguably, suspicion that accommodation would be needed, if the decision-maker has only an unsubstantiated motive of avoiding offering a religious accommodation, may violate Title VII even if the decision-maker has only an unsubstantiated suspicion that accommodation would be needed,” Wright recounted. “Arguably, Abercrombie is limited to the situation in which the employee actually does need an accommodation, but the decision-maker isn’t sure about it,” he said. “Now, in Heffernan, the Court takes the next step: The decision might be motivated by a belief, even when the belief is false.”

Best practices. Wright offered a best practice suggestion as a result of the Heffernan ruling: “Although Heffernan arose in the context of a governmental employer, all employers should take notice of the ruling,” he said. “The Court is separating the issue of motive from the underlying facts. All that matters is what the decision-maker believed. Employers would do well to incorporate this point into training for supervisors.”

2017 Court

Our experts turned their thoughts to the future and gave us their best estimates as to what we might expect from the Supreme Court in 2017. Most Court watchers expect Justice Scalia to be replaced by another conservative jurist, given the Republican White House and GOP-dominated Congress. While some have characterized Gorsuch as a ‘mainstream’ nominee, many commentators see him as a conservative who falls outside the boundaries of the mainstream category.

NLRB general counsel question. As to the issues facing the 2017 Court, Bourgeacq first identified one that he described as not unlike the Court’s 2014 Noel Canning ruling that President Obama’s recess appointments to the NLRB were unconstitutional. In SW Gen., Inc. dba Southwest Ambulance v. NLRB, the Justices will review the validity or, as the D.C. Circuit held, the invalidity of then-NLRB general counsel Lafe Solomon’s appointment. “Should the Supreme Court uphold the D.C. Circuit’s decision, there is a significant question about the validity of several unfair labor practice cases initiated by the general counsel—cases which, contrary to post-Noel Canning, may not be able to be decided again by rubber stamp,” Bourgeacq suggested. “While difficult to predict the outcome here, and although Noel Canning was unanimous, I think the new appointment to the Court will tilt the decision against the NLRB.”

FVRA problem. Bloom and Rosen were of a similar mind. In vacating a Board order, the D.C. Circuit in SW General held that former Acting General Counsel Lafe Solomon could not have lawfully delegated authority to an NLRB Regional Director to issue the underlying unfair labor practice complaint against Southwest Ambulance because Mr. Solomon, at the time, was not lawfully appointed as the Board’s Acting General Counsel. “The court held that Solomon served in violation of its 2015 ruling in EEOC v. Abercrombie & Fitch Stores, Inc. There, the Court held that an employer who acts with the motive of avoiding offering a religious accommodation may violate Title VII even if the decision-maker has only an unsubstantiated suspicion that accommodation would be needed, Wright recounted.”

More of the same liberal-conservative balance?

“ ‘I don’t expect a conservative bench, similar to what we had before, to materially alter the balance in labor and employment cases,” Bourgeacq said. “When the Court was in full strength, we saw, surprisingly, labor and employment cases decided in favor of employees as often as employers—frequently unanimous decisions.”

Elaborating, Bourgeacq pointed out that the Court in recent years had rejected President Obama’s unconstitutional recess appointments in Noel Canning v. NLRB on the one hand, while on the other hand, interpreted discrimination statutes in favor of employees based on plain readings of the statutes, for example in Abercrombie and Thompson v. North American Stainless (2011) (expanding retaliation liability).

Wright saw it similarly. “Although [President Trump] will likely nominate a more conservative thinker to the Supreme Court, the direction of the Court on recent issues is unlikely to change,” he said. “The Court has taken a narrow view of issues presented and is likely to continue with this narrow approach.”

gossiped that he was supporting the Mayor’s opponent. The next day, Heffernan was demoted for his “overt involvement” in the campaign.

False belief provides motive. “The issue before the Court was whether Heffernan had a claim for retaliation for his exercise of free speech when he actually had not engaged in any protected speech; the decision-maker only falsely believed Heffernan was involved in the campaign,” Wright explained. “The Court determined that Heffernan had a claim because the issue was one of motive, and the decision-maker could be motivated by his or her belief Heffernan was involved in the campaign, even if Heffernan was not actually involved.”

Wright said the Court’s reasoning was reminiscent of its 2015 ruling in EEOC v. Abercrombie & Fitch Stores, Inc. There, the Court held that an employer who acts with the motive of avoiding offering a religious accommodation may violate Title VII even if the decision-maker has only an unsubstantiated suspicion that accommodation would be needed, Wright recounted. “Arguably, Abercrombie is limited to
of the Federal Vacancies Reform Act (FVRA) for nearly three years, from 2011 through most of 2013, because the FVRA prohibited him from serving as the Acting General Counsel after President Obama nominated him for the position,” Bloom and Rosen said.

“The case is important to all statutorily created agencies, as the FVRA affects all federal positions that require a presidential nomination and Senate confirmation,” the Jackson Lewis attorneys explained. “For most agencies, decisions by the unauthorized official are void ab initio, that is, from the moment they are made, and may not be ratified by a subsequently validly nominated and confirmed successor. However, the FVRA exempts the position of NLRB General Counsel from these provisions, instead making the decisions of an acting general counsel, or a regional director acting on his behalf, only voidable.”

Arcane technical issue. Wright further refined the issue in the case, describing it as concerning whether Obama could nominate Lafe Solomon to be NLRB general counsel when Solomon was then acting general counsel. Solomon had not been the first assistant to the previous general counsel, and FVRA might be read to bar the nomination of an acting officer, if the officer had not been the first assistant to the office for at least 90 days, Wright clarified. “At issue appears to be the validity of NLRB actions between June 2010 and November 2013, but the issue does not turn on the merits of any of those NLRB actions,” he said. “Instead, this issue hinges on ‘an arcane technical issue’ of textual interpretation.”

D.C. Circuit likely to be upheld. In the oral argument, the Court seemed resistant to consider legislative history on the meaning of the FVRA, and instead, the argument was replete with examples of ordinary English usage of the word “notwithstanding,” according to Wright. “Neither the government nor the respondent was obviously winning at oral argument, but it seems unlikely that the Court will find the nomination to have been improper. Such a ruling would affect many other government officers nominated and appointed, over decades, despite serving as the acting officer and not serving as the first assistant.”

Bloom and Rosen likewise believe that a fully constituted Court will uphold the decision of the D.C. Circuit. Agency deference. Jackson Lewis attorneys Jeffrey Brecher and Richard Greenberg, who cited Trump’s frequent declaration that he will nominate a Justice to the Supreme Court who shares the judicial philosophy of the late Justice Scalia, predicted that the 2017 Court will have significant impact on several areas affecting employers, including one that frequently arises in wage and hour law—the deference owed to administrative interpretations. Several Justices, including the late Justice Scalia, have indicated a willingness to revisit and possibly overturn a prior Supreme Court decision, Auer v. Robbins (519 U.S. 452 (1997)), that requires courts to defer to an agency’s reasonable interpretations of their own regulations.

“Critics have argued the [Auer] rule encourages federal agencies to issue ambiguous regulations with the knowledge they can ‘fill in the gaps’ with later interpretations and then subsequently demand Courts defer to those regulations.”

—Jackson Lewis attorneys Jeffrey Brecher and Richard Greenberg
In January, the Court consolidated three class action waiver cases in its order granting certiorari. The Court implicitly honored the NLRB’s bid, in *NLRB v. 24 Hour Fitness USA, Inc.*, for a ruling on the three petitions in *NLRB v. Murphy Oil* (No. 16-307), *Ernst & Young, LLP v. Morris* (No. 16-300), and *Epic Systems Corporation v. Lewis* (No. 16-285) before the Justices would consider the 24 Hour Fitness case. The cases will not be heard until the Court’s next term, which begins in October 2017.

Brecher and Greenberg believe that the Court is likely divided on this issue, and a ninth Justice will decide it.

**EEOC subpoena enforcement.** Wright noted that in 2017 the Court will also rule on *McLane Co. v. EEOC*, which arises out of a fight over the enforcement of an EEOC subpoena. The EEOC had expanded its investigation of an individual charge of discrimination into a request for nationwide records of various kinds, including personal information about employees, he explained. The district court had narrowed the required production, but the Ninth Circuit reversed. “The Supreme Court agreed to hear only a narrow issue—whether a court of appeals should review the district court’s order on an EEOC subpoena for abuse of discretion or using a *de novo* standard,” Wright said.

“On the face of it, it seems likely that the Court will adopt the abuse of discretion standard,” Wright continued. “That is the standard in most circuit courts of appeal and it appears that both parties support it.” The parties disagree on the effect on the specific subpoena at issue if the Court directs the Ninth Circuit to apply the abuse of discretion standard, Wright stressed. “The petitioner would have the Ninth Circuit defer to the district court; the EEOC argues that the Ninth Circuit should still reverse the district court ruling on a mistake of law. Unfortunately, the Supreme Court will not reach the heart of the subpoena issue. Its ruling will concern only the standard for review.” Accordingly, the ruling will likely disappoint practitioners who hope for more guidance on the extent to which the EEOC may expand its investigation from a local individual charge to allegations involving a nationwide class of employees, Wright predicted.

**Expanding employee protections.** *SW General and McLane* demonstrate the Supreme Court’s tendency to focus only on narrow, specific, and limited critiques of agency action, Wright said, adding that the Court is not likely to participate in a wholesale attack on regulatory agencies. “Despite the Court’s reluctance to impose any form of strict judicial review of agency actions, we expect the Court to continue to expand the scope of employee protections,” the Sherman & Howard attorney said. “In recent years, agencies have advocated for, and the Court has accepted, more expansive protections for employees, based on employees’ association with individuals in protected categories, based on amorphous forms of protected activity, and most recently, based on decision-makers’ mistakes about underlying facts.” The Court will have the opportunity to address the EEOC’s arguments expanding Title VII to protect sexual orientation and transgender employees, Wright observed. “Given the trend, it would not be surprising if the Court endorses the EEOC’s position.”

The EEOC has also hinted that it will pursue claims of retaliation if employers take materially adverse action against applicants or employees only because the workers might engage in protected activity in the future, according to Wright. If this claim comes before the Court in 2017, that too would be an opportunity to expand employee protections. “Given the Court’s separation of motive from the factual content of the decision-makers’ beliefs, we anticipate the Court will endorse anticipatory retaliation claims as well,” Wright said.

**A bit of advice ...** Wright offered up a few words of advice. “In 2017, managers’ motivations will be under more intense scrutiny than ever before,” he said. “The facts concerning applicants’ and employees’ conduct will not matter as much as the managers’ beliefs. Litigation will continue to focus on the search for patterns in management decisions and on statistical analyses. Employers would be well advised to review their current training programs to focus managers’ attention only on job-related standards and conduct.”

Wright added that Sherman & Howard continues to advise clients to prepare for Obama-era regulatory changes, including new EEO-1 requirements, more emphasis on union organizing, more protection for worker concerted activities, rigorous enforcement of independent contractor classifications, and stiffer enforcement of retaliation and whistleblower provisions. “The Court has not signaled any willingness to overturn agency actions readily,” he said. “We can expect rapid change in the regulatory landscape only if the new Congress overturns recent regulatory changes in bulk, by, e.g., eliminating the courts’ deference to agency rule and legislating against recent regulations.”

**ERISA “church plans.”** On the employee benefits front, Jackson Lewis lawyer Joy Napier-Joyce is closely monitoring the consolidated cases in which the Court will decide whether religiously affiliated hospitals can rightfully claim that they are exempt from ERISA as a “church plan.” “Several appellate courts have already
ruled in favor of the employees, and if the U.S. Supreme Court agrees, there will be much confusion on what happens next,” Napier-Joyce suggested. “In many cases, a retroactive determination that a religiously affiliated entity does not have a strong enough connection to the church to sponsor a church plan will mean that the plans are severely out of compliance with ERISA, including its funding requirements.”

The consolidated cases, Advocate Health Care v. Stapleton, St. Peter’s Healthcare v. Kaplan, and Dignity Health v. Rollins are set for oral argument March 27.

Immigration struggle

2016 saw some action on the immigration front, but as in prior years, there was nothing from either Congress or the White House that would comprehensively address the problems of what is universally considered a broken U.S. immigration system. As we go to press, however, 2017 has already seen plenty of controversial immigration action under the new Trump Administration including plans to build a wall along the Mexican border, a massive hiring initiative to police that border, and a so-called ”Muslim ban” that got snagged in the courts.

Moving the ball forward

Despite the lack of comprehensive immigration reform, there were several developments in 2016 that impacted the practice area. Neifach and Peck weighed in on what they saw as the most important immigration developments in 2016.

New STEM guidelines. On March 11, after what Neifach and Peck called “challenges, heated debates, and stops and starts,” the Department of Homeland Security issued its final rule for instituting an additional period of work authorization for science, technology, engineering, or mathematics (STEM) graduates. “The new rule, which went into effect in May 2016, allows foreign students holding F-1 status and graduating from U.S. colleges or universities with STEM degrees to extend their period of work authorization (Optional Practical Training) from an initial period of 12 months to a total of 36 months if they work for an employer that uses E-Verify for work authorization verification,” the attorneys explained. “This was a welcome increase from the rule’s old 17-month extension period, especially given the scarcity of H visas.”

Improvements for nonimmigrant workers. On November 18, U.S. Citizenship and Immigration Services published its final rule, Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers. Neifach and Peck said the rule created improvements for nonimmigrant workers including providing more security and retention of priority dates in certain circumstances; allowing separate work authorization on a showing of compelling circumstances; providing grace periods for individuals in certain nonimmigrant status; providing automatic extension of work authorization based upon the timely filing of EAD renewal applications; and codifying and expanding the policy on H-1B cap and fee exemption for nonprofits related to or affiliated with institutions of higher education. The new rule took effect on January 17, 2017.

Further elaborating on the final rule, Sherman & Howard attorney Carol Hildebrand explained that the revisions make continuous work authorization documentation easier to maintain for employers and workers where a petition seeking permanent residency has been filed and is awaiting adjudication. “Similarly a provision benefiting a nonimmigrant employee for up to 60 days where that foreign worker is changing to a different U.S. employer or seeking an alternate nonimmigrant status has been added,” Hildebrand said. “Eligible nonimmigrants

USCIS fees increased

Jackson Lewis attorneys Michael Neifach and Amy Peck noted that in December 2016, U.S. Citizenship and Immigration Services adjusted the required fees for most immigration applications and petitions, including these increases:

- From $325 to $460 for Form I-129 (nonimmigrant petition filings seeking H-1B, L-1, and TN status);
- From $580 to $700 for Form I-140 (immigrant petition for alien workers); and
- From $1,070 to $1,225 for Form I-485 (application to register permanent residence or adjust status).

Supplemental fees for L-1 and H-1B visas were doubled for those employers with 50 or more workers in the United States that have more than 50 percent of their US workforce in H-1B, L-1A, or L-1B nonimmigrant status.
include those in E-1 ‘treaty trader,’ E-2 ‘treaty investor,’ E-3 ‘Australian professional,’ H-1B ‘professional,’ L-1 ‘intracompany transferee,’ O-1 ‘alien of extraordinary ability,’ or TN ‘professional’ status. These workers will no longer be considered to have fallen out of status and thereby be deportable during that 60-day period.

And there's more … Pointing to other updates, the Sherman & Howard attorney said, “The interplay between H-1B ‘professional’ work authorization and state licensure laws for certain foreign professionals has been expanded to specify that where a state authorizes non-licensed professionals to practice a profession if supervised by a licensed professional, foreign professionals may be granted work authorization to practice in that manner, too.”

“Regulatory provisions detailing available H-1B extensions of work authorization for employee beneficiaries of pending or approved labor certifications or immigrant petitions have been expanded,” Hildebrand continued. “Regulations listing circumstances where nonprofit organizations associated with colleges, universities, or research institutes may utilize H-1B employees and not be limited by the annual H-1B quota were also expanded.”

Hildebrand also pointed out that employers and employees benefit from a new regulation specifying that USCIS Employment Authorization Document will be valid for employment for 180 days beyond its expiration date where a timely extension request is filed.

New I-9 Form issued. In November, USCIS released a new I-9 Form (11/14/16 N) to be used to verify employment authorization starting on January 22, 2017. “The new form includes a ‘smart form’ version with drop down menus that may help to eliminate errors,” according to Neifach and Peck. “The new smart form also includes a QR Code that will make it easier for the government to analyze information when conducting audits.”

Hildebrand noted that although the form is not significantly different from prior versions, it is fillable electronically. “However, employers must print the completed Form I-9,” she stressed. “Both the new hire and the employer’s representative must sign it by hand. Retention can be in paper or in electronic format if regulations on electronic storage are followed.”

Foreign entrepreneurs. The final development highlighted by the Jackson Lewis attorneys was a proposed new rule, submitted by the Homeland Security Secretary on August 24. That proposal “would allow foreign entrepreneurs who have founded a U.S. company in the past three years, who own at least 15 percent of that company, who actively manage the business, and who have demonstrated the startup entity’s potential for rapid growth and job creation through compelling evidence, to enter the United States for an initial two-year period to continue to provide a significant public benefit and grow their companies,” Neifach and Peck explained.

“The International Entrepreneurship Rule” was established on the basis of President Obama’s Executive Order and the final version of the Rule is now pending at the Office of Management and Budget—the last stage in the review process.”

DACA program. Pointing to the injunction that remains in place to halt implementation of President Obama’s executive order intended to expand the categories of undocumented foreign people eligible for U.S. work authorization, Hildebrand observed that only the earlier and more limited executive order authorizing a two-year deportation deferral with work authorization has been kept viable for employers’ and workers’ use. The Employment Authorization Document received by the individuals is an acceptable document for Form I-9, “Employment Eligibility Verification,” completion, she also noted.

What’s ahead?

Our immigration experts offered their take on what we might see in 2017 on the immigration landscape. The Trump Administration during its first week in the White House issued a very broad so-called “Muslim ban” temporarily barring entry of individuals from seven majority-Muslim countries that has already been blocked by the courts. The president on March 6 issued a replacement executive order that allegedly fixes the legal infirmities of the earlier order. Trump purportedly is also going to call for comprehensive immigration legislation. He has also substantially stepped up enforcement by giving broad discretion to immigration officers in determining which aliens pose a threat to the homeland and thus should be deported. These and other immigration measures, however, are not specifically targeted to the workplace.

Unpredictable. Speaking before the Trump Administration moved into the White House, Hildebrand opined: “How the Executive Branch and Congress will interact on immigration legislation or on executive actions of the prior immigration officials cannot be predicted. Although major restrictions were expansively discussed in pre-election politics, there are business, economic, and humanitarian reasons that
could limit the legislative actions that were proclaimed to be advisable.”

“Whether immigration law or related regulatory changes will be selected as priorities or imperatives also makes predictions difficult,” Hildebrand continued. She suggested that employers should pay attention to their industry groups’ assessments and to their industry’s government relations activities.

Enforcement. For their part, Neifach and Peck, also offering insights prior to Trump’s inauguration, made a few forecasts about immigration in the context of employment. The new administration may focus on expanding enforcement of existing immigration laws in the workplace, including encouraging more employers to use E-Verify under existing law, as well as working with Congress to expand mandatory use of E-Verify, the Jackson Lewis attorneys predicted.

“Under current federal law, E-Verify is voluntary for employers except as mandated by executive order for federal government contractors or under some state laws,” they explained. “Enforcement efforts may also include an uptick in worksite compliance visits, audits, and raids.”

DACA Program. As to the DACA program, Neigach and Peck observed that after he was elected, Trump stated that he would reverse the program. This may include the revocation of work-authorization for currently eligible workers under DACA.

This issue has proved tricky for the Trump Administration, though, which has so far left the currently blocked Obama Administration’s executive action on DAPA and expanded DACA in place.

Vetting. Niefach and Peck also thought the new administration might suspend temporarily the issuance of visas to certain countries and regions designated as high risk. “Individuals from countries such as Syria, Iraq, Libya and other designated high-risk areas or individuals who have travelled in those countries may face even longer delays in obtaining visas for travel to the United States,” they had predicted. “Global mobility may be affected if the U.S. restricts or delays business visas with ‘extreme vetting,’ resulting in reciprocal treatment by the affected countries.” And this prediction has been largely born out.

Abuse investigation. Underscoring that Trump has said he will “investigate all abuses of visa programs that undercut the American worker,” Neifach and Peck said that this “may lead to increased scrutiny of employment based visa programs including H-1Bs, L-1s, as well as a possible increase in prevailing wage requirements for H-1B workers and/or pre-filing market tests to determine if there are U.S. workers ready and willing to perform the jobs being offered to foreign nationals.”

Work authorization. Neifach and Peck also suggested that the Trump Administration might move to rescind some expansions of work authorization, such as eliminating work authorization for H-4 visa holders and cutting down on STEM work authorization for F-1 student visa holders.

Trade deals. Finally, the Jackson Lewis attorneys noted that Trump has talked about ending trade deals and treaties such as NAFTA. “Although it would probably take some time to wind down that treaty, the ability of Canadians and Mexicans to circumvent the H lottery and obtain work authorization in the U.S. could end, and with that the reciprocal ability for U.S. citizens to obtain with relative ease, work authorization in Canada and Mexico,” they observed.

About the Editor

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