



Boulder Area Human Resource Association

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## WHAT MIGHT THE NEW CONGRESS DO?

"Legal Minute" – November 15, 2018

The November 6 mid-term elections have given control of the House of Representatives to the Democrats. Below are some employment-related legislation the Democratic-controlled House might be expected to send to the Senate.

### **ENACT PAID SICK LEAVE:**

Just what it says: Creating a federal law requiring employers to grant paid time off for illness.

### **RAISE THE FEDERAL MINIMUM WAGE:**

Raising the minimum wage from \$7.25/hour to \$15/hour has long been a rallying cry for the Democrats. Now they have a chance to do something about it.

### **BROADEN THE TEST FOR DETERMINING IF A WORKER IS AN INDEPENDENT CONTRACTOR OR AN EMPLOYEE:**

The House may look to expand the worker-friendly "ABC" test for determining if a worker is an "independent contractor" or an "employee" and apply it to all federal laws. (Note that "federalizing" the test would apply only to federal laws; the differing state laws would be unaffected.)

### **ERASE THE U.S. SUPREME COURT'S RULING IN *EPIC SYSTEMS CORP. v. LEWIS*:**

*Epic Systems* is the case that declared lawful the use by employers of class-action waivers. That is, *Epic Systems* resolved the debate over whether an arbitration agreement with an employee could require the employee to arbitrate claims that sought to resolve workplace issues that were not limited to the individual employee's own circumstances, but which affected the circumstances of similarly situated employees throughout the company. The Supreme Court said "yes," employers can require employees to arbitrate individual as well as "class" claims. It is likely the Democrats in the House will introduce legislation to "overrule" *Epic Systems* and prohibit employers from requiring employees to arbitrate class claims.

### **WIPE OUT ARBITRATION AGREEMENTS ALTOGETHER:**

There has been much argument in the media and in plaintiffs' lawyers' forums to simply bar employers from requiring employees to arbitrate employment-related claims, period—or, at least, to bar employers from requiring that sexual harassment claims be arbitrated. (Some states already are moving to bar forced arbitration of sexual harassment claims.)

### **HELP LABOR UNIONS GROW BY . . . :**

. . . Taking measures to reduce the impact of states' "right-to-work" laws (the laws that make it unlawful to condition an employee's employment on joining the union that represents the employee's work unit).

. . . Taking measures to streamline—*i.e.*, make it easier for unions to win—unions' organizing efforts.

. . . Making it more onerous for "persuaders"—consultants who advise employers when faced with a union campaign to organize its workforce—to play a role on behalf of employers opposing the union's organizing efforts.



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#### **ADDRESS THE IMMIGRATION MORASS:**

Whether through legislation or oversight, we can expect the House to dive deeply into the issues surrounding immigration that have been a constant source of controversy in President Trump's first two years on office.

#### **MUCH ADO ABOUT NOTHING?**

It's anybody's guess whether any legislation from the Democrat-controlled House can pass the Republican-controlled Senate. Vegas odds are that nothing will pass, however, absent strong support from President Trump.

## **BONUS "LEGAL MINUTE" FOR EMPLOYERS OF TIPPED EMPLOYEES: IT LOOKS LIKE THE 80/20 RULE IS DEAD!**

On November 8, 2018, the U.S. Department of Labor issued an Opinion Letter rescinded the so-called "20% Rule," which purported to segregate the duties of tipped employees between allegedly tip-generating duties and related non-tipped duties (sometimes referred to as a "side work"), and thereby limit the availability of the tip credit. *See* DOL Op. Ltr. FLSA2018-27 (11/8/2018) (reinstating the prior Opinion Letter from 2009, FLSA2009-23).

Please contact BAHRA, your attorney, or Pete Bulmer ([BulmerP@jacksonlewis.com](mailto:BulmerP@jacksonlewis.com)) if you wish further information.

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