

New Year, New President—How Will Employers Be Affected?

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At the commencement of each new year we like to look ahead, pretend that we have a crystal ball and predict what this new year will bring in the world of employment law. This year is different in that we face a major change in our government. For the first time in over a decade, we have a Republican president and a Republican majority in the Senate and the House of Representatives.

Our government has been operating at a stalemate over the past few years, unable to reach consensus on many issues of governance. As a result, President Barack Obama has issued numerous executive orders and stacked the federal agencies with pro-employee and pro-union minded leaders in an attempt to provide promised protections and benefits to workers. As a result, agencies like the Equal Employment Opportunity Commission (EEOC), National Labor Relations Board (NLRB), Office of Federal Compliance Programs (OFCCP) and the Department of Labor (DOL) have been aggressive, and some might add controversial, in their implementation of policy and in their method of enforcement. Now that we have a Republican executive and a Republican-controlled legislative branch, we will, in short order, see major policy and enforcement shifts. We can expect to see a return to less governmental control and a more conservative approach to workplace discrimination, wage-and-hour issues and employee-benefits issues under President Trump. This article provides an overview of the areas where we can expect to see change in 2017.

Courts

The U.S. Supreme Court has been operating with only eight justices since Justice Antonin Scalia passed away last February. While Obama nominated Merrick Garland to fill the position last March, the Republicans, in an unprecedented move, stonewalled the nomination, claiming that despite the fact that Obama had over nine months of his presidency remaining, the new president should be the one to select Scalia's successor. There are also many judicial vacancies in our federal circuit and district courts. Our new president has clearly stated that he intends to nominate conservatives and strict constructionists to fill these posts. With a more conservative majority on the bench, the court may hear and decide a number of hot issues including whether the president has the power to fill senior leadership positions in federal agencies; whether arbitration agreements violate the National Labor Relations Act; whether requiring a public employee to join a union violates the first amendment and transgender rights (bathroom usage, etc.).

NLRB

The board presently has two vacancies (only three of the five seats are currently occupied). In addition, Board Chairman Mark Pearce's term expires on Aug. 17. Pearce was a major architect of many of the board's pro-union decisions. Assuming that Trump fills these seats with two Republicans, pro-management individuals, the board would then have a pro-management majority that would likely overturn many of the pro-employee/union decisions issued by Obama's NLRB. While the new administration may not make these appointments in the first 100 days, it is anticipated that the new administration will make them sometime this year. One issue the new board may address immediately is the speedy election rules recently adopted by the current board. Overturning current decisions, however, is not something that will happen immediately after the appointments are confirmed, and could in fact take a number of years.

Also, the board's general counsel Richard F. Griffin Jr.'s four-year term expires on Nov. 3, 2018. Griffin is pro-union and has been responsible for many of the pro-union changes that we have seen over the past few years. Griffin's replacement will undoubtedly be pro-management and, as a result, we will likely see a pendulum swing on a number of issues including, but not limited to, employee use of email for union activity, discipline for social media comments about employers, NLRB scrutiny of confidential policies and agreements, joint employer and franchise standards and class action waivers.

Department of Labor

Trump has nominated fast food executive Andy Puzder as the new Secretary of Labor. Puzder, whose own restaurant businesses were the subject of a wage-and-hour investigation in 2006 and 2007, publicly opposes the new white collar overtime rule that is presently stayed while its legality is litigated in the U.S. District Court for the Eastern District of Texas. Puzder, in post-nomination interviews, stated that he believes workers are overprotected and that it is time to undo the "extensive regulatory maze the President Obama administration has imposed on employers." As an aside, selecting Puzder for this post runs contrary to Trump's "make America work again" campaign message. Given that Puzder is clearly pro-management, it is anticipated that the DOL will modify its position on a number of issues including, but not limited to: joint employer, exempt status minimum salaries (new regulations possible), independent contractor status, the new persuader rule (which is currently permanently enjoined), the new fiduciary rule for financial advisors (will likely be modified or repealed altogether), and the Affordable Care Act (Obamacare). Puzder has also voiced his disagreement with having an established federal minimum wage. In Puzder's view, the states alone should set minimum wage. It is unclear whether or not he will pursue this issue.

EEOC

The new administration will also shift the focus at the EEOC. While the new administration might not immediately change the agency's priorities, it is likely that it will amend and reissue the 2016-2021 strategic plan. It is also likely that the new administration will repeal the new compensation reporting on EEO-1 regulation. The EEOC will not focus on enforcement under the new administration. We will likely see a less proactive EEOC with less self-initiated investigations and claims. However, employers should not become complacent. While the EEOC might not pursue background check or credit report check investigations, state agencies and our state legislatures are likely to focus upon employee protections. Expect to see states and municipalities continue to roll out ban the box, mandatory PTO and pay equity legislation.

Executive Orders

Trump has consistently stated that he intends to rescind all of Obama's executive orders. The vast majority of the employment law-related executive orders on the chopping block affect government contractors. Included on the endangered list are the following executive orders: EO No. 13673 Fair Pay and Safe Workplace (requires government contractors and subcontractors to report violations of federal and state laws including discrimination laws, wage-and-hour laws, FMLA and OSHA), EO No. 13496, which established paid sick leave for federal contractors and subcontractors, and EO No. 13658, which established a minimum wage for contractors. In addition, Trump has stated that he will reverse the Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans (DAPA) executive actions.

Affordable Care Act

During his campaign Trump said he would repeal the ACA. However, post-election, he has waffled on his position, stating that he might keep parts of the act. The Senate has already taken steps to repeal the ACA. However, the House and Trump are hesitant to repeal the ACA without replacement legislation. At present, employers should stay the course and continue to follow the current law and regulation, but look out for modifications that could ease the employer's financial and managerial burden under the ACA.

The first 100 days of Trump's presidency will provide a clearer picture of our future employment law landscape. At present, employers should continue to follow current, applicable federal, state and local law and wait to see if this new administration will provide them with some regulatory relief. •

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