
The Trump Presidency And Labor And Employment Law

Donald Trump will assume office on January 20, 2017. Many employers are wondering whether Donald Trump's election means that they can ignore many of the changes in the employment law arena which have occurred or are slated to occur in the near future. The answer is NO! Laws and orders that are currently in effect will remain in effect until action is taken to change them. Laws or rules that are scheduled to take effect will do so unless action is taken by the courts, Congress, or the President to stop them from taking effect.

While it is likely that changes will be made in the labor and employment arena during Mr. Trump's presidency, it is also likely those changes will take time to develop and be implemented. Mr. Trump has not revealed many specifics about his agenda on the labor and employment front. He has released a paid maternity leave plan (which he has reaffirmed after the election) and spoken about the minimum wage. The expectation from labor and employment lawyers is that Mr. Trump's policies and personnel appointments in the labor field will lean more conservative. Mr. Trump has named a long-time Washington lobbyist who focuses on tax and employee benefits as the leader of his labor transition team.

We will attempt to highlight certain areas of importance and actions that may take place.

FLSA Exemption Changes

It is unlikely that President Obama or the U.S. Department of Labor will delay or suspend the new regulations which are scheduled to take effect on December 1, 2016.

Two lawsuits have been filed in the Eastern District of Texas to stop the implementation of the FLSA regulations. One was filed by a collection of states, including Wisconsin. Another suit was filed by various Texas Chambers of Commerce. On October 19, 2016, the cases were consolidated into one lawsuit. There was a hearing on a potential preliminary injunction preventing the implementation of the new regulations on November 16, 2016. The judge has stated he will issue his decision on the injunction by November 22, 2016. There is also a motion for summary judgment pending with oral arguments scheduled for November 28, 2016. It is likely that either party would seek to immediately appeal an adverse ruling to a higher court.

Many employers have already planned for and made changes to comply with the new regulations, and it is unlikely that a court decision will be issued in time for employers to unravel their plans. Therefore, unless a court issues an injunction, employers should plan to comply with the new regulations effective December 1, 2016.

Whether the FLSA changes will be cut back or eliminated in some way in the future is pure speculation at this point. It is unlikely that Mr. Trump would be in a position to simply reverse the changes immediately upon his inauguration. Any move to do so would probably result in further litigation and yet more uncertainty.

President Trump could direct the U.S. Department of Labor to commence a new rulemaking process, subject to a notice and comment period, with the goal of undoing some or all of the earlier revisions. However, the rulemaking process tends to be long.

President Trump could direct the Department of Labor to adopt a non-enforcement policy with respect to the increased thresholds. However, even if he does this it will not shield employers from private lawsuits based on the regulations that would then be in effect.

Finally, a new Congress could pass remedial legislation that President Trump would likely sign. However, no one can say for sure whether or when this might occur.

For now, employers take a significant risk in assuming that the revised regulations will not go into effect on December 1, 2016.

Executive Orders

President Obama issued numerous Executive Orders during his eight years in office. At least eight of those Executive Orders imposed restrictions on federal contractors. They include items such as establishing a minimum wage, requiring paid sick leave, and requiring notice of rights being posted under federal labor laws. Some of those Executive Orders have been subject to legal challenge and at least one has been enjoined.

Unlike laws or administrative rules which typically take action by Congress or an agency to change, the Executive Orders can be changed immediately by the President. Many expect President Trump to issue new Executive Orders repealing or reversing many of the Executive Orders currently in place with respect to federal contracting.

Supreme Court Vacancies

The United States Supreme Court has been operating with eight justices since the death of Justice Antonin Scalia in February 2016. It appears President Trump will have an opportunity to fill at least that vacancy (unless the Senate acts quickly and confirms President Obama's nominee, Merrick Garland, in the waning days of President Obama's term - a highly unlikely prospect). It would appear President Trump would nominate a more conservative justice thus securing a five to four conservative majority on the Court, and perhaps restoring Justice Anthony Kennedy to a swing vote in tight cases. It is also likely, given the age of other justices, that President Trump will have an opportunity to nominate at least one, if not two more, Supreme Court justices. In addition, President Trump will have an opportunity to nominate many lower-level federal court justices.

National Labor Relations Board

Currently, the five-member NLRB has only three members consisting of a two-to-one democratic majority, with two vacant seats. By custom, the President usually is given the opportunity to appoint Board members to achieve a majority along political lines. Thus, the open seats will likely be filled by Trump appointees who will likely be more business friendly.

A new Board with a republican majority is likely to revisit a number of NLRB rules and decisions which have been issued over the past eight years, such as those decisions which 1) broaden the test for finding two unrelated employers to be "joint employers;" 2) allowing the inclusion of temporary workers in bargaining units with an employer's regular workers; 3) making class action waivers illegal; 4) expanding the scope of protected concerted activity (e.g., the scrutiny of employer handbooks and policies which are alleged to infringe on employee rights); and 5) dealing with the conduct of representation elections under the so-called "quick election rules."

How quickly new NLRB members will be appointed and the speed in which they reverse these prior decisions remains to be seen, but it will take time.

DOL Persuader Rules Now Permanently Enjoined

The Department of Labor's efforts to expand the "persuader" rules which were scheduled to take effect July 1, 2016, but were temporarily enjoined by the courts in June were permanently enjoined by the court on November 16, 2016. The judge relied on his reasoning from his earlier decision. While the injunction ruling may be appealed, the rules and lawsuit may ultimately be abandoned by a Trump Department of Labor. These rules would impose burdensome reporting requirements on employers who seek advice concerning union organizing (or other matters involving unions) and would also require reporting by attorneys or advisors who employers use to obtain that advice.

EEO-1 Pay Data Reporting

Final rules revising the EEO-1 report to add pay data from certain employers and federal contractors are scheduled to take effect on March 31, 2018. The new administration may consider rescinding these changes or modifying the reporting requirements to ease the burden on employers. The thought was by requiring this additional pay information that it would be easier to identify discriminatory pay practices.

Agency Enforcement

Many federal agencies have been very aggressive and controversial in their enforcement methods under the Obama administration. President Trump will have an opportunity to appoint key policy positions throughout these agencies, including a new Secretary of Labor, a Solicitor of the U.S. Department of Labor, the Assistant Secretary of Labor for Occupational Safety and Health, and the Administrator of the Wage and Hour Division. Under new leadership employers should expect a return to a more traditional conservative theory of discrimination previously recognized by federal courts.

Employers may also see the EEOC ease its systemic discrimination enforcement activity and enforcement position on such issues and the Americans with Disabilities Act, Title VII, Pregnancy and Discrimination Act and their position with respect to LGBT issues and transgender rights.

Affordable Care Act

Mr. Trump vowed to repeal and replace the ACA. He has already announced, however, that he may be in favor of retaining portions of the ACA following his meeting with President Obama. How quickly any change may occur and what, if anything, is offered as a replacement will be an important issue to watch. It is unlikely a full repeal of the ACA will occur. Despite the fact that Republicans will control both the House and Senate, there is no Republican consensus on what should replace the ACA or some of its provisions. For the meantime, employers will have to stay the course.

Immigration and E-Verify

While many people expect to see an increase in workplace enforcement actions, including both ICE audits and raids by the U.S. Immigration and Customs Enforcement Agency, it is unclear what other types of immigration reform may occur. Mr. Trump vowed to increase the use of E-Verify and perhaps work with Congress to expand mandatory use of E-Verify. Under current federal law, E-Verify is voluntary for employers except as may be required for federal government contractors and in some states.

On November 14th the new version of the I-9 Form was released (<https://www.uscis.gov/news/news-releases/uscis-revises-form-i-9-used-all-new-hires-us>). The new form is required to be used beginning January 22, 2017. It is not currently known whether the new administration will make additional changes to this form or change the implementation date.

FMLA

While Mr. Trump indicated during the presidential debates that he may be open to the idea of expanding certain paid family medical leave, he did not provide any specifics regarding any such plans. Therefore, it may be a lower priority for him on the labor and employment front.

OSHA

It is likely President Trump will streamline OSHA and repeal some or all of the recent rules on increased penalties and reporting requirements. President Trump is also likely to eliminate the electronic reporting rules slated to take effect on July 1, 2017.

SUMMARY

As a result of the election and the Republicans now controlling the White House, Senate, and the House, employers and voters may expect to see quicker and more action than what occurred under the “gridlock” which has existed for a number of years. Whether the election results will bring about greater bi-partisanship and less political acrimony remains to be seen.

Over the coming weeks and months, we will work to keep you informed of the actions of the new administration and any changes which occur that affect employers.

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