

What Can Employers Expect from the Trump Administration in the Upcoming Year?

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It has been a little less than a month since President Donald Trump took office, and employers are anxious to see what changes the new administration will make that will affect both businesses and employees. President Trump is certainly business-minded, perhaps more so than any other recent American president, and has promised to focus on creating American jobs and incentives for businesses that bring jobs back home from overseas. However, he has also presented himself as an advocate for “blue-collar” workers, which could put him at odds with more conservative thinkers on some employment-related issues. While it is difficult to predict with confidence what specific actions the new administration may take that will impact employers, we can gain some insight from actions the President has already taken and from statements made during his campaign.

What has Happened So Far?

- ***Focus on Limiting Federal Regulations and the Size of the Federal Workforce.*** During his campaign, President Trump promised to reduce the amount of federal regulation and the size of the federal workforce. In keeping with these promises, Trump issued an Executive Order (EO) requiring agencies to identify two existing regulations to be repealed whenever a new one is proposed (subject to certain exceptions, including for military, national security and foreign affairs) and setting an annual cap on the cost of new regulations. The President also issued a Memorandum imposing a hiring freeze across the federal government, with exceptions for military, national security or public safety personnel.
- ***Freeze of Federal Regulations.*** The President has issued a Memorandum imposing a freeze on new federal regulations until they have been reviewed by a Presidential appointee. The Memorandum also delays by 60 days the effective date of regulations that have already been published but have not yet taken effect. These regulations will be reviewed with respect to any questions of law, fact or policy that they raise, and agencies are encouraged to consider further notice-and-comment rulemaking for regulations that raise such questions. Following the delay in the effective date, for those regulations that raise substantial questions of law or policy, agencies are to notify the Director of the Office of Management and Budget (OMB) and take further appropriate action in consultation with the OMB Director.

While this Memorandum does not apply to regulations that have already taken effect, it could impact some significant and controversial Obama administration regulations:

- **DOL Rule Amending White Collar Exemptions.** The most significant regulation that may be impacted by the Memorandum is the DOL’s Final Rule amending the white collar exemptions to the minimum wage and overtime

requirements of the Fair Labor Standards Act (FLSA). The amendments would have increased the annual salary threshold to qualify for overtime exemption from \$23,660 to \$47,476 and the annual threshold for the highly-compensated employee exemption from \$100,000 to \$134,004, extending eligibility for overtime compensation to approximately 4.2 million American workers. A federal court [enjoined](#) implementation of the Final Rule in November 2016. Since it had not taken effect when President Trump issued the Memorandum freezing federal regulations, the Final Rule appears to be subject to review in accordance with the Memorandum's directions. Additionally, although the DOL appealed the injunction to the Fifth Circuit, that court did not issue a decision before President Trump took office. The DOL has requested an extension of time in which to file its reply brief "to allow incoming leadership personnel adequate time to consider the issues." The Fifth Circuit granted the request, which was unopposed. Thus, it is likely that either the DOL will drop its opposition to the lawsuit or the regulations will be subject to further action after review by the Trump administration.

- **EEO-1 Summary Pay Data Reporting Requirement.** In 2016, the Office of Federal Contract Compliance Programs (OFCCP) and the Equal Employment Opportunity Commission (EEOC) joined together to publish a revised Employer Information Report (EEO-1) to include summary pay data. Covered federal contractors with more than 50 employees and private employers with 100 or more employees are required to file an EEO-1 annually. Employers provide data on this form regarding the number of individuals they employ by job category and by race, ethnicity, and sex. The data include seven race and ethnicity categories and ten job categories, by sex. The revised EEO-1 report would require employers with 100 or more employees (both federal contractors and private employers) to report summary W-2 income by sex, race, ethnicity, and job group, in addition to the information required by the original form. Federal contractors with between 50 and 99 employees would not be required to submit the pay data and would continue to submit the information required by the original report form. The new rule also changed the annual filing deadline to March 31, with the first report due in 2018. Because the first report under the new rule is not due until March 31, 2018, it appears to be subject to review in accordance with the Memorandum's directions regarding regulations that have been published but have not yet taken effect.
- **"Fair Pay and Safe Workplaces" Executive Order.** On July 31, 2014, former President Obama signed the "Fair Pay and Safe Workplaces" EO, requiring certain federal contractors and subcontractors to disclose any violations that they have incurred under 14 different federal workplace laws (and their state-law equivalents); prohibiting certain contractors from requiring arbitration of Title VII sexual harassment or assault claims; and requiring contractors to provide employees with paycheck details regarding hours worked, overtime hours, and additions or deductions to their pay. Regulations implementing the EO were

published in August 2016, but the provisions requiring disclosure of violations (i.e. the “blacklisting” provision) and prohibiting mandatory arbitration agreements were [enjoined](#) by a federal court in November 2016. Accordingly, they appear to be subject to further review in accordance with the Memorandum’s directions regarding regulations that have been published but have not yet taken effect. Additionally, the U.S. House of Representatives has passed a disapproval resolution pursuant to the Congressional Reform Act that would permanently block labor and employment law violation disclosure requirements for federal contractors. The Senate is expected to approve the resolution, which will then be sent to President Trump for signature. The White House has stated that the President’s advisors will urge him to sign the resolution if it is presented to him.

- **DOL Persuader Rule.** Because implementation of the DOL’s revised “persuader rule” was [enjoined](#) in 2016, it had not taken effect when President Trump signed the Memorandum freezing federal regulations and appears to be subject to further review in accordance with the Memorandum’s directions for regulations that have been published but have not yet taken effect. The persuader rule requires employers, third-party lawyers and other labor consultants to disclose to the DOL any arrangement to persuade employees directly or indirectly concerning the right to organize or bargain collectively. Although direct persuasion has always been reportable, in June 2016 the Obama DOL published a revised rule that sought to compel the reporting of “indirect” persuader activity. For companies, this meant reporting any advice designed to persuade employees regarding union organization – whether legal counsel made direct or indirect contact with employees. Just before the persuader rule was to take effect, a federal court issued a preliminary injunction, in part because the Rule potentially required violation of the attorney-client privilege in many states. That same court later entered a permanent injunction, preventing the DOL from implementing the rule entirely. An interlocutory appeal on the preliminary injunction is pending before the Fifth Circuit. At this point, it is unclear whether the DOL will continue to pursue that appeal.
- **Immigration.** On January 27, 2017, President Trump issued an [EO](#) entitled “Protecting the Nation From Foreign Terrorist Entry Into The United States,” which, among other things, imposes a 90-day entry ban on nationals from seven countries “of particular concern” and provides for certain changes to visa processing procedures. Challenges to the legality of the EO have been filed in federal court, and the [Ninth Circuit](#) recently upheld the temporary suspension of key provisions of the Order while the challenges are pending. The administration has stated that it is weighing its options with regard to this EO. Based on statements made during President Trump’s campaign, employers should expect additional changes to U.S. immigration policy in the upcoming months.
- **Health Care Reform.** President Trump has also issued an [EO](#), “Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal,”

which directs the Secretary of Health and Human Services and the heads of all other executive departments and agencies to take all actions consistent with law to waive, defer, or delay the implementation of any provision or requirement of the Affordable Care Act (ACA) that would impose a financial (fee, tax, penalty) or regulatory burden on states, individuals, families, healthcare providers, and/or health insurers. The EO does not repeal the ACA, which would require Congressional action, but does signal that employers should anticipate some changes to the healthcare law over time.

- ***U.S. Supreme Court Nomination.*** On January 31, 2017, President Trump nominated Judge Neil Gorsuch of the U.S. Court of Appeals for the Tenth Circuit to fill the Supreme Court vacancy created by the passing of Justice Antonin Scalia. Judge Gorsuch is generally viewed as conservative and likely to take a business-friendly position on many issues. If he is confirmed, he could provide the swing vote for a Court that is predicted to split over the issue of whether class action waivers in arbitration agreements with employees violate federal labor law as claimed by the National Labor Relations Board. While a simple majority of Senate votes is needed to confirm a Supreme Court nominee, there have been reports of a threatened filibuster by Senate Democrats. If that occurs, 60 votes would be needed to confirm Judge Gorsuch, unless Republicans use parliamentary action to eliminate the filibuster for a Court nominee, as then-Democratic Senate Majority leader Harry Reid did in 2013 to end other Senate filibusters.

Still to Come?

Changes to the Composition of the National Labor Relations Board

Under the Obama administration, the NLRB issued a number of decisions that were viewed as being favorable to unions, many of which overturned long-standing NLRB rulings. Some of the Board's more significant actions included redefining the standard for joint employers under the National Labor Relations Act, essentially making employers liable for the acts committed by their contractors; expanding the concept of protected activity to invalidate many types of employer handbook rules and policies such as those governing social media, confidentiality and workplace investigations; and revising its rules to substantially shorten the time frame for union elections.

Since President Trump will be able to fill two vacancies on the five-member Board, employers are likely to see an ideological shift in favor of more conservative rulings and a less aggressive approach. As of January 23, 2017, President Trump began making strides toward more business-friendly Board rulings by appointing Republican Philip Miscimarra to the temporary role of Acting Chairman of the Board. Miscimarra is an Obama appointee who often broke rank with the Democratic Board members and issued dissents in some of the Board's more controversial decisions, including *Browning-Ferris*, the decision that redefined the joint employer standard.

Changes in the Department of Labor

President Trump originally nominated Andrew Puzder, CEO of CKE Restaurants, the parent company of Carl's Jr. and Hardees, for the role of Secretary of the Department of Labor. Puzder hails from a long history of managing companies in the foodservice industry and would have

brought to the DOL a deep-seated knowledge of business management and regulation, as well as strong views against increasing the minimum wage for American workers. Puzder withdrew his nomination as of February 15, 2017, amid growing criticism from both parties over his personal background. Nevertheless, we anticipate that whoever is ultimately confirmed as Secretary of Labor, employers are likely to see a less aggressive, more business-friendly DOL.

Changes to the Equal Employment Opportunity Commission

Under former President Obama, the EEOC took steps to increase pay transparency, impose stricter reporting requirements, advance LGBTQ rights in the workplace, and moved toward a more systemic litigation program. While some may have expected more measured changes to the Commission, after less than a week in office President Trump replaced former EEOC chairman Jenny R. Yang, naming Commission member Victoria Lipnic Acting Chair of the EEOC. Though an Obama appointee, over the last few years Lipnic has often broken away from Agency majority, including dissenting in a 2012 landmark decision that held for the first time that discrimination against gay employees is a form of discrimination based on sex. She also voted against changing the EEO-1 form to require the reporting of summary pay data.

Minimum Wage Increase?

One of former President Obama's hallmark campaign goals was to increase the minimum wage. This proposal was met with staunch opposition from Congress. Although unable to achieve an increase in the minimum wage rate for private employees, by Executive Order Obama increased the minimum wage for employees performing work on certain federal contracts.

President Trump's view on the minimum wage issue has not been as clear as some would hope. Trump, who once opposed increasing the minimum wage, said on the campaign trail that he is not against seeing an increase to the federal minimum hourly wage. Since that time, he has clarified his support, saying that while he supports raising the minimum wage to \$10.00 per hour, he still believes that states should set minimum wage as they see appropriate. Thus, it is likely employers will continue to see increases in the minimum wage rate at the state and local level, however, whether the federal rate will change remains to be seen.

Paid Maternity Leave?

On the campaign trail, President Trump suggested that he would support providing mothers six weeks of paid maternity leave. This proposal, if formally introduced, could meet resistance from both parties, based on criticism expressed during the presidential campaign. Thus, it is not clear whether Congress would approve such a bill and, if it did, what the details of the final law would be. In the past few years, several state and local governments have enacted paid leave laws, and employers are likely to see more activity at that level in the near future than at the federal level. Federal contractors and subcontractors are already subject to a paid sick leave requirement, pursuant to an Obama EO and DOL regulations implementing the EO. It appears unlikely that the Trump administration would take steps to amend the paid sick leave regulations for federal contractors, but it is possible.

The Bottom Line: Employers should anticipate that 2017 will be a time of change, hopefully in the direction of less regulation by the federal government. Of course, the precise nature of these changes remains to be seen.

If you have any questions regarding this article or other labor or employment law issues, please feel free to contact the author, [Rachel E. Kelly, rkelly@fordharrison.com](mailto:rkelly@fordharrison.com), who is an attorney in our Dallas office. You may also contact the FordHarrison attorney with whom you usually work.