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Labor and Employment Law Changes in the Trump Era

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President Trump's first 11 months in office brought significant changes to labor and employment law. The Obama administration succeeded in enacting many pro-employee policies through regulations and executive orders. Due to the largely regulatory nature of those changes, the Trump administration reversed many of those enactments, and has signaled a much more business-friendly stance than its predecessor. Immediate changes to the leadership and agendas for the Department of Labor (DOL), the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB) have already occurred, along with reversals of policy and positions taken in court.

The DOL

The DOL played a key role in implementing the Obama agenda during the last administration. The Trump DOL has already rolled back many Obama-era regulations, such as ending a narrow reading on requirements for drug testing among applicants for unemployment benefits (*see*http://bit.ly/2nRUlN5); proposing a new rule to end the prohibition on tip pooling between servers and other personnel at restaurants such as bartenders, hosts, and dishwashers (*see*http://bit.ly/2nRUlN5); and proposing a rescinding of the so-called "persuader rule," which required attorneys advising employers facing union campaigns to make mandatory disclosures of their clients (*see* http://bit.ly/295qcWd).

The DOL has also moved to reverse three major administrative interpretations of the Fair Labor Standards Act (FLSA) that had a significant impact on employers: 1) the interpretation regarding which workers are considered independent contractors; 2) which employers are considered "joint employers"; and 3) the overtime rule, which reduced the number of employees exempt from overtime regulations. The DOL has withdrawn a 2015 administrative interpretation that for the first time began with the presumption that a worker is an employee, rather than an independent contractor. *See* http://bit.ly/2rBbZcf. This interpretation put the burden on companies to show that a worker was not an employee.

Also withdrawn by the DOL was the 2016 administrative interpretation of the definition of "joint employer" under the FLSA. Prior to the Obama-era interpretation, the DOL considered companies joint employers when they had "direct control" over workers, including the power to hire and fire. The withdrawal of these two administrative interpretations is expected to reset the independent contractor and joint employer tests to the standards in place prior to the Obama administration.

Also reversed by the Trump DOL was the Obama-era overtime rule, which raised the salary minimum for classifying workers as exempt from overtime requirements of the FLSA. The Obama regulation never went into effect due to an injunction issued by a Texas federal district court in November 2016. The Trump DOL decided not to continue the Obama DOL's appeal of the injunction, and final judgment was entered against the government by the district judge. The DOL issued a new request for information (RFI) asking for public input to help guide potential new rules. *See* http://bit.ly/2vJUMxi. Public comment on the RFI closed Sept. 25, 2017.

The EEOC

President Trump has appointed new members to the EEOC to fill several vacancies, which will change the majority of the board from Democrat to Republican. The newly composed EEOC is expected to be more "business-friendly" with the appointment of Janet Dhillon as chair. The other new commissioner appointed by President Trump is Republican Daniel Gade, an Iraq war veteran and expert on disability policy. Both Dhillon and Gade have had their confirmation hearings, but as of press time, had not yet been confirmed by the Senate.

The EEOC under Obama issued guidance that Title VII protected against discrimination on the basis of sexual orientation and gender identity. *See* http://bit.ly/1Omlsf1. Dhillon and Gade refused to commit to a position on whether Title VII covers sexual orientation in their recent Senate confirmation hearings. *See* http://read.bi/2yHEnPj.

The Supreme Court is likely to consider whether Title VII protects against discrimination on the basis of sexual orientation, as there is a ripe circuit split on that issue. Current EEOC guidance indicates that Title VII protects against discrimination on the basis of sexual orientation, a viewpoint that the U.S. Court of Appeals for the Seventh Circuit shares as of April 2017. *See*http://bit.ly/2oFN9Vp.

However, in March 2017, the U.S. Court of Appeals for the Eleventh Circuit reached the opposite conclusion, holding that binding precedent prevented it from finding that Title VII protected against sexual orientation discrimination. *See* http://bit.ly/2n5ZQL6. This opinion split can be seen in stark terms in the recent Second Circuit case, *Zarda v. Altitude Express dba Skydive Long Island*, where the EEOC filed an amicus brief arguing that Title VII covers sexual orientation. *See*http://bit.ly/2yHmMqL. In June 2017, however, the Trump DOJ filed a separate amicus brief arguing that Title VII does not cover sexual orientation, and further stating that the EEOC does not speak for the United States on this issue. *See* http://bit.ly/2Aro9H8. At oral argument, the EEOC and the DOJ maintained those opposing positions.

The NLRB

The Trump NLRB is also expected to be more business friendly, with Trump appointee Peter Robb as General Counsel. Robb is on record as being critical of recent NLRB interpretations of "neutral" policies in employer handbooks as being unlawful and prohibiting concerted activity. Such handbook provisions typically prohibit the use of company email or technology for personal uses. The Obama NLRB struck down many of these policies as violating the Section 7 rights of the employees.

Currently pending before the Supreme Court is *Ernst & Young LLP v. Morris*, which challenges arbitration clauses in individual employment agreements as violative of the National Labor Relations Act. These arbitration clauses waive employees' collective action rights. President Obama's Solicitor General had filed, on behalf of the NLRB, a petition for *certiorari* with respect to collective action waivers in employee agreements (this petition was consolidated with *Ernst & Young LLP* and *Epic Systems Corp. v. Lewis*). *See* http://bit.ly/2hlKCR8. The NLRB argued that such waivers violate employees' Section 7 and Section 8(a)(1) rights, and chill collective legal actions.

The DOJ under President Trump has taken the opposite view, and filed an amicus brief arguing that the Federal Arbitration Act is a "super statute" that trumps the provisions of the NLRA, which arguably prohibit such arbitration clauses between employees and employers. *See*http://bit.ly/2hlKCR8. At oral argument, the Solicitor General argued on behalf of the Trump administration that such clauses were permitted, and the NLRB's General Counsel

argued the opposite position, leading to the strange sight of the government essentially arguing against itself.

Another expected change under President Trump's NLRB is the end of the "joint employer" rule from the 2015 NLRB *Browning-Ferris* decision, which ended the prior "direct control" standard. *See* http://bit.ly/1LDMtIx. Under that standard, an employer must exercise direct control over the terms and conditions of employment to be considered an "employer." Under *Browning-Ferris*, a company may be considered a joint employer of a worker even if another employer of the worker (such a franchisee or employee leasing company) exercises direct control over the terms and conditions of employment. A bill is currently making its way through the House of Representatives to amend the NLRA to undo the *Browning-Ferris* decision. The Save Local Business Act, H.R. 3441, was in the Rules Committee in the House at press time, and is shortly expected to make its way to the floor. *See* http://bit.ly/2iFNuoX.

Conclusion

As the Trump administration closes out its first year, and many important agency positions remain vacant, there may be many additional changes to labor and employment law in the coming years. Companies should remain attentive to announcements from the Trump administration agencies to glean clues about enforcement priorities and changes in policy. Ultimately, acts of Congress and court decisions will be a check and balance on administration actions.

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