

WHAT DOES FEDERAL REGULATORY REFORM MEAN FOR LABOR AND EMPLOYMENT LAW?

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Soon after taking office, President Trump signed Executive Orders promoting "regulatory reform." The Orders require federal agencies to reduce regulatory burden on business by, for example, rescinding two existing regulations for each new one. To ensure that these directives are carried out, each agency must appoint a Regulatory Reform Officer and form a Task Force.

Will this effort in fact reduce the burdens and costs of hiring and maintaining a workforce? Or is reform something that sounds alluring on a general level but likely will have little practical impact?

Any one of a certain age knows that regulatory reform efforts crop up in Washington from time to time. President Clinton signed an Executive Order in 1993 directing agencies to "promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need," which led to then-Vice President Gore's famous "Reinventing Government" initiative of the mid-1990's. More recently, in 2011, President Obama signed an Executive Order designed to improve on President Clinton's. Yet, few would argue that regulatory burden waned between 2011 and today.

This history makes clear that, even if reform bears fruit, long-term benefit is not guaranteed. Still, easing regulatory burden appears to be a true priority of the new Administration. The two-for-one directive provides something of an objective yardstick for compliance. Moreover, President Trump's cabinet heads appear ready to take reform to heart.

Of course, it is still too soon to forecast the impact of the Executive Orders on the Department of Labor, the National Labor Relations Board, or the EEOC. The Senate just yesterday confirmed the President's Labor nominee, Alex Acosta. The agencies have not yet identified their Regulatory Reform Officers or Task Force members. The following thoughts address some of the most significant labor and employment law matters directly affected by potential Washington reforms.

Immigration. Immigration "reform" will not ease burdens on employers that rely on foreign skilled workers or unskilled laborers. To the contrary, President Trump's "America first" policy promises to make employing foreign labor harder. For example, US Citizenship and Immigration Services has already announced new efforts to detect and deter employer overuse of the H1-B visa process (for temporary speciality jobs). USCIS will coordinate those efforts with the Department of Justice.

Labor Department. Secretary Acosta will undoubtedly embrace the Administration's emphasis on regulatory burden reduction. However, that focus likely will be implemented by a retreat from new rulemakings more so than unwinding recent regulations. The new Secretary will have the opportunity to appoint new leadership for various agencies within DOL, such as the Administrators of the Wage and Hour Division and OSHA, as well as to appoint new members to the Administrative Review Board (ARB). The ARB handles agency appeals in cases under a variety of federal labor and employment laws, and can make important policy changes through its interpretations of those laws. In other DOL areas:

OSHA. OSHA made controversial changes last year to injury and illness reporting requirements, which mandated additional public disclosures and added a new set of whistleblower protections. A federal court declined to enjoin the rule. The U.S. Chamber of Commerce's "top ten" areas for reform in the labor arena include repeal of three OSHA standards the Chamber views as particularly costly for employers--the respirable silica rule, the hazard communication standard, and the cranes and derricks standard. Those regulations are primarily of interest to organizations involved in construction, manufacturing, and heavy-duty or industrial enterprises. The Trump Administration recently delayed implementation of the silica rule until this September.

Wage and Hour. The hot topic last year in wage and hour regulation was the amendment of Fair Labor Standards Act regulations, which nearly doubled the minimum base pay required for employee exempt status. A federal court issued a nationwide injunction against the new regulations, just before they were scheduled to take effect. The new Secretary will likely prioritize the rescission or modification of these requirements.

EEOC. The Commission is now headed by a Republican Acting Chair, Victoria Lipnic, but Democrat appointees retain their majority. Lipnic reportedly has downplayed the notion that the EEOC will significantly change its focus or strategy. Nonetheless, Lipnic voted last year against the expanded EEO-1 reporting requirements, which among other things require the reporting of certain employee compensation information. The EEOC's position that the prohibition on sex discrimination also prohibits discrimination based on sexual orientation is now fully ensconced in litigation and likely will be resolved by the Supreme Court in the not-too-distant future.

OFCCP/Government Contracts. The future of President Obama's July 2014 Fair Pay and Safe Workplaces Executive Order is in doubt. Last year, to implement the Order, the DOL issued guidance and the Federal Acquisition Regulation Council supplemented its rule to require prospective and existing contractors on covered contracts to disclose violations of certain labor laws. Those violations would then be considered in awarding contracts. On another front, new affirmative action/non-discrimination requirements for veterans and the disabled could also be reconsidered.

Benefits. The so-called Fiduciary Rule has been the main attention-getter in terms of DOL benefits regulation. In a nutshell, this 1,000+ page regulation imposes new fiduciary obligations on advisors to ERISA-covered employee benefits plans. The rule's primary impact would be on brokers rather than employers. The new Administration delayed the effective date of the Fiduciary Rule until June and likely will take steps to further delay, amend, or potentially revoke the rule. Although not squarely a matter of DOL regulation, looming promises to repeal and replace the Affordable Care Act have created substantial uncertainties about what lies in store for ACA regulations and how those changes would impact employers.

National Labor Relations Board. The Board now has a Republican Chairman, Philip Miscimarra, but not yet a Republican majority. Changes to NLRB regulations are likely but may be slow in coming. The controversial Obama-era Persuader Rule, which requires public disclosure of the identities of consultants and attorneys who advise employers on union campaigns, is unlikely to take effect. A federal judge in Texas recently issued a nationwide injunction against the rule's enforcement, the Administration is not likely to continue to defend the rule, and a Republican-majority Board is not likely to resurrect the matter. Rules adopted in 2014 encouraging so-called quickie union elections, viewed as highly pro-labor, are likely to be unwound, even though legal challenges were unsuccessful.

Many controversial labor relations developments in recent years resulted from adjudicative determinations by the NLRB, rather than regulation. Board decisions outlawed previously unobjectionable handbook policies (confidentiality, social media, etc.); restricted the scope of employment arbitration agreements; and discouraged confidentiality measures in workplace investigations. These determinations affect all employers, regardless whether part of the workforce is unionized. Revoking these changes will require a newly constituted Board to overrule precedent that has disadvantaged employers.

A federal court is currently reviewing changes made by the NLRB in recent years to the test for determining joint employer status. The NLRB adopted a more liberal test allowing the agency to treat two organizations as joint employers where either has an indirect right to control workers of the other. Even if the courts sustain the new interpretation, the NLRB will in all likelihood abandon it once the Board has a Republican majority.

This summary is provided as an informational tool.

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