EMPLOYMENT LAW NEWS

from the Washington, DC office of

CONNER & WINTERS

END-OF-YEAR REPORT: WHAT DOES FEDERAL REGULATORY REFORM MEAN FOR LABOR AND EMPLOYMENT LAW?

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December 21, 2017

In April, we commented on prospects for regulatory reform in federal labor and employment law under the Trump Administration. (Our April report is below.) As 2017 draws to a close, we provide an update on how those prospects have played out to date.

Immigration. We suggested that President Trump's "Hire America" focus would lead to increased scrutiny of foreign labor and that has been the Administration's direction. For example, in October, U.S. Citizenship and Immigration Services instructed agents that they should no longer defer to determinations on prior visa petitions when considering extensions. In addition, the Department of Homeland Security recently published a proposal to reverse a 2015 rule that extended employment eligibility for certain spouses of H-1B immigrants. The agency also intends to rescind the International Entrepreneur Rule following a federal court decision earlier this month setting aside the agency's attempt to delay the Rule's implementation.

Labor Department. Secretary of Labor Acosta had just been confirmed when we published our April report. In testimony to Congress last month, the Secretary lauded the country's "remarkable" job growth in 2017 and restated his commitment to "rolling back regulations that unnecessarily eliminate jobs, inhibit job creation, are unnecessary, or impose costs that exceed benefits." According to the Secretary, DOL regulatory reform will focus on respect for the individual and the rule of law, where rulemaking is based on public input and policy is not advanced by informal means. Due to continued delays in the process for Senate confirmation of some senior-level DOL appointees, the Secretary has not yet been able to foster significant change in certain areas. For example, the Administrative Review Board remains under the one-party control of five members appointed by the Obama Administration.

Wage and Hour: An Obama Administration-era rule would have narrowed the class of employees deemed exempt under the Fair Labor Standards Act by nearly doubling the minimum base pay used as part of the test in determining exempt status. Due to federal court injunctions, that rule never took effect. While Secretary Acosta has cited the 2016 rule as an example of how executive overreach negatively impacts Americans, he recognizes that the DOL's existing regulations may be outdated and are "worthy of reconsideration." To that end, in July, the Wage and Hour Division began soliciting public comments on the rules for exempt status and received more than 200,000 responses. The Division will likely propose revised regulations in 2018, although it currently only has an acting Administrator, Bryan Jarrett.

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This Alert was authored by Donn Meindertsma, a partner in the Washington, D.C. office of Conner & Winters, LLP, and a member of the firm's litigation and labor and employment practice groups.

OSHA: Although the new OSHA Administrator, Scott Mugno, has not yet been confirmed by the full Senate, OSHA has taken action on some of the issues discussed in our April report. The due date for compliance with the rule requiring certification of crane operators has been pushed back to next November. Changes to the permissible limits on silica exposure took effect in September, but OSHA has focused on compliance assistance rather than enforcement. The requirement that employers submit injury and illness reports electronically, which was somewhat controversial due to fears that raw data would be publicly released without appropriate context or explanations, has nevertheless taken effect. OSHA recently announced that it will not take enforcement action against employers who have not yet complied if they electronically submit their data by the end of the year.

EEOC. Last year, the EEOC added a requirement that employers submit employee pay data along with the demographic data already collected in annual EEO-1 reports. In August 2017, the Office of Information and Regulatory Affairs (OIRA, part of the Office of Management and Budget) issued a Memorandum staying the effective date of the expanded reporting requirements. OIRA determined that the revised EEO-1 form did not pass muster under the Paperwork Reduction Act. Our April report also noted the EEOC's stance that Title VII's bar on sex discrimination also bars discrimination based on sexual orientation. Although the EEOC is still short of its full complement of five members, the EEOC might not reverse its stance even with a Republican majority. Even so, the Department of Justice disagrees with the EEOC's position and advocates in litigation that Title VII does not bar sexual orientation discrimination. Since our April report, federal appellate courts have reached conflicting decisions on this issue. While the Supreme Court last week declined to review one such decision, it is likely to step in to resolve this conflict at some point.

OFCCP/Government Contracts. President Obama's Fair Play and Safe Workplaces Executive Order, which tied federal contracts to compliance with federal labor laws and was implemented through new contracting regulations last year, is officially dead. While the DOL had issued its own guidance in support of implementing the Executive Order, the DOL rescinded that guidance effective November 6, 2017. The DOL only recently gained a new director for the OFCCP, Ondray Harris, who assumed that position on December 10.

Benefits. The so-called Fiduciary Rule, which expanded investment advisor obligations imposed by the tax code and ERISA, was partially effective as of June 2017. Consistent with a directive by President Trump, the DOL has been examining the potentially adverse effects the rule may have on the ability of individuals to gain access to retirement information and financial advice. Following temporary delays in the rule's implementation, the DOL published a final rule in late November postponing certain compliance requirements until July 1, 2019. Effectively, that action delays enforcement of the rule for 18 more months, and in the interim the DOL may well limit the rule or rescind it altogether.

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National Labor Relations Board. The Board has only had a Republican majority since late September. (Last week, the Republican Chairman stepped down at the end of his term, so the majority was short lived. However, a new Republican member is expected to be nominated soon.) In that short time, the Board issued several major decisions. For example, a Board decision last week tightened the test that applies when (as has occurred in hundreds of cases) an employer's facially neutral rule, policy, or handbook provision is challenged as restricting protected labor rights.

The following provides updates to specific topics covered in our April report:

Persuader Rule: Adopted by a Democrat-majority Board in 2016, the Persuader Rule would have required employers to publicly disclose the identity of their advisors (such as attorneys) on union campaigns, even if the advisors did not directly engage with (or try to "persuade") workers. As of April, the rule had already been enjoined by a court, and we noted that it was unlikely ever to take effect. That has been the case. In June, the DOL's Labor-Management Standards Office published a notice of a proposed rulemaking and a request for comments on a proposal to rescind the Persuader Rule.

Election Procedures: In late 2014, the Board made dozens of changes to the regulations governing representation elections, which were widely viewed as favoring unions at the expense of employers. While the revised regulations have been in effect since early 2015, the newly composed Board is likely to change them. Last week, the Board published a *Federal Register* notice soliciting public comments (due February 12, 2018) on whether the 2014 rule revisions should remain intact, be revised, or be rescinded. Action by the Board in response to public comments is expected in 2018.

Joint Employers: Earlier this month, in *Hy-Brand Industrial Contractors*, the Board held that an entity may be deemed a joint employer for labor law purposes only if it exercised actual control over the essential employment terms of another entity's employees. A joint employer relationship is not proved merely by evidence of indirect control, contractually-reserved control that has never been exercised, or control that is limited and routine. The Board thus reversed the controversial 2015 *Browning Ferris Industries* decision that had liberalized the joint employer test. In addition, the DOL recently rescinded its own, informal guidance on joint employers and independent contractors.

We will continue to monitor regulatory reform developments of interest to employers in 2018.

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April 28, 2017

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.

This Alert was authored by Donn Meindertsma, a partner in the Washington, D.C. office of Conner & Winters, LLP, and a member of the firm's labor and employment practice group.

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.
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> **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 Comission 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.

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