Employment Regulation: A View From the Outside

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Trump L&E: (Almost) 150 Days In

- An introduction to the impact of “Trump’s World” on the employment law landscape
  - Wage & Hour/Department of Labor
  - EEOC/Discrimination
  - National Labor Relations Board
  - Executive branch overhaul in the works?
- Up to now and what’s next
- Let’s be clear—my predictive abilities are limited
**Background**

- Trump campaign wasn’t focused on employment-related issues (more about building walls, Obamacare, immigration, etc.)
- One clear statement—everything Obama did was wrong and needs fixing/retracting
- Anti-regulation philosophy—too many regulations hurting U.S. (so, for every 1 issued, retract 2)
- Trump has already signed 13 Congressional Review Act resolutions
  - Only used 1 prior time—2001 (DOL Ergonomics Rule)

**What Do We Know?**

- Trump mindset—gov’t is just like running a business
- Can envision scenarios when that mindset generally benefits ERs
- When biz isn’t hitting targets, 2 basic options:
  - Grow revenue, or
  - Reduce expenses
- Trump unlikely to grow revenue (taxes) but can cut staff/services
  - Beneficial to ERs if enforcement staff of DOL/EEOC is cut?
Comp Time Is (Almost) Here!? 

“Working Families Flexibility Act”

- Key provisions:
  - Non-exempt (non-union) EE must agree in writing
  - EE can change mind at any time; ER 30-day notice
  - Eligible if work 1000 hours in 12-month period
  - Max accrual 160 hours
  - No carryover to next calendar yr; payout unused at yr-end
  - Can use for any reason with reasonable notice as long as not “unduly disrupt” operations
  - ER can’t pressure EE to take comp time instead of OT

Pros: spreads out OT costs; gives EEs the choice

Cons:
- EE by EE
- No certainty because EE can change mind anytime
- Administrative nightmare to track each EE
- Potential claims: forced to take comp time; only give OT to EEs choosing comp time; denied use; define “unduly disrupt”

Prediction: doubtful; passed House 5/2/17; uphill in Senate
- Democrats promise filibuster
- More important issues first: taxes, healthcare, immigration?
- Even if passes, still must comply with state laws
**Paid Leave—Trump Delivering for Ivanka**

- Proposed budget—like an “opening bid”; Congress to weigh in
- Seeks to establish “Paid Parental Leave” law
- By 2020, 6 weeks paid leave for new mom/dad for birth or adoption
- Not paid for by ERs; funded by unemployment ins. reforms
  - “Fully offset” cost via reforms, such as clamp down on improper payments
- Short on details—each state to develop own program
- May find traction in Congress—too early, too little detail

**Department of Labor—Budget**

- Trump proposes slashing budget—20% overall
  - Mostly impacts workforce training programs
  - But must impact enforcement? Acosta—“we’re going to do more with less”
- WHD gets $3M INCREASE – why?
  - To create effective “compliance tool” for ERs
- Office of Labor-Mgmt Standards—22% INCREASE—Why?
  - “Keep those unions in check”—enforce disclosure requirements
  - Restore office that audits large international unions (Obama disbanded)
Department of Labor—Leadership

- New Secretary of Labor—Alex Acosta
  - Solid background—FIU Law School Dean, Harvard grad, 3d Cir. clerk (Alito), U.S. Attorney, NLRB (Bush)
  - Thoughtful, intelligent, good listener, cautious, well-liked, consensus builder, not looking for conflict—see any contrasts?
- Head of WHD—Cheryl Stanton?
  - Currently executive director SC state agency; W&H defense attorney; Bush admin as liaison to DOL/EEOC/NLRB
  - Good news for ERs—maybe reverse heavy-handed efforts
- Not so easy filling positions

DOL—Acosta Kicks Things into Gear...

- Bye-bye ... “Administrator’s Interpretations”
  - 6/7/17: DOL rescinded both the IC and Joint ER guidance documents
  - Each broadened the scope of potential liability for ERs
  - IC – most workers are “EEs”; cherry picked from cases
    - De-emphasized traditional element of “control” by alleged ER
  - Joint ER—expanded realm; more cherry picking
  - 1st step back to Opinion Letters!
- Bye-bye ... Persuader Rule
  - TX court enjoined; appeal still pending
  - DOL commenced process to issue new rule formally rescinding it
DOL—Acosta Kicks Things into Gear...

- New white collar exemption rule (doubling salary level)?
  - Currently enjoined by TX court; appeal pending ... for now
  - Acosta preparing RFI seeking new public comments on the rule—gather info to determine best path forward—new rule?
  - Acosta: doubling current level to $47k creates “stress on the system”; but “life gets a lot more expensive” (“troubling” that no update has occurred since 2004)
  - **Prediction:** Obama rule dies; deliberate process but eventually get new rule to increase minimum salary to mid-30s
  - Things that make you go hmm...
    - Lawsuit filed against Chipotle in DNJ 6/7/17—claims rule automatically went into effect absent “final” court adjudication

DOL—Predictions/High Hopes (?)

- Back to compliance-focused agenda (not “gotcha”)
- Eliminate public shaming (press releases for W&H/safety violations)
- Refocus on EE complaints as trigger to investigate, less on “targeted initiatives” by industry and geography
- End abusive tactics—no notice, 72-hour demands
- More willing to negotiate back pay
- Look back 2 years, rather than 3
- No LDs, low CMPs
- But will plaintiff attorneys fill the void?
**EEOC—LGBT Discrimination—Title VII**

- Perhaps most significant change/evolution in 20+ years
- *Hively v. Ivy Tech Community College*—7th Cir. (4/4/17)
  - 8-3 decision by full panel (11 judges)
  - Hold: sexual orientation discrimination = sex discrimination
  - Prior 3-judge panel: LGBT discrimination not covered
  - Panel was conflicted but felt bound by prior case law
  - Noted “paradoxical legal landscape in which a person can be married on Sat. and then fired on Mon. for just that act”
  - 11th Cir. (*Evans v. Ga. Reg’l Hosp.*)—not covered
  - 2d Cir. (*Christiansen v. Omnicom Group* and *Zarda v. Altitude Express*)—not covered; but full panel review coming
  - Sup. Ct.—here we come! (Gorsuch/Scalia; Kennedy swings)

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**EEOC—Leadership & EEO-1s**

- New Chair—Victoria Lipnic
  - Republican, pro-biz, mgmt. lawyer, Bush DOL 7 yrs
  - Will continue to pursue LGBT enforcement under Title VII
  - EEOC: 5 commissioners
    - Lipnic only Republican currently
    - Trump to appoint 2 more this year to reach Republican majority
- New EEO-1 Rule—does it have a future?
  - Lipnic voted against it originally (1st report due 3/31/18)
  - Pay equity effort for federal contractors & large ERs
  - Report pay by gender, race, & ethnicity across 12 pay bands
  - Not just across job categories
  - How would it be used?
National Labor Relations Board

- Obama NLRB tried to rescue the union movement
  - WSJ 1/24/17—“Don’t Ignore the Labor Board”: Obama turned it into “a wholly owned subsidiary of the AFL-CIO”
  - Union membership downward spiral: < 7% in private sector
- Arguably, most miserable 8 years for ERs (though no impact on union membership)
  - “Achievements”: quickie elections, destructive joint ER standard (Browning Ferris), protection for class actions (DR Horton), “micro units” (Specialty Healthcare), more liability for handbook policies
  - Study: Obama NLRB “upended 4,559 total yrs of established law”
  - Board has been “bored” so intrude into non-union workplaces

NLRB—Where to from Here?

- Rumor—Congressional Republicans want to “punish” Board, “exact revenge”
- Trump proposed 6% budget cut, reduce staff by 275 (1600 to 1325)
- Budget projects 5% INCREASE in cases – yikes (major slowdown)
- Big Question: when will Trump Board start reversing “crazy” decisions?
  - Unlikely before Republican majority on 5-member Board
  - Presently 2 Ds, 1 R (Chair Phil Miscimarra)
  - Trump finally nominated to fill 2 vacancies – takes time (FBI, Congress)
- Board decisions interpret NLRA (different from EEOC/DOL)
  - Courts defer to Board, so almost establish the law
  - Next: fill vacancies, then wait for cases to percolate up
Potential Ticking Time Bomb?

- Trump Executive Order 3/13/17
- “Comprehensive Plan for Reorganizing the Executive Branch”
- Potential far-reaching ability to shape the structure and programs of executive agencies—even elimination
- Accepting public comments suggesting improvements

- Trump began canvassing the private sector to ID worst regulatory issues (asked manufacturers—EPA/DOL focus)

Tick, Tick, Tick ...

- Let the “process” begin!
- Each federal agency must create plan to reorganize and improve its effectiveness
  - Plans due 9/2017
  - Goal: save taxpayer money and reduce workforces
- Your role:
  https://www.whitehouse.gov/reorganizing-the-executive-branch
  - Pick the agency you’d like to “reform” and offer suggestions
  - Pick the agency you’d like to “eliminate”—no real need to explain, just use the dropdown box
Yes, YOU Could Change the Federal Gov’t

What agency would you like to eliminate?

SELECT CABINET AGENCY (SELECT AS MANY AS APPLICABLE): *
- Department of Labor: Employee Benefits Security Administration
- Department of Labor: Mine Safety and Health Administration
- Department of Labor: Occupational Safety and Health Administration
- Department of Labor: Office of Federal Contract Compliance Programs

SELECT OTHER AGENCIES, BOARDS AND COMMISSIONS (SELECT AS MANY AS APPLICABLE): *
- Equal Employment Opportunity Commission
- Executive Office of the President’s Council of Economic Advisers

PLEASE SHARE YOUR IDEA, INCLUDING THE PROPOSAL AND BENEFITS. IF NECESSARY, YOU MAY INCLUDE A LINK TO A MORE DETAILED REPORT OR ADDITIONAL INFORMATION.

Questions?