

Greater Valley Forge Human Resources Association

Trump's World Meets Employment Law – A Fork In The Road?

April 18, 2017

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Agenda – Predictions?

- Let's be clear – my predictive abilities are limited
- An introduction to Trump's employment world
- Potential impact on:
 - Department of Labor
 - Equal Employment Opportunity Commission
 - National Labor Relations Board
- Ok, fine, my predictions...

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 regs hurting U.S. (so, for every 1 issued, retract 2)
- Trump has already signed 11 Congressional Review Act resolutions, with 2 more waiting
 - Only used 1 prior time – 2001 (DOL Ergonomics Rule)

Potential Time Bomb – Trump Exec. 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
- Process – overseen by Office of Mgmt & Budget (OMB):
 - Each federal agency creates plan to reorganize, improve effectiveness
 - Public comments suggesting improvements
 - OMB submits to Trump proposed plan to reorganize the executive branch, including addressing the elimination of “unnecessary agencies, components of agencies, and programs”

Potential Time Bomb – Trump Exec. Order 3/13/17?

- Let the “process” begin – 4/12/17 OMB issues plan ...
- All federal agencies must immediately act to save taxpayer \$ and reduce workforces
- OMB will help ID areas to eliminate, restructure, consolidate
- 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 Government

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): *

Denali Commission
Election Assistance Commission
Equal Employment Opportunity Commission
Executive Office of the President: Council of Economic Advisers

LIST ANY SPECIFIC PROGRAMS:

SELECT WHY: *

- Select -

SELECT WHY: FIELD IS REQUIRED.

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

So, What Does That Tell Us?

- 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 and/or EEOC is cut

Department of Labor – Likely Leadership

- Secretary of Labor – Alex Acosta (FIU Law Sch Dean)
 - Solid background – Harvard, 3d Cir. clerk (Alito), U.S. Attorney, NLRB (Bush)
 - Thoughtful, intelligent, good listener, cautious, well-liked, consensus builder, not looking for conflict
 - Much different from prior nominee (Andy Puzder) or Trump
- Head of WHD – Alex Passantino?
 - Seyfarth Shaw DC attorney (W&H specialist)
 - Acting WHD director under Bush

DOL – Moving Forward

- Change will be slow-moving – lots of key positions to be filled
 - Lots of career investigators who have to be re-educated and re-trained
- Likely business as usual for near term, but...
 - No more public shaming via press releases re: W&H, safety violations
 - Expected budget cuts will eliminate certain programs and could shrink staff, which would impact enforcement efforts (less resources)
 - 1985-2006 WHD opened 55,000 cases
 - 2007-16 WHD opened 183,000 cases (vast majority are MW, OT cases)
 - Not likely to “drain the swamp” and start all over (no massive deregulation expected under Acosta)

DOL – As Acosta Kicks Things Into Gear...

- Predictions ...
 - Opinion letters come back; bye-bye “administrator’s interpretations”
 - Acosta said he finds “a value” in opinion letters – applying the law to specific facts
 - Tracking towards more compliance-focused agenda (not “gotcha”)
 - Listening more to ERs
 - Focus on education
 - Offering more opportunities to comply
 - Refocus on EE complaints, less on “targeted initiatives” by industry (“fissured industries” of WHD Admin. David Weil) and geography

DOL – As Acosta Kicks Things Into Gear...

- More Predictions ...
 - End abusive investigation practices, such as:
 - Showing up with no notice, or
 - Demanding documents in less than 72 hours
 - More willing to negotiate back wages
 - Look back 2 years, rather than 3 (even if willful is arguable)
 - No LDs, less CMPs
 - DOL to show a bit more “humility” says acting solicitor (hmm ...)
- But, will plaintiffs lawyers fill the void – more lawsuits (8300 FLSA class actions in federal court in 2016)?

DOL – Hot Issue: New OT Regulations

- New rule re: white collar exemptions – doubling salary level
 - Currently enjoined by TX court; litigation continues ... for now
 - Acosta may drop DOL appeal/defense of litigation
 - Acosta: doubling current level to \$47k creates “stress on the system”; but “life does become more expensive over time” (“troubling” that no update has occurred since 2004)
 - He mentioned statistics indicate a COLA to 2004 = approx. \$33k
 - Prediction: Obama rule dies; long process but eventually get to increase to mid-30s (possibly by rule-making or even Congressional action as noted by TX court)

DOL – Hot Issues: Blacklisting Rule

- “Blacklisting” Rule killed (Fair Pay and Safe Workplaces rule)
 - Obama issued executive order + DOL guidance
 - Required federal contractors to disclose recent labor/employment law violations when bidding on a new contract worth at least \$500k
 - Required to report “alleged violations” regardless of merit – “presumed guilty”
 - Covers 3 yrs, 14 federal labor laws and similar state labor laws (incl. EEOC charges)
 - Considered by contracting officers in awarding contracts
 - Last year, a TX court temporarily blocked it from going into effect
 - Trump signed Congressional Review Act resolution nullifying it
 - Interesting: the resolution bars any future president from issuing a “substantially similar” rule without Congressional approval

Equal Employment Opportunity Commission

- Acting Chair – Victoria Lipnic
 - Republican, pro-biz, mgmt. lawyer, Bush DOL 7 yrs
 - 5 commissioners – she’s the only R currently; 1 vacancy; Jenny Yang (former chair) term ends in July; Trump to appoint 2 this year for R majority
 - EEOC GC – currently vacant; run by 30+ year career EEOC attorney
 - Jim Lee (Deputy GC) – considered pro-employee
 - Will continue to follow its Strategic Enforcement Plan for 2017-2021
 - Priorities include equal pay, age discrim., inflexible leave policies, LGBT protections
 - Trump may influence focus among existing priorities, lessen pursuit of equal pay, LGBT

EEOC – Hot Topics: LGBT Discrimination – Title VII?

- EEOC begun interpreting Title VII’s prohibition on “sex” discrimination as including protection against sexual orientation and gender identity
 - Lipnic: EEOC won’t change advocacy for LGBT protections
- Now, we have a circuit court split, waiting for the Supreme Court
 - 7th Cir. (Hively v. Ivy Tech Community College) – all 11 judges reviewed, voted 8-3 that sexual orientation is same as sex discrimination
 - Prior 3-judge panel was conflicted but felt bound to find it was not covered by Title VII
 - 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) – not covered
 - Trump’s impact – Justice Gorsuch (replaces Scalia; avoids Garland)

EEOC – Hot Topic: New EEO-1 Reports

- Potential for rollback under Trump
- Pay equity effort requiring federal contractors and large ERs to report pay by gender, race, and ethnicity
 - Fear that info is used for more lawsuits
 - May give appearance of pay inequities, since no explanation provided
- Rule covers 2017; 1st report due March 31, 2018
- Lipnic voted against its issuance in 2015
- Lipnic said its costs and benefits need to be re-evaluated
- Change requires Comm. vote (must wait for Republican majority)
 - Possible: OMB reconsiders validity of EEOC's estimate of burden on ERs

National Labor Relations Board

- Obama NLRB attempted 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”
 - Some “achievements”: quickie elections, destructive joint ER standard (Browning Ferris), stricter corporate liability for handbook policies, protection for class actions (DR Horton), “micro units” (Specialty Healthcare)
 - Study: “upended 4,559 total years of established law”
- Currently, 2-1 majority of Democrats
 - Acting Chair Phil Miscimarra (only R on Bd, term expires Dec.)
 - Trump to appoint 2 more, then replace/re-nominate Miscimarra
- GC Richard Griffin – Obama holdover until Nov.

NLRB – Where To From Here?

- Unions unusually supportive of Trump
 - Trump doesn't seem as anti-U as most Republicans
 - So, will unions have more influence than normal in a R administration?
- Difficulty – most important changes occur through case decisions
 - Takes time for change to dismantle Obama precedents
 - Must wait for case to wind its way through Board process (years)
 - Can't start until 3-2 Republican majority (Trump must appoint); ideally, new GC too (coming late 2017)
- Only rule-making is “ambush” election rules
 - Shorter time to election (42 to a goal of 21 days – avg. is now 23)
 - Restrict ER and EE rights and time to evaluate
 - Chance for change? Slim – 1st need R majority, then rulemaking (notice/comment)

NLRB – Where To From Here?

- There's an interesting “wild card”
- Rumor – Congressional Republicans seek to “punish” the Board
 - Exacting revenge because of Obama Board pro-union decisions
 - Tighten the purse strings – potential budget cut of 25%
- Impact?
 - Staffing cuts = fewer investigators/attorneys = slowing of every phase
 - Indirect mooting of “ambush” election rules if pace slows
 - Re-think bringing costly cases or those with weak evidence
 - Changed settlement strategy – less leverage for the “usual” hardball

Family “Center Of Influence” – Impact?

- Ivanka Trump
 - Daddy wrapped around her little finger?
 - Most influential 1st daughter ever (< 100 days in)?
 - Office in the West Wing
 - Meets foreign leaders
 - Top security clearance
- Unprecedented – Trump listens to her, so we likely should
- Ivanka 2024?

(Not So) Bold Legislative Prediction

- No comprehensive federal regulation of workplace in 24 years
 - Last was FMLA in 1993
 - Overdue?
- Ivanka Trump may change that – strong advocacy for issues directly related to women, especially working moms
 - Paid maternity leave
 - Gender pay equity, workplace advancement
 - Arguably not traditionally Republican – contrary to base?

(Not So) Bold Legislative Prediction – Paid Maternity LOA

- Paid maternity leave is coming
- Ivanka has been talking it up, campaigning to Congress
 - Was Trump campaign promise too
- Seemingly contrary to vow to minimize biz regulation
- Pro-employee concept, but many large ERs prefer a national program over piecemeal regulation by state/city/municipality
- Particularly valuable to Trump, who's (somehow 😊) viewed as anti-women by many
- Some interesting statistics for consideration:
 - Only 12% of women in U.S. have access to similar paid leave
 - 40% of households dependent on mother's income
 - Many other countries have programs

Potential Federal Paid Maternity Leave Law

- Odds are in favor of creation – long time since major fed reg
- Questions:
 - How to fund? (ER or EE contributions/taxes?)
 - Would it contain preemption language? (prevent state/local laws)
 - How much paid time and how can it be used? (6-8 weeks)
 - Who would be eligible? (minimum EE threshold/small ER exception, length of service?)
 - Use for paid paternity leave too?

Predictable (Continuing) Trend – State & Local Laws

- Where the federal government hasn't done “enough” or if Trump/Congress refuse to do more...
- “Activist” states/cities/municipalities picking up the slack
- Examples
 - Paid sick leave laws (Philly, CA, etc.)
 - Minimum wage increases (21 states, DC, many cities incl. in AL, IA, KY)
 - “Ban the box” laws (Philly, NYC, Chicago, NJ, CA, etc.)
 - Salary inquiry bans (Philly*, MA, NYC)
- Compliance nightmare for multistate ERs

Bucking That Trend?

- Consider the potential role of “preemption” efforts, whether at the federal or state level
- Interesting internal conflict playing out right here – city vs. state:
 - Philly sick leave ordinance – up to 40 hours paid time required
 - In Harrisburg, Senate seeking to prevent such local legislation, as it hurts small ERs and is nightmare for multistate ERs
 - WI, AZ, FL passed laws preventing cities from enacting paid sick leave

Questions?

