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Employment Law Outlook

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Labor and Employment Law Under President Trump

William M. Furr

Now that the United States has a new President and a Republican majority in both the U.S. Senate and the House of Representatives, employers should be prepared for significant changes in the laws affecting the workplace. Although it is difficult to predict which laws will change under a new administration, the following is a list of potential developments.

Affordable Care Act: Steps have already been taken by President Trump and Congress to rescind the Affordable Care Act. The question remains as to what will replace Obamacare. President Trump and the Republican leaders have promised to replace the Affordable Care Act with a new scheme for providing health insurance to Americans. We will have to wait to see what legislation is passed on this.

U.S. Supreme Court: President Trump has promised to nominate a conservative Justice to the U.S. Supreme Court to replace Justice Antonin Scalia. Additionally, three sitting Supreme Court Justices are age 78 or older. If President Trump has the opportunity to nominate two or more conservative Justices, it will likely result in Supreme Court decisions favoring employers over employees' rights.

National Labor Relations Board: The NLRB will now be governed by a Republican majority. Under President Obama, the NLRB issued numerous decisions favoring labor unions and employees including rulings implementing "quickie elections," expanding the concept of joint employment, and scrutinizing employers' social media and email policies. A Republican-led NLRB is likely to back off of some of these initiatives.

Federal Wage and Hour Laws: Neither President Trump

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Federal District Court Blocks New DOL Overtime Salary Basis Threshold

Phillip H. Hucles

On November 22, 2016, a federal judge in Texas issued a nationwide preliminary injunction prohibiting the implementation of the United States Department of Labor's (DOL) new regulations on the Fair Labor Standards Act's white-collar exemption. The new rule, originally set to take effect on December 1, 2016, has been stayed pending a final determination by the courts.

The DOL's new overtime rules substantially revised the previous salary requirements for the white-collar exemption. The new rule changes the baseline salary threshold from $455 per week to $913 per week. The new rule more than doubles the previous white-collar salary threshold and posed a daunting challenge for many employers.

The district court's preliminary injunction temporarily blocks the implementation of the rule until the court may hear argument on whether to issue a permanent injunction. The court also has before it a summary judgment motion filed by the plaintiffs asking the court to hold the new regulations unlawful.

The DOL announced on December 1, 2016, that it would appeal the court's temporary injunction ruling to the Fifth Circuit Court of Appeals – the appellate court with jurisdiction over federal courts in Texas. The DOL has also requested an expedited appeal of the temporary injunction to have the appellate court rule on the appropriateness of a temporary injunction. Whether the appellate court will grant the motion or reverse the district court is uncertain.

Furthermore, the DOL's approach may change now that President Trump is in office. Even under the DOL's expedited briefing schedule before the appellate court, final arguments are being submitted to the court during the Trump administration.

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Form I-9 Compliance Considerations: New President, New Form, New Enforcement?

James B. "Jimmy" Wood

The employment-immigration focus of the executive branch changes with each presidency. During the presidency of George W. Bush, there were a higher number of workplace raids and surprise inspections than under President Barack Obama. President Obama shifted the enforcement policy to focus more on paperwork audits through non-legislative policy and executive order. This policy has led to over $100 million fines imposed on employers since 2009 in connection with Form I-9 audits.

Throughout his presidential campaign and after his election, President Donald J. Trump indicated that a major tenet of his administration would be protecting the American worker through strict enforcement of our country's immigration laws. While President Trump's objectives are clear, the legal specifics of how he will seek to strictly enforce the immigration laws have not yet been defined. On the campaign trail, President Trump indicated that he would support and push for mandatory E-Verify usage. This would require a legislative change; therefore, it is unlikely that an E-Verify mandate would be immediate. Form I-9 Employment Eligibility Verification compliance is one area where many commentators and scholars agree that we could soon see increased enforcement without legislative change.

One important step to ensuring compliance with the I-9 process is to ensure that your business is using the appropriate version of the Form I-9. Beginning January 22, 2017, employers will be required to use a new Form I-9 that bears a revised date of "November 14, 2016." This revised Form I-9 is available as a PDF and was designed to encourage completion of the I-9 electronically as the Form itself is a "smart" form. While neither Apple's Siri nor Amazon's Alexa will be able to help you with the new "smart" Form I-9, U.S. Citizenship and Immigration Services (USCIS) has included features in the new Form like the validation of data (e.g. ensuring that the type of data entered in a given field is appropriate for the field) and on-screen tutorial help to explain the requirements of different fields. Additionally, some of the language on the Form I-9 has been changed to reduce confusion (e.g. "Other Names Used" was changed to "Other Last Names Used").

In addition to using the appropriate Form I-9, employers may also want to consider proactively assessing their I-9 compliance by reviewing company policies related to I-9 completion and retention, as well as through the completion of an I-9 self-audit. Recently, a spokesperson for USCIS underscored the importance of continuously assessing I-9 compliance by stating that an estimated 76% of paper I-9s contain an error that could result in a fine from ICE.

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A Form I-9 self-audit provides employers with an opportunity to review the I-9s on file, including ensuring that an I-9 is on file for each employee and reviewing the accuracy of the I-9s on file. In the event an error is identified, a self-audit provides the employer the opportunity to address it. Ultimately, while I-9 errors and deficiencies cannot be completely cured retroactively, corrections made in self-audits and good faith efforts to comply with I-9 regulations can carry weight and reduce potential penalties, if the government conducts an I-9 audit.

Self-audits are not required, but they can be helpful in staying compliant with immigration regulations and avoiding fines and other penalties. There are several important considerations that employers will need to contemplate prior to completing a self-audit, including whether the audit will be conducted internally or externally by outside counsel or others, and whether the audit will be a complete audit or a random sampling. Additionally, it is important for employers to develop clear and concise policies and strategies related to the Form I-9 self-audit to ensure that the audit is conducted lawfully, properly communicated to employees, and does not raise potential discrimination concerns.■

EEOC Updates Guidance on National Origin Discrimination

Jerrauld C.C. Jones

On November 18, 2016, the Equal Employment Opportunity Commission issued updated enforcement guidance on national origin discrimination, the first update to national origin guidance since 2002. The guidance helps to inform both employers and employees how the EEOC interprets, approves, and/or disapproves of court interpretation of national origin discrimination cases.

Among other things, the guidance clarifies the definition of "national origin," and what constitutes discrimination based on "place of origin" and "ethnicity" under Title VII of the Civil Rights Act of 1964. National origin is defined as "discrimination because an individual (or his or her ancestors) is from a certain place or has the physical, cultural, or linguistic characteristics of a particular national origin group."

Employment discrimination based on place of origin is "discrimination because of an individual's, or his or her ancestor's, place of origin." The place of origin may be a country or a former country, it may be the United States, and it may be a geographic region, including a region that was never a country but nevertheless is closely associated with a particular national origin group.

Finally, the Commission defines ethnicity as "a group of people sharing a common language, culture ancestry, race, and/or other social characteristics," and encompasses discrimination based on ethnicity and physical, linguistic, or cultural traits.

The EEOC stated its position that employment discrimination because an individual is Native American or a member of a particular tribe also is discrimination based on national origin.

The guidance also addresses national origin discrimination that overlaps with prohibited discrimination based on race, color, or religion. Oftentimes a national origin group may be associated or perceived to be associated with a particular religion or race. For example, charges filed by Asian Americans may involve allegations of discrimination motivated by both race and ancestry (national origin) or discrimination against people with origins in the Middle East may be motivated by race, national origin, or even the perception that they follow particular religious practices. As a result, the same set of facts may state claims alleging multiple bases of discrimination, not just national origin.

The EEOC also includes a list of "promising practices" which may help employers cut down on potential violations. The guidance provides tips in the areas of "Recruitment," "Hiring, Promotion and Assignment," "Discipline, Demotion, and Discharge," and "Harassment."

In 2015, approximately 11 percent of the nearly 90,000 private sector charges filed with EEOC alleged national origin discrimination. Commentators have suggested that an increase in immigration that has resulted in a more diverse workforce was a main driver in the Commission's decision to update its guidance.■

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nor the Republican Congress is likely to support the revised overtime rules that were issued by the Secretary of Labor under President Obama. President Trump has also expressed his intention to revoke Executive Orders issued by President Obama requiring federal contractors to pay increased minimum wages and offer paid sick leave.

Equal Employment Opportunity Commission: The Chair of the EEOC is likely to be replaced along with its General Counsel. Some commentators believe that the new administration will abandon the recently issued EEO-1 pay transparency requirements in which employers are required to report their employees' W-2 earnings and hours worked.

Immigration: The Trump Administration may expand the enforcement of existing immigration laws by requiring employers to be more vigilant in ensuring that they do not employ illegal aliens. On January 27, 2017, President Trump issued an Executive Order temporarily suspending entry to the United States by individuals from certain countries associated with terrorism. Commentators predict that more restrictions will follow.

It will be important for employers to stay abreast of the initiatives, Executive Orders, and legislation of the new Administration and the new Congress. Employers should be prepared to see significant changes in workplace laws.■

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Given the uncertainty of the law, employers have several options to pursue in light of the recent development. Employers who have announced salary increases or switched employees to non-exempt to comply with the new rules may: (i) choose not to make any changes until there is a final ruling from the appellate court; (ii) continue forward as it planned before the issuance of the temporary injunction; or (iii) continue forward with some changes, but only those that are in the employer's best interest.■

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