

## PANEL COUNSEL

# Workplace Law Under the Trump Administration: Six Months In, Six Issues to Watch



Earlier this year, experts from Marsh and Jackson Lewis PC held a webcast to discuss potential changes to labor and employment law that could affect employers under the new administration. This briefing reviews six areas to watch and assesses potential future implications.

## EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)

### BUILDING A REPUBLICAN MAJORITY

Republican appointee Victoria Lipnic was appointed acting chair of the US Equal Employment Opportunity Commission (EEOC), where the majority of the commissioners are Democrats. However, this may change after July 2017, when Democrat and former EEOC Chair Jenny Yang's term expires. President Donald Trump recently nominated Janet Dhillon, general counsel of Burlington Stores Inc., to chair the EEOC. If Dhillon is confirmed, Lipnic will become a commissioner. President Trump also is expected to name Republicans to fill Yang's seat, creating a 3-2 Republican majority, and to appoint a Republican as the EEOC's general counsel. Despite these new appointments, it is expected that any changes to the EEOC's strategic direction will occur slowly.

## COMBINING REGULATORY AGENCIES

In its first budget proposal, the Trump administration proposed folding the Office of Federal Contract Compliance Programs (OFCCP) — currently within the US Department of Labor (DOL) — into the EEOC. While the EEOC is responsible for enforcing federal laws that make it illegal to discriminate against job applicants or employees in protected categories — including race, color, religion and sex — the OFCCP is responsible for ensuring that employers doing business with the federal government comply with the laws and regulations requiring nondiscrimination.

The business community has expressed concern that such a proposal will create a “super agency.” The US Chamber of Commerce issued a statement listing its objections to the merger: “There is a fear in the business community that this newly formed grouping might result in the worst of all worlds from both agencies... For example, EEOC does not have the power of debarment for federal contracts, but OFCCP does. Damages are more limited under OFCCP than they are under EEOC. OFCCP has very broad access to employer records, where the EEOC must justify need for access.”



## CALLING FOR MORE ENFORCEMENT

On May 23, 2017, the House Committee on Education and the Workforce Subcommittee on Workforce Protections held a hearing to discuss what the subcommittee majority sees as the need for more responsible regulatory and enforcement policies at the EEOC. Subcommittee Chairman Bradley Byrne expressed concern over

the EEOC’s enforcement efforts under the Obama administration, noting that the agency had 73,000 unresolved cases at the end of 2016.

According to acting chair Lipnic, the EEOC will continue to advocate for federal protections against discrimination for LGBTQ workers, an EEOC strategic enforcement priority. The 7th US Circuit Court of Appeals has issued two decisions concerning the rights of LGBTQ individuals, which has set the stage for a potential US Supreme Court review of whether Title VII of the Civil Rights Act’s prohibitions against discrimination on the basis of sex encompass protections for LGBTQ workers.

## WAGE AND HOUR

There are several developments related to wage and hour risks that organizations should watch. These include:

- A potential new overtime rule that lowers the salary level threshold set by the Obama administration, according to comments from recently confirmed US Secretary of Labor R. Alexander Acosta.
- Potential uncertainty as none of the three key policymaking positions in the US Department of Labor’s (DOL) Wage & Hour Division — the administrator, deputy administrator, and solicitor of labor — have been filled.
- Potential uncertainty for employers about the DOL’s new overtime rule, even though, on June 30, 2017, the DOL finally filed its reply brief in its appeal of the preliminary injunction prohibiting the 2016 “Final Rule” from taking effect. The reply brief states that the DOL will no longer advocate for the specific salary level (\$913 per week) set under the Final Rule, but will instead focus on “the threshold legal question of the DOL’s statutory authority to set a salary level.”
- Two recently rescinded DOL interpretations about independent contractor misclassification and joint employment status. This move does not change the legal responsibilities of employers under the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act, nor does it alter case law in this area. Still, employers should welcome the DOL backing away from these two employee-friendly initiatives.

- The DOL's re-implementation of its prior practice of issuing opinion letters in response to employers' specific questions about wage and hour laws and regulations.
- The Working Families Flexibility Act, which would amend the FLSA to allow private-sector employers to grant compensatory time (or "comp time") in lieu of paying overtime to hourly workers. The measure – which was passed by the House of Representatives – would need to be passed by the Senate, where it requires Democratic support. Although the White House issued a statement supporting the bill, employers should be mindful that many states have their own overtime laws that may not permit the use of compensatory time.

## GOVERNMENT CONTRACTORS

Government contractors no longer need to disclose alleged National Labor Relations Act (NLRA) violations as part of the bid process, following revocation of the Fair Pay and Safe Workplaces Executive Order and regulations. However, government contractors still must abide by President Barack Obama's amendment to Executive Order 11246 prohibiting sexual orientation and gender identity discrimination, which President Trump has said he will preserve.

Government contractors must also wait for the Trump administration to take a position on requiring paid sick leave for workers on covered federal contracts.

Additionally, government contractors likely will be required to comply with President Obama's executive order regarding pay transparency, including a requirement to

disseminate an OFCCP-prescribed pay transparency non-discrimination provision.

## LABOR

The National Labor Relations Board (NLRB) currently has a Democratic majority. If the Senate confirms President Trump's two NLRB nominees (Marvin Kaplan and William Emanuel), the board majority would shift to Republicans and employer could expect more pro-business rulings from the NLRB. This could affect policy on:

- Class-action waivers.
- Joint employer status.
- Temporary workers.
- Union election procedures.
- The definition of protected concerted activity.
- The definition of appropriate bargaining units.
- The status of college/university faculty and student-athletes.

Separately, the Service Employees International Union (SEIU) plans to cut the organization's budget by 30% in anticipation of opposition to organized labor from all three branches of government. If the SEIU follows through, employers may see a decrease in union organizing.



## LITIGATION AND CLASS ACTIONS

Employers may see more pro-business decisions from the US Supreme Court following the appointment of Justice Neil Gorsuch. Issues that may be affected include:

- Arbitration and class-action waivers.
- Standards for class certification.
- Underlying merits questions on wage and hour claims.
- Other areas for employers to look out for include:
- Potential US Supreme Court guidance on whether class-action waivers in employment arbitration agreements violate the NLRA.
- Drastic reform in class-action litigation if the Fairness in Class Action Litigation Act is approved by the Senate. The bill has been passed by the House of Representatives.

- A potential change in the EEOC's pay collection rule, which could affect gender wage gap issues.
- Potentially more EEOC lawsuits

## OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA)

President Trump has nominated attorney James Sullivan to the US Occupational Safety and Health Review Commission (OSHRC) to fill the remaining vacancy on the three-member commission. With the addition of Sullivan, the majority members of the Review Commission will have backgrounds as management representatives, something the Commission has not seen since the departure of Chairman W. Scott Railton in 2007. This likely will affect key decisions issued by the three-member panel.

As the employment law landscape continues to change and evolve under new leadership, Marsh and our partners will continue to monitor events and offer insights and advice pertaining to risk management and insurance programs.

**For more information on this topic and/or to discuss your employment practice liability (EPL) and wage and hour insurance in greater detail, contact:**

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