Employment Law in President Trump's First 60 days

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When President Trump was running for office he made many statements suggesting changes he intended to make which would impact employment law. Some of those assertions recognized the need to work with Congress, such as the repeal of the Affordable Care Act (ACA). The majority of his claims, such as the general promise to roll back initiatives of the Obama administration pertaining to the Fair Labor Standards Act (FLSA), gender identity accommodation, National Labor Relations Board rules on social media and other matters, are under the purview of the executive branch. The President could more directly control such topics through appointments, directives or changes in administrative rules.

With regard to legislative changes, while the failure to pass the rewrite of the ACA has taken the most attention, President Trump succeeded on a different issue. Last Monday, the President signed a joint resolution repealing an Obama-era rule that required companies seeking significant federal contracts to disclose violations of labor standards, like safety and fair-pay rules, or instances when they were accused of such violations. The so-called "blacklisting rule" was intended to prevent companies that violated workplace regulations from getting federal money.

The President has taken some more measured and effective steps on the administrative side. In a significant move that did not receive much press, on January 20, 2017, Reince Priebus issued a memorandum instructing the heads of executive departments and agencies to give the administration an opportunity to review any new or pending regulations before taking further action, and generally instructing those officials to:

1. Refrain from sending any new material to the Federal Register for publication until it can be reviewed by "a department or agency head appointed or designated by the President" ;
2. Withdraw any regulations, including proposed rules, final rules, and guidance documents, which have been sent to the Federal Register (forwarded for publication to make them law), but have not yet been published, so that they may be reviewed by the new Administration; and
3. Delay until March 21, 2017, the implementation of any final rules or guidance documents that have been published, but have not yet become effective, and consider proposing to delay implementation beyond that date. Those

regulations are to be reviewed by Trump-appointed or designated agency heads in consultation with the Office of Management and Budget (OMB). This has proven an effective "shot across the bow" that has already impacted several initiatives of the Obama administration.

One notable impact was in regard to the previously proposed FLSA changes whereby the Department of Labor (DOL) dramatically increased the salary test for partially determining whether an employee could be exempt from overtime. On November 22, just 10 days before the implementation date of the new FLSA rules, a Federal District Court in Texas enjoined the implementation of that rule. President Obama's Department of Labor immediately filed an appeal of that injunction.

Shortly after Priebus' memo was issued, the DOL requested a 60 day extension in the briefing schedule for the appeal. The extension was granted on February 22, giving the DOL until May 1 to submit their response. One reason given for the request was to allow the new administration to assess the issues presented by the rule change.

The Trump administration took a similar approach in regard to gender identity issues. Last May, the departments of Education and Justice issued joint guidance (referred to as a "Dear Colleague letter") recommending schools allow transgender students to use facilities that correspond with their preferred gender identity. The Trump administration took little time to issue its own "Dear Colleague letter," withdrawing the guidance of the first letter "in order to further and more completely consider the legal issues involved".

The current administration has also refused to publish OSHA fines issued against employers (sometimes referred to as the "name and shame" program). The Obama administration issued an average of about 460 news releases annually announcing fines and other enforcement actions. Since the inauguration of President Trump, OSHA has not posted a single news release about an enforcement fine.

Given the forgoing, the trend and intent is clear: the current administration has set the stage for rolling back some of the employment law changes imposed during the Obama years. Consistent with the wording of Priebus' memo, as each new appointee takes office they will review pending or proposed rules and set the agenda for the future.

For now employers are wise to be vigilant. Federal agencies are still staffed at the field level by employees whose views may or may not be in harmony with the new administration, and thus employers should seek counsel as to the current state of laws, regulations and enforcement efforts. When the laws or regulations change, personnel policies and procedures should be updated to reflect the new measures, both to conform with the changes but also to avoid employee assertions relying on personnel policies based on the old law.