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Richard D. Alaniz • Dec. 07, 2016

With the election of Donald Trump as the 45th president of the United States, the business community can almost certainly look forward to a new era. Although many of Trump's policies on labor and employment-related laws and regulations have yet to be fully developed, there are many Obama-era initiatives that could face significant changes under the new Republican administration.

In some instances, the courts may become involved-and several judges have already

while often strengthening unions. Many of those changes could be undone, rolled back, or at least revised by the incoming Trump administration.

Those might include:

- **"White Collar" Salary Exemption**

On Nov. 22, a federal judge blocked a U.S. Department of Labor rule that would have taken effect on Dec. 1 and extended mandatory overtime pay to more than 4 million salaried workers. U.S. District Judge Amos Mazzant of the Eastern District of Texas agreed with 21 states and an assortment of business groups that the rule was unlawful.

Under the previous regulations, bona fide professional, administrative, or executive ("white collar") workers who made at least $23,660 per year were entitled to overtime. Under the new rule, most "white collar" workers who earn less than $47,476 annually would have had to be paid time-and-a-half when they work more than 40 hours each week. Judge Mazzant's recent order stops this rule from going into effect, at least for the time being. The Labor Department has appealed the ruling to the Fifth Circuit Court of Appeals.

Many organizations had already changed employee salaries and job classifications to comply with the new rule. On a practical level, it could be difficult for employers who proactively instituted changes to cut salaries or rearrange work schedules for employees. However, if competitors did not adjust salary levels, some employers may find it necessary to roll back any salary changes.

- **Persuader Rule**

On Nov. 16, another federal judge in Texas issued a permanent nationwide injunction blocking the so-called "persuader rule." The rule, which the Labor Department put

forward as part of the Labor Management Reporting and Disclosure Act of 1959,

injunction has already been appealed to the Fifth Circuit.

- **Changes by the National Labor Relations Board**

Over the last eight years, the National Labor Relations Board (NLRB) has made many significant rulings that have been often pro-union. Among the rulings that could be targeted for change:

"Quickie" Election Rules

The NLRB's so-called "quickie" union election rules, which took effect in April 2015, accelerated the time between the filing of a petition to unionize and a union election. Despite concerns that the new election rules would lead to more union wins, it appears those concerns have not yet been realized.

According to a "Wall Street Journal" article published in April 2016, union elections have taken place 40-percent faster under the new rule. However, unions have continued to win at about the same rate as they did before the new rule took effect-about two thirds of the time. This may mean that the rule may not be among the first priorities for the new administration. Furthermore, President Trump cannot unilaterally change the election rules.

Instead, the NLRB would need to propose new rules, elicit public comment on the rules, and follow the administrative regulation process. There are, however, two empty NLRB positions currently, which if filled by President Trump would likely swing the Board composition to a management-friendly majority.

Purple Communications Decision

In 2014, the NLRB ruled that employers could open their corporate email to union organizing by employees, except in very limited situations. The decision involving

Purple Communications overturned a 2007 NLRB decision that found that corporate

would presume the union-designated bargaining unit was appropriate. If an employer sought to argue that a unit should include more employees, the employer needed to show that employees in a larger unit share an "overwhelming" community of interest with those in the petitioned-for unit. The Board has consistently applied the Specialty Healthcare micro-unit rule in recent years, with an NLRB regional director even recently approving a 28 worker bargaining unit at an Ohio manufacturing complex, when the employer had argued that another 115 workers should have been included. With a new NLRB majority, this union-friendly rule could be on the chopping block.

Electronic Authorization Cards

In 2015, the NLRB general counsel issued a memo that allowed union representatives and employees to submit electronic signatures in support of a showing of interest, rather than requiring handwritten authorization cards. Starting in September 2015, the cards could be completed electronically and online.

In order to be accepted, the electronic access cards must include: the signer's name; email address or social media account information; phone number; the language the signer agreed to; employer's name; and date the electronic signature was completed.

Unions have their own requirements when submitting electronic signatures, including a declaration that identifies what electronic signature technology was used; an explanation as to how that technology ensures that the signature is that of the employee; and that the employee actually signed the document. Given that this rule seems solely designed to facilitate a union's ability to gain sufficient signatures to petition for a union election, it too may be subject to review under a new administration.

Joint Employer Rulings

Some of the most far-reaching actions by the NLRB recently have been around joint-

employer standards.

Once Obama is out of office and the threat of his veto disappears, a Republican controlled Congress could take action to pass legislation that revises the definition of a joint employer. Additionally, the NLRB could reconsider its decision in Browning-Ferris. Finally, Browning-Ferris is currently appealing the decision to the D.C. Circuit, which has yet to issue an opinion.

Arbitration Agreements

Under Obama, the NLRB has aggressively challenged agreements between companies and workers that require employment-related disputes to be settled in arbitration.

For example, in February 2016, the NLRB threw out an arbitration agreement utilized by Ralph's Grocery Co. Ralph's had a four-page mediation and binding arbitration policy that required employees, as a condition of employment, to waive their rights to pursue class or collective actions in employment-related claims. In July 2013, an administrative law judge invalidated the policy. The case was then appealed to the NLRB, which ruled 2-1 that Ralph's policy violated Section 8(a)(1) of the NLRA.

Appeals courts have been split over the NLRB's decisions regarding mandatory arbitration agreements, with three Circuit Courts finding such agreements enforceable and two Circuit Courts agreeing with the NLRB, so the issue could possibly end up being resolved by the U.S. Supreme Court.

- **Federal Contractor Rules**

Another Obama order, The Fair Pay and Safe Workplaces, has also been partially enjoined by a preliminary injunction, issued by U.S. District Court Judge Marcia A. Crone, from the Eastern District of Texas, before it was scheduled to take effect. The rule would require companies working on federal contracts to disclose information about labor violations when participating in the bidding and selection process. The

Department of Labor has the option to appeal the decision, and it is currently

major undertakings of the new administration and new Congress in January.

Conclusion

While there will be many changes in the regulatory, legislative, and enforcement environment under Pres. Trump, employers need to be aware that changes may not come about immediately. It's likely that regulators will continue enforcement for the foreseeable future. However, over the next several years, many of the Obama-era administrative regulations may be subject to repeal and reversal.

Employers must be vigilant about the potential for enforcement actions and work carefully with legal and HR experts, until it becomes clear what a Trump administration will focus on and how regulations will be revised. There is no doubt that most employers are looking forward to less regulation and less red-tape.

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