

Outside Counsel

Expert Analysis

Potential Impact of Obama's Re-Election on Employers

After 18 months of campaigning, the expenditure of \$6 billion in campaign funds, 468 congressional elections and one presidential election, the political landscape remains remarkably unchanged. The House of Representatives continues to have a Republican majority, the Senate continues to have a Democratic majority, and Barack Obama remains president.

As the previous four years have shown, this political landscape created substantial gridlock that stymied Obama's efforts to implement many of the initiatives that he had hoped to pass into law when he was first elected in 2008. While certain employers may expect much of the same until the political landscape changes, this will not necessarily be the case.

One of the underlying trends during the Obama administration's first four years has been the administration's attempt to advance its legislative agenda through alternative means when confronted with opposition in Congress. Indeed, while the Obama administration was able to pass into law certain

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pieces of employment legislation such as the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Lilly Ledbetter Fair Pay Act of 2009, a number of the administration's other legislative goals did not come to fruition.

As a result, the administration sought to achieve its goals through federal administrative agencies such as the Department of Labor, the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB). Over the past four years, each of these agencies have both increased their enforcement of existing laws and regulations, and introduced numerous initiatives that have presented employers with novel challenges. Obama's reelection, along with the reelection of a divided Congress, all but ensures that this trend will continue, and employers need to be prepared as the election dust settles. Discussed below is a sampling of what the Obama administration's Labor Department, EEOC and

NLRB likely have in store for employers over the next four years.

Focus on Misclassification

Over the past several years the Obama administration has demonstrated an increased interest in deterring the misclassification of employees as independent contractors. This interest is directly tied to the estimated \$3.4 billion annual revenue loss resulting from such misclassification which impacts the Treasury, Social Security, Medicare and Unemployment Insurance Trust Funds.¹ To that end, in September 2011, the Labor Department launched its "Misclassification Initiative" under the auspices of Vice President Joe Biden's Middle Class Task Force.

As part of this initiative, the Labor Department is working with the Occupational Safety and Health Administration and the Office of Federal Contract Compliance Programs, and has signed memorandums of understanding with the IRS and 13 states, to coordinate their respective misclassification enforcement efforts. Furthermore, the Labor Department's fiscal year 2013 budget seeks additional funds and employees to combat misclassification, including \$10 million in awards designed to incentivize states to improve their misclassification efforts by paying a "high performance

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bonus” to the states that are most successful at detecting and prosecuting misclassification.²

Accordingly, employers can expect that misclassification will remain a high priority for the Obama administration, and that the Labor Department, as well as state and local enforcement agencies, will aggressively pursue misclassification issues by auditing employers, and prosecuting those employers, whom the Labor Department perceives to have misclassified its workers.

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The Labor Department will also focus on employers who are perceived to have misclassified employees as exempt from overtime under the Fair Labor Standards Act (FLSA). More specifically, in support of the Obama administration’s “blueprint for an economy that’s built to last” and its emphasis on the middle class, one of the Labor Department’s key fiscal year 2013 budget initiatives will be “Helping Workers Provide for Their Families and Keep What They Earn,” doing so, in part, by increasing the Labor Department’s enforcement of the FLSA’s overtime provisions.

In connection with this effort, employers can expect the Labor Department to issue “right to know” regulations that further empower the Labor Department and place additional burdens on employers. In 2010, the Labor Department announced its intention to revise the FLSA’s recordkeeping regulations “in order to enhance the transparency

and disclosure to workers of their status as the employer’s employee or some other status...”³ These so called “right-to-know” regulations would require employers that seek to exclude workers from FLSA coverage to: (1) perform a classification analysis; (2) disclose the classification analysis to the worker; and (3) retain the classification analysis and provide it to the Labor Department upon request.⁴ The regulations would apply to both the classification of workers as exempt from overtime under the FLSA and as independent contractors.

Although the Labor Department has postponed the proposed regulations’ release date on several occasions, it is expected that the proposed regulations will be issued in early 2013. Irrespective of whether or not the “right-to-know” regulations are enacted, employers should be prepared to face increasing scrutiny from the Labor Department as the Obama administration continues to push an employee rights agenda.

EEOC’s Systemic Initiative

Following George W. Bush’s presidency, during which the EEOC’s funding and staffing levels were significantly decreased, Obama has sought to strengthen the EEOC by reenergizing it with additional funds and employees. Armed with new resources, the EEOC, which is tasked with enforcing federal employment discrimination laws, began aggressively pursuing several enforcement initiatives which resulted in the receipt of approximately \$1.34 billion in monetary benefits on behalf of charging parties in fiscal years 2009 through 2012, including a record \$365.4 million in fiscal year 2012 alone.⁵

Among its enforcement initiatives during the administration’s first term has been the EEOC’s focus on investigating and litigating cases of systemic bias. Systemic cases are defined by the EEOC as a “pattern or practice, policy, or class case where the alleged discrimination

has a broad impact on an industry, profession, company or geographic area.”⁶ Thus, these cases permit the EEOC to seek relief on behalf of large numbers of individuals which can result in multi-million dollar judgments and significant litigation costs for employers.

Although the EEOC launched its “systemic initiative” in 2006, it has become a greater priority for the agency since Obama was elected in 2008. Employers should expect this trend to continue over the next four years. Indeed, at the close of fiscal year 2012, the EEOC had the largest proportion of systemic suits on its docket since the initiative began, and through the resolution of numerous systemic investigations, recovered four times the amount of monetary benefits procured in fiscal year 2011.⁷

According to its fiscal year 2013 Congressional Budget Justification, the EEOC will continue to place a high priority on investigating and litigating cases of systemic discrimination over the coming years, with a primary focus on recruitment and hiring practices that lead to systemic bias. Pursuant to the EEOC’s recently released Strategic Enforcement Plan, the EEOC will concentrate on intentional hiring discrimination and facially neutral practices that have a disparate impact on women, older workers, racial and ethnic minorities, and individuals with disabilities. These practices include restrictive application processes, the steering of workers into particular positions on account of their status in a particular group, the use of pre-employment screening tools, and the use of arrest and conviction records.

In addition to its systemic initiative, the EEOC will also target several “emerging issues” including the failure to provide accommodations to pregnant workers, discrimination against LGBT persons, the proper application of employers’ defenses to claims brought pursuant to the Americans with Disabilities Act (ADA), and whether par-

ticular individuals qualify as disabled pursuant to the ADA Amendments Act. Accordingly, employers can expect increasing pressure from the EEOC in Obama's next term.

Non-Unionized Work Forces

Following the lead of the Labor Department and the EEOC, the NLRB, which is responsible for enforcing the National Labor Relations Act, has become much more aggressive under Obama. For example, the NLRB has more liberally construed the NLRA and has attempted to achieve its goals through substantive rulemaking (e.g., the employee rights notice posting rule and the streamlined election procedures). Perhaps most importantly, the NLRB has extended its reach into the characteristically unfamiliar territory of non-unionized work forces. Section 7 of the NLRA, which grants employees the basic rights to self-organization and to bargain collectively, applies to most private sector employers irrespective of whether or not their workplaces are unionized.

Although the NLRB has typically focused its attention on unionized work forces, it has recently seized upon the portion of Section 7 which provides that employees "shall have the right to... engage in other concerted activities for the purpose of... mutual aid or protection," to take action against common-place personnel policies of non-union employers.⁸ This effort on the part of the NLRB likely stems from the continued slide in union membership rates which fell to 11.8 percent of the American workforce in 2011 from 12.4 percent in 2008, and the Obama administration's failure to pass the Employee Free Choice Act which, among other things, would have permitted unions to gain recognition without a secret ballot election being held.⁹

The NLRB has seemingly targeted social media policies more so than any other employer policy. Specifical-

ly, the NLRB has released three guidance documents on social media policies and recently issued its first social media decision. In *Costco Wholesale*, 358 NLRB No. 106 (2012), the NLRB ruled that a provision in Costco's social media policy prohibiting online statements that would "damage the company, defame any individual, or damage any person's reputation," violated the NLRA because employees could reasonably believe that the policy requires them to refrain from posting statements critical of Costco's treatment of its employees or its working conditions, and thus, tends to chill employees in the exercise of their Section 7 rights.

Employers can expect that the NLRB will persist in its heightened scrutiny of standard employer policies following Obama's reelection. In addition to its ongoing social media activity, the NLRB has recently issued advice memorandums concerning "at-will" employment disclaimers and has found an employer's workplace investigation procedure to be unlawful. In *Banner Health Systems*, 358 NLRB No. 93 (2012), the NLRB held that an employer's policy of directing employees making complaints of workplace misconduct not to speak about the matter with coworkers while the investigation is ongoing violated the NLRA. The NLRB concluded that this widespread practice violates employees' rights to engage in protected concerted activity under Section 7.

In addition to the policies discussed above, the NLRB will continue to target policies typically found in employee handbooks, paying particular attention to those policies relating to employee communication, such as codes of conduct, confidentiality policies, and solicitation policies. Ultimately, the president's reelection ensures that the NLRB will maintain its course of aggressively inserting itself into non-unionized workplaces as its traditional constituency shrinks even further.

Conclusion

Obama's first term in office was marked by the administration's aggressive enforcement of existing laws and regulations through the Labor Department, EEOC and NLRB, as Obama met significant resistance in a divided Congress. He is likely to meet similar resistance in his next term as Congress remains sharply divided along party lines. Accordingly, his labor and employment agenda, and its residual effect on employers, will continue to be felt primarily through federal agencies. Employers must be prepared for this development by taking proactive steps to ensure that their policies and procedures are in accordance with applicable laws and regulations, and that they are capable of handling administrative agency prosecutions, audits and other inquiries.

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1. See Dept. of Labor Regulations, Live Q&A Session with WHD (Jan. 6, 2011), <http://www.LaborDepartment.gov/regulations/chat-whd-static-201012.htm> (last visited Nov. 18, 2012).

2. See Dept. of Labor, Fiscal Year 2013, Budget in Brief, [http://www.LaborDepartment.gov/Labor Department/budget/2013/PDF/FY2013BIB.pdf](http://www.LaborDepartment.gov/Labor%20Department/budget/2013/PDF/FY2013BIB.pdf), at 24.

3. Right to Know Under the Fair Labor Standards Act, [http://www.Labor Department.gov/whd/regs/unifiedagenda/fall2010/1235-AA04.htm#UKm5-oYmPup](http://www.Labor%20Department.gov/whd/regs/unifiedagenda/fall2010/1235-AA04.htm#UKm5-oYmPup) (last visited Nov. 18, 2012).

4. See Dept. of Labor: Spring Regulatory Agenda 2010, [http://www.Labor Department.gov/regulations/factsheets/whd-fs-flsa-recordkeeping.htm](http://www.Labor%20Department.gov/regulations/factsheets/whd-fs-flsa-recordkeeping.htm) (last visited Nov. 18, 2012).

5. See EEOC Statistics, All Statutes FY 1999—FY 2011, <http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm> (last visited Nov. 18, 2012); EEOC FY 2012 Performance and Accountability Report, <http://www.eeoc.gov/eeoc/plan/upload/2012par.pdf>, at 3.

6. EEOC.gov, Systemic Discrimination, <http://www.eeoc.gov/eeoc/systemic/index.cfm>, (last visited Nov. 18, 2012).

7. See EEOC FY 2012 Performance and Accountability Report, supra note 6, at 28, 30.

8. 29 U.S.C. §157 (2011).

9. See BLS.gov, U.S. Bureau of Labor Statistics, Access to Historical Data, <http://www.bls.gov/cps/cpslutabs.htm> (last visited Nov. 18, 2012).