WORKPLACE COMPLIANCE IN THE TRUMP-ERA

It has been said that politicians campaign in poetry and govern in prose. In the early days of every presidency we watch as a new administration struggles to turn promises made on the campaign trail into law. We have a Republican President and a Republican Congress, which historically has meant a more business-friendly regulatory environment. Yet, as these first 100 days have shown, unwinding is neither quick nor easy. The Affordable Care Act has not been repealed and little is on the horizon. A blinding number of Executive Orders have been signed, but the impact of the orders remains unclear. The President’s Budget Blueprint for 2018 proposes to slash the Department of Labor’s budget by 21% but for the reasons outlined below, it could be months or years before businesses see any change in DOL enforcement strategy. Amidst all of this chaos, two clear trends have emerged: (1) federal judges, who enjoy lifetime appointments, have shown a clear refusal to be influenced by the current administration; and (2) we are seeing a surge in state and local legislation aimed at providing employees with an ever growing list of rights and protections. It is these trends - not tweeting or media reports - that are most urgently impacting employment law compliance in the present and near future, particularly for employers with locations in multiple states.

THE IMPACT OF THE JUDICIAL BRANCH

Over the last 100 days, the judiciary has proven to be a thorn in the Trump administration’s side, particularly with regard to the ill-fated Travel Ban. At the present most federal judges are democratic appointments. That said, the appointment of Neil Gorsuch to the Supreme Court will have a huge impact on employment laws for years to come; and President Trump has 103 circuit and district court judge vacancies to fill, which means the pendulum will swing back to the right during President Trump’s term. All of this will significantly shape the country’s legal landscape.

However, the exact impact of all of this remains wholly unknown. In recent years the Supreme Court has reduced the number of cases it hears, which means that a number of important employment law questions such as LGBT and other forms of discrimination protection, labor issues, and gun laws will be heard by the Circuit and District courts. Therefore, whether President Trump fills these vacancies, and with whom, will have a large practical impact on employment law compliance; but the actual impact on employers will not be immediate. What we do know right now is that the current appointments to the federal courts have shown a great deal of independence and a willingness to challenge the Trump administration. This was
most recently seen in the Seventh Circuit’s historic holding that discrimination on the basis of
sexual orientation is a form of sex discrimination. The Second Circuit has already hinted at a
willingness to reconsider its stance on sexual orientation discrimination. Unless or until this
issue is taken up by the U.S. Supreme Court, it is these courts that will be interpreting the law.

**IN THE ABSENCE OF FEDERAL REGULATION STATE LEGISLATE**

A logical reaction to an administration that deregulates federal law is that the states will
more actively legislate, and legislate they have. Below are a number of employment law compliance
areas in which state legislation is actively impacting employers.

**Marijuana**

29 states and the District of Columbia currently have laws legalizing marijuana in some form,
including seven states (and Washington, D.C.) that have legalized marijuana for recreational
use: Alaska, Colorado, Massachusetts, Maine, Nevada, Oregon and Washington. Additionally,
parts of California’s Prop. 64 have taken effect, allowing adults 21 and older to possess up to
one ounce of marijuana, while tax and licensing provisions of the law will take effect in January
2018.

The majority of states have now legalized marijuana in some form, which means now, more
than ever, it is vital for employers to have internal policies clearly outlining how they will
address marijuana usage. Employers maintain the right to prohibit marijuana use and
possession in the workplace, but they can no longer rely on vague drug use policies that
prohibit the use of illegal drugs in the workplace. Instead, employers should stop to consider
some of the realities of an emerging marijuana industry:

- Edible marijuana means that employers may not be able to easily identify employee use
  or possession.
- There is no accurate drug test for current marijuana intoxication. Drug testing may lead
to disciplining legal use outside of work hours.
- In states where recreational marijuana use is now legal, employers will need to address
  possession and use of marijuana at company events and decide whether pre-
  employment drug testing for marijuana continues to make sense.
- In states where marijuana is now legal, automobile fatalities due to marijuana
  intoxication have risen dramatically. Employment policies should be targeted to include
  use or possession while operating a motor vehicle, machinery, or other high risk job
  responsibilities.

**Paid Leave**

In 2016, San Francisco, California became the first jurisdiction to mandate that employers
provide paid parental leave for new child bonding. While the rest of the nation may be quick to
discount this as a liberal city benefit it is important to remember that back in 2006 San
Francisco passed another first in the nation ordinance, paid sick leave. Ten years later paid sick
leave ordinances are passing in cities and counties all over the country. Below is the list of states that now have a state, county, and/or city Paid Sick leave law.

- Arizona
- California
- Connecticut
- Florida
- Illinois
- Maryland
- Massachusetts
- Minnesota
- New Jersey
- New York
- Oregon
- Pennsylvania
- Vermont
- Washington
- Washington, D.C.
- Wisconsin

Looking forward, starting January 1, 2018 New York’s Paid Family Leave Program will provide New York employees with job-protected, paid leave to bond with a new child, care for a loved one with a serious health condition or provide care related to active military service.

**Equal Pay**

On July 1, 2018, the Massachusetts Equal Pay Law, arguably the most robust law in the country will take effect in an effort to close the gender pay gap. Other states, counties and cities are also passing Equal Pay legislation, and California expanded its Equal Pay law to include race and nationality protections. While many states have sex discrimination laws that specifically prohibit wage discrimination, new equal pay laws are aimed toward forcing employers to close the wage gap.

**THE FUTURE OF FEDERAL LAW**

In his newly released budget “blueprint,” the President has proposed $2.5 billion in cuts to the U.S. Department of Labor’s (“DOL”) operating budget. The blueprint is short on details but does expressly call for reduced funding for grant programs, job training programs for seniors and disadvantaged youth and support for international labor efforts. It also proposes to eliminate the U.S. Chemical Safety and Hazard Investigation Board (“CSB”) – an independent, federal, non-enforcement agency that investigates chemical accidents at certain facilities. These cuts account for $500 million dollars of the DOL budget. The blueprint does not specify where the other $2 billion in cost savings will come from, except to say more funding responsibility will go to the states. If approved by Congress—a big if—the cuts will involve a loss of funds that could be distributed heavily through DOL’s enforcement programs. This will include the EEOC and OSHA. Yet the process by which these agencies collect fines is a valuable revenue generator and unlikely to end easily.

At this point, the likelihood of the final budget looking like the proposed one is total conjecture. First, the “blueprint” is not an actual budget proposal; and once that proposal exists, it will still have to make its way through Congress for approval. Furthermore, even with the expected cuts...
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