Legal Update: Trump's One-offs to Labor Regulations Change the Big Picture

Mark A. Konkel

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When Trump was a brand-new President (or force of nature, depending on how you look at it), we observed that the dawn of his administration would not necessarily augur wholesale changes to the overall landscape of legal concerns for employers. Why? Because, as with so many things in Trumpworld, there didn't appear to be a coherent labor policy, or (given the inexperience of some of his closest team members) even policy competence.

In fairness, however, marauding Huns didn't have to be particularly artful or finessed about the way they sacked whole cities, right? In a transformative conquest, a blunt hammer probably works as well as a rapier with pinpoint accuracy.

And so it is with Trump. With just about eight months of activity, we have seen the Presidential administration do what Trump is best at: take direct aim at what Obama did and do the opposite. Incremental changes to labor and employment law and regulation under Trump (and some related developments in the courts) have, one by one, almost entirely reversed course on many of the pet labor and employment initiatives the Obama administration championed, among them:

- Limitations on class action waivers, which made it more difficult for large groups of plaintiffs to sue companies.
- "Joint employer" standards that gave labor unions ammunition to argue that multiple franchisees (think McDonald's), which in the past were treated as separate employers, are in fact joint employers. Those standards, now reversed, gave unions one big fish for organizing instead of many little ones.
- A DOL focus on policing the misclassification of employees as independent contractors by employers—a move sometimes made by employers to reduce tax and employee benefits liabilities.
- Limitations on OSHA drug testing rules covering employees.
- "Blacklisting" regulations that would require federal contractors to publish claims brought against them alleging labor and employment law violations.
- Providing additional fiscal resources to the EEOC and OFCCP, instead merging these employment-related agencies into a single entity.
- Expansions of the so-called "persuader rule," which required employers to disclose paid relationships with individuals or firms helping employers fight union organizing campaigns.

- New FLSA overtime regulations, which would have raised the "salary threshold" under which overtime must always be paid and expanded overtime pay entitlement to as many as four million American workers.
- A National Labor Relations Board stocked with progressives who increased burdens on employers and decreased burdens on unions, in favor of an NLRB much more likely to roll back Obama-era changes.

DOJ Changes Position on Class Action Waivers: The Obama Department of Justice consistently argued against the enforceability of class action waivers in arbitration agreements, arguing that the waivers hurt consumers and individual claimants. The Trump DOL has now reversed course: in a Supreme Court *amicus* brief filed by the DOJ on June 16, 2017 in *Ernst & Young LLP v. Morris*, *NLRB v. Murphy Oil USA Inc.* and *Epic Systems Corp. v. Lewis* (Case Nos. 16-285, 16-300, 16-307), the DOJ was candid: "[i]n *Murphy Oil*, this Office previously filed a petition for a writ of certiorari on behalf of the NLRB, defending the Board's view that agreements of the sort at issue here are unenforceable. After the change in administration, the Office reconsidered the issue and has reached the opposite conclusion." Now, the Trump DOJ contends, enforcement of the parties' arbitration agreements in accordance with the Federal Arbitration Act, including ones containing broad class action waivers, do *not* deprive claimants of any substantive rights conferred by other federal statutes.

This is potentially good news for companies and employers who use arbitration agreements to limit the expansive and expensive risks associated with large class actions. But it may not be that simple: in the later years of the Obama administration, the Supreme Court has objected to regulators taking sharp U-turns. In one case, *Kiobel v. Royal Dutch Petroleum*, the late Justice Antonin Scalia grilled Solicitor General Donald B. Verrilli Jr.: "Why should we listen to you rather than the solicitors general who took the opposite position?" he asked. "Why should we defer to the views of the current administration?" The answer remains to be seen.

Labor Secretary Withdraws Pro-Employee Agency Guidance: In a June 7, 2017 news release, U.S. Department of Labor Secretary Acosta, announced the agency's withdrawal of its 2015 and 2016 guidance on "joint employment" and independent contractors. During the Obama administration, agencies like the National Labor Relations Board had expanded potential employer liability by grouping individual employers as a "single employer," a move having particular impact on the ease with which labor unions could organize franchises like fast food restaurants. Similarly, the Obama administration tightened regulation and enforcement of employer misclassifications of employees as independent contractors, which released many employers from tax and benefits obligations owed to employees.

According to the DOL release, "[r]emoval of the administrator interpretations does not change the legal responsibilities of employers under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act, as reflected in the department's long-standing regulations and case law." The release further noted that "[t]he department will continue to fully and fairly enforce all laws within its jurisdiction, including the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act." That said, the aim of the DOL pullback is clear: two progressive Obama-era polices are no longer on the agenda at DOL.

DOL Rescission of Rule Limiting Drug Test Mandates for Unemployment Benefits: In March 2017, President Trump signed legislation which quashed a U.S. Department of Labor rule which provided narrow limits for the circumstances under which drug testing could be administered by states in connection with unemployment insurance systems. The President's actions undid a rule

finalized in August 2016 under the previous administration which narrowly defined the circumstances in which drug tests could be conducted. The final rule was published in the Federal Register on May 11, 2017. 82 Fed. Reg. 21,916 (May 11, 2017). The impetus of the Obama rule, now disregarded by Trump, was in part the current opioid epidemic in the U.S., since as much of one quarter of the labor force in some Midwestern cities may test positive for opioid use.

Longer-term OSHA Reporting Rule Curtailed: In April 2017, President Trump signed a Congressional Review Act authorization rolling back OSHA's "Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness" final rule. Known as the "Volks Rule," the rule would have helped OSHA to issue recordkeeping violations for a longer look-back period. The withdrawal of the regulation was finalized in the Federal Register on May 3, 2017. 82 Fed. Reg. 20,548 (May 3, 2017).

Repeal of "Blacklisting Rule" Impacting Federal Contractors: On March 27, 2017, President Trump signed a Congressional Review Act resolution which invalidated the Fair Pay and Safe Workplaces Act, which required, among other things, that federal contractors and subcontractors disclose labor law violations under a number of laws to the federal government in order to bid on government work.

Proposed Merger of EEOC and OFCCP: In its proposed budget for 2018, released on May 23, 2017, the White House proposed merging the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs in order to "creat[e] one agency to combat employment discrimination." The budget further provided that "OFCCP and EEOC will work collaboratively to coordinate this transition to the EEOC by the end of FY 2018…The transition of OFCCP and integration of these two agencies will reduce operational redundancies, promote efficiencies, improve services to citizens, and strengthen civil rights enforcement." Although the proposal, on its face, promotes agency efficiency, the move has been criticized as a way of limiting the resources and reach of two traditionally separate agency functions—one policing equal employment opportunity laws, and the other promoting diversity and nondiscrimination in workforces.

Status of "Persuader Rule": On November 16, 2016, the U.S. District Court for the Northern District of Texas issued a nationwide permanent injunction against DOL revisions to the so-called "persuader rule." That rule would have required law firms providing strategic advice to companies facing union organizing drives to disclose their clients and their fees in connection with such activities, far expanding the rule beyond its original coverage of hired "persuaders" posing as employees. On June 2, 2017, the Department of Labor requested that the Fifth Circuit place the currently pending appeal on hold by way of a filing with the court. On June 15, 2017, the Fifth Circuit issued an order placing the appeal in abeyance pending the Department of Labor's rulemaking process, or until December 12, 2017. *Natl. Federation of Indep. Bus., et al. v. R. Acosta, Secretary LABR, et al.*, No.: 17-10054 (5th Cir. June 15, 2017).

DOL Overtime Rule Struck Down by Federal Judge in Texas on August 31, 2017: On August 31, 2017, District Court Judge Mazzant granted summary judgment to the Plano Chamber of Commerce and more than 55 Texas and national business groups, concluding that an Obama administration extending overtime to an additional four million U.S. workers. The decision effectively bars the overtime rule. *State of Nevada et al. v. U.S. Department of Labor et al.*, No.: 4:16-cv-00731 (E. D. Tex.).

New Republican NLRB Could Tip the Scales: During the summer of 2017, the White House

announced Marvin Kaplan and William Emanuel as nominees for the two vacant NLRB seats. Marvin Kaplan was subsequently sworn in in early August 2017. In the event the second nominee is confirmed, the Republicans will regain the majority on the 5-person board. Should this occur, there is potential that the board will significantly reverse the work of the prior presidential administration. Specifically, at risk for unraveling by the new board is the *Browning-Ferris* ruling which substantially broadened the joint-employer doctrine utilized by the labor board. The 2015 *Browning-Ferris* decision allowed for "indirect control" or reserved control to establish joint employment, in contrast to the previous requirement that the employers exercise the authority to control terms and conditions of employment. 362 NLRB No. 186 (2015). In addition, potential exists for NLRB decisions to be reconsidered related to the ability of graduate students to organize and the ability of small groups of workers to form unions ("micro-units").

These and other changes keep rolling in almost daily, and we'll be keeping our readers updated, so check back with us as the transformation of labor and employment regulation under Trump picks up speed.