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BLOG POST

Post-Election Update: Labor, Employment and Human Resources

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The result of the 2012 elections almost certainly means that employers will face significant employment-related actions by federal agencies, including the National Labor Relations Board (NLRB), Equal Employment Opportunity Commission (EEOC), Occupational Safety and Health Administration (OSHA), and Office of Federal Contract Compliance Programs (OFCCP). Accordingly, employers need to consider and plan for the challenges ahead.

By the time of the inauguration, the NLRB will have only three Members, with Member Hayes' term expiring December 16, 2012 and with two "recess" appointments (Members Block and Griffin) under judicial review. The recess appointments expire on December 16, 2013. The President can again appoint new Members during the 2012 Congressional recess. Chairman Mark Pearce's term expires in August 2013. Thus, there is both an opportunity and perhaps a necessity to recompose the Board in this administration.

There promises (or threatens) more stability at the EEOC, with Chair Berrien's term expiring in July 2014 and remaining terms for Commissioners Feldblum (July 2013), Barker (July 2016) and Lipnic (July 2015). A fifth Commissioner position is vacant; with a pending nomination for Washington, D.C. employee rights advocate, Jenny Yang. The President can again appoint new Commissioners during the 2012 Congressional recess.

The other important posts are filled through presidential appointment, with some requiring Senate confirmation.

Obamacare

Perhaps the most significant employer issue in 2013 will be the finalization and release of implementing regulations and interpretations for the Patient Protection and Affordable Care Act ("Obamacare"). The massive health care reform legislation will be implemented in January 2014, with state exchanges in place by October 1, 2013. Although 13,000 pages of regulations have been released, there are many gaps, holes, and questions remaining as of the election. Employers, as well as insurers, employees, health care providers, and state governments, all have significant stakes in these regulations.

The NLRB

During the current administration, perhaps no federal agency has proved more aggressive in attempting to expand employee and labor rights than the NLRB (the Board). The Board has sometimes also proved ineffective in its efforts. Although the Board mandated the posting of a new notice of employee rights, including the right to unionize, and adopted union-friendly

election rules, both have been temporarily blocked by federal courts. In line with the Administration's management by executive fiat, the Board has significantly invaded the non-union workplace by regulating employer control over social media posts and by regulating the confidentiality of internal company investigations. The Board has found policies violative of the NLRA for simply "being on the books," without any evidence of enforcement. Additionally, the agency has approved "micro-units" for bargaining, which allow small groups of employees within an organization to be represented by separate unions and thus facilitating union organization.

In this Administration, employers can expect resolution of several key issues which were not resolved by the Board prior to the election:

- The Board will address the 2007 Board decision in Register Guard allowing employers to restrict the use of company e-mails, including restrictions prohibiting union organizing and other activities protected by Section 7 of the NLRA. In a pending case, the Board has the opportunity to confirm or outlaw such restrictions.

- In twin pending cases involving NYU and the Polytechnic Institute of New York, the Board will decide whether to overturn its longstanding precedent that graduate students are barred from forming or joining unions.

- The Board will decide whether to continue to defend its election rules in the courts and/or it can draft new ones, addressing the procedural deficiencies fatal to its first attempt.

- The Board can continue to assist organized labor through its attack on work rules that require non-abusive, non-profane, and generally respectful conduct by employees. The Board's concern with these rules is based on the notion that such restrictions, even if unenforced, may sufficiently "chill" employees' exercise of their rights to engage in protected, concerted activity related to working conditions and other protected activity under Section 7 of the NLRA. The Bush-Era Board, in its Lutheran Heritage Village-Livonia line of cases, had allowed employers relatively substantial latitude in adopting and enforcing work rules that prohibited undesirable behavior such as unprofessionalism, abusive language and conduct, and dishonesty.

The EEOC

The EEOC has also been active during this Administration. Earlier this year, the Agency issued Guidance on employers' use of employees' and applicants' criminal histories, including convictions. The Guidance forces employers to abandon across-the-board exclusions of employees based upon generic criminal background status and instead to consider the specific criminal history based upon an individual assessment of each employee or applicant because of the adverse impact of such policies on males and racial and ethnic minorities. In addition, the EEOC applied Title VII and the ADAA to applicants or employees who experience domestic or dating violence, sexual assault or stalking, signaling the agency's broader examination of protections for off-duty events. The EEOC, along with several federal courts, concluded for the first time that gender identity (transsexual) discrimination constitutes sex discrimination in violation of Title VII.

The EEOC has announced that one of its priorities over the next four years will be to pursue litigation alleging sex discrimination and sexual harassment. Its current focus is on systemic discrimination.

The OFCCP

Another federal agency that has been particularly aggressive over the past four years has been the OFCCP, which has jurisdiction over federal government contractors and subcontractors. The OFCCP enforces various laws that prohibit discrimination and require employers to take affirmative action in their employment decisions. The Obama OFCCP has:

- Required, through Executive Order, that covered federal contractor employers post a Notice of employee rights under the NLRA. That requirement remains in place. However, federal courts have temporarily blocked the NLRB from implementing a similar requirement that all employers who are subject to the jurisdiction of the NLRB post a similar notice.

- Increased focus and enforcement on compensation equity class issues.

- Predicted issuance of final regulatory amendments to Section 503 of the Rehabilitation Act and Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, potentially greatly increasing the affirmative action program obligations of covered employers to include applicant recordkeeping obligations and statistical analyses, enhanced outreach for veterans, and a 7% goal for the employment of disabled individuals.

- Increased focus on disability and veteran complaints, coupled with more burdensome investigations, including more on-site investigations.

- Increased filings of administrative complaints upon failure of the conciliation process.

- Continued efforts to expand OFCCP jurisdiction in the health care industry, including potential challenges to the recent dismissal of OFCCP claims basing jurisdiction solely on TRICARE network provider agreements.

OSHA

Anti-employer hallmarks of the Obama OSHA program include doubling minimum penalties for serious violations, restricting discretion in penalty assessment, initiating a Severe Violator Enforcement program, and outlawing many safety incentive programs. Several nationwide OSHA investigations have been at the behest of unions facing problems at the bargaining table or organizing employees.

These aggressive and regressive agency actions should be of particular concern to employers in light of the changing makeup of the federal judiciary during the upcoming Administration. Employers often have been able to receive relief from agency action through the typically more conservative federal courts. The appointments over the next four years will define the continued availability of such effective agency oversight.

In bracing both for the impact of what has already been wrought and for what is around the corner, employers must prepare their organizations by:

- Closely monitoring developments between November 7 and January 20.
- Examining current and proposed policies and procedures to identify, revise, and/or eliminate rules or practices that could invite or fail agency challenge under current standards.
- (Re)considering and bolstering strategies and action plans for lawfully responding to union organizing efforts. With a labor-friendly Board and other federal agencies having acted for four years on labor's behest where legislative efforts have failed, unions have appreciated and utilized this window of opportunity for organizing workplaces and threatening non-cooperative employers.
- Carefully following regulatory developments, including new rules and initiatives by federal agencies.
- Monitoring decisions from federal courts to determine whether aggressive agency actions and decisions will be enforced.
- Monitoring state legislatures and courts for new and different mandates or restrictions in the employment arena.