



INSIDER BRIEFING



Monthly Newsletter | June 2017

What Will the Second Hundred Days of the Trump Administration Hold?

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From the workplace policy perspective, much of the focus of the first 100 days of the Trump administration was on confirming a new Secretary of Labor and reversing the Obama administration's labor and employment agenda. During this second 100-day period, the focus remains on rolling back the policies of the prior administration, much of which is still in place. Yet, with Secretary of Labor Alex Acosta now confirmed, attention will also turn to filling the subcabinet-level positions at the Department of Labor (DOL) as well as vacant slots at the National Labor Relations Board (NLRB) and Equal Employment Opportunity Commission (EEOC).

Employers wondering when they will see a change in direction from the NLRB and EEOC will have to wait until after nominees for existing vacancies and upcoming vacancies are named and confirmed. At the NLRB, there are two open Board seats to be filled that would shift the balance on the Board to Republican control. The all-important general counsel position is still held by Obama-appointee Richard Griffin, Jr., until his term expires in November. At the EEOC, the situation is reversed. The EEOC general counsel position is vacant,

but control of the Commission will not shift until after Commissioner Jenny Yang's term expires and her replacement is nominated and confirmed. Thus, the second 100 days of the Trump administration are unlikely to yield the dramatic shift in labor and employment policy at the NLRB and EEOC that many employers have been expecting since Inauguration Day.

Regulatory Reform

The president's [budget request](#) to fund the federal agencies for FY 2018, which was released on May 23, provides insight into the president's priorities and policy initiatives in the coming months. The budget request confirms the commitment to regulatory reform set forth in the president's earlier executive orders. Under the caption of "Regulatory Rollback," the budget states: "We must eliminate every outdated, unnecessary, or ineffective Federal regulation, and move aggressively to build regulatory frameworks that stimulate—rather than stagnate—job creation. Even for those regulations we must leave in place, we must strike every provision that is counterproductive, ineffective, or outdated."

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On January 30, 2017, the President signed Executive Order (EO) 13771, “Reducing Regulation and Controlling Regulatory Costs” requiring federal agencies to identify for elimination at least two existing regulations for each new regulation they issue. It generally also requires agencies to ensure that for 2017, the total incremental cost of all new regulations be no greater than \$0. EO 13777 establishes within each agency a Regulatory Reform Officer and a Regulatory Reform task force to carry out the president’s regulatory reform priorities. The budget request explains: “These new teams will work hard to identify regulations that eliminate jobs or inhibit job creation; are outdated, unnecessary, or ineffective; or impose costs that exceed benefits ... and these teams and this effort will be a critical means by which Federal agencies will identify and cut regulations in a smart and efficient manner.”

The week before President Trump released his budget request containing these regulatory reform principles, the Senate Homeland Security and Government Affairs Committee approved a [package of bills](#) designed to give Congress greater say in the rulemaking process. Among the legislation approved by the Committee was the Midnight Rules Relief Act of 2017 (S. 34), which would enable Congress to block multiple bills at a time under the Congressional Review Act. Other regulatory reform bills approved by the Committee were the Regulatory Accountability Act of 2017 (S. 951); Regulations from the Executive in Need of Scrutiny Act of 2017 (S.21); Providing Accountability Through Transparency Act of 2017 (S. 577); Small Business Regulatory Flexibility Improvements Act (S. 584); and the Early Participation in Regulations Act of 2017 (S. 579). These bills largely represent messaging pieces designed to demonstrate congressional Republicans’ commitment to regulatory reform, as well as a desire to increase congressional control of the rulemaking process itself.

Spending Priorities

In addition to regulatory reform and beyond a reversal of the prior administration’s workplace policy agenda, what new course might the Trump administration chart? The budget numbers reveal a different approach to workplace regulatory and enforcement policy than that taken under the prior administration. The funding levels

for DOL discretionary spending proposed in President’s Trump’s first budget request represent an almost 20% decrease in funding for the DOL. The total proposed funding for FY2018 for the DOL is \$ 9.7 billion, which is \$2.4 billion below the current funding level.

The DOL’s “[Budget in Brief](#)” explains that the “FY 2018 Budget reflects the Administration’s commitment to national security and highlights the tradeoffs and choices inherent in pursuing this goal.” How the funds will be directed also reflects a shift from the prior administration towards more compliance assistance. “The Department has placed a priority on helping American employers understand and comply with worker protection laws. The FY 2018 Budget request reflects this emphasis on compliance assistance and outreach through requested compliance assistance funding increases totaling \$16.6 million in the Department’s worker protection agencies.” Notably, the budget provides that the DOL’s Office of the Solicitor (SOL) will “support the priority of enhancing compliance assistance in concert with the Department’s worker protection agencies” with \$2.2 million to support these initiatives.

The following are highlights of the budget request for DOL’s agencies:

- The budget request would provide \$230.1 million for the Wage and Hour Division (WHD) to enforce laws that establish the minimum standards for wages and working conditions in many of the workplaces in the United States, “particularly in industries where workers are most at risk.” The Budget includes a funding increase of \$3 million for the WHD to perform compliance assistance projects to educate employer groups and industry associations on how to comply with the law.
- The budget provides \$543.3 million for the Occupational Safety and Health Administration (OSHA), including \$130.0 million for federal and state compliance assistance activities, an increase of \$4 million. While increasing resources for compliance assistance, the OSHA budget reflects a decrease of \$1,962,000 and 11 full-time employees reflecting the Administration’s commitment to reducing regulatory activities.

- The Budget provides \$183.9 million to the Employee Benefits Security Administration (EBSA), which includes a \$1.3 million increase for compliance assistance on Employee Retirement Income Security Act (ERISA) disclosure requirements.

Although more resources would be directed to compliance assistance, this does not mean that the DOL will not enforce compliance. It does, however, indicate that more priority will be placed on helping employers understand their compliance obligations. Coupled with the administration's regulatory reform initiatives, the budget also suggests that new rulemaking capacity and activity will be diminished.

OFCCP/EEOC Merger

In addition to regulatory reform, President Trump has called for reforming the federal government and reducing the federal bureaucracy. In furtherance of this objective, the DOL budget request contains one of its most notable – and no doubt controversial – proposals. The budget proposes to merge the DOL's Office of Federal Contract Compliance Programs (OFCCP) into the EEOC by the end of FY 2018. The Budget in Brief explains that the intent of this combination is “to promote greater policy coordination, management efficiency, and cost-effectiveness” and “builds on the existing tradition of operational coordination between the two employment civil rights agencies.” The document goes on to explain that: “[a]fter full integration of the two agencies, there will be seamless sharing of enforcement data and expertise, operational efficiencies, expanded compliance assistance to employers, improved customer service, and fully aligned policy.” The EEOC would receive \$364 million in its funding for FY 2018 in the president's budget request, representing a slight reduction.

The proposed merger has already been met with criticism given the diverging missions, regulatory schemes and authority of the two agencies. Indeed, during a [congressional hearing](#) held the same day the budget was released, witnesses from both the business community and civil right organizations expressed their opposition to the proposal to fold the OFCCP into the EEOC.

The May 23 hearing held by the House Subcommittee on Workforce Protections entitled “The Need for More

Responsible Regulatory and Enforcement Policies at the EEOC” scrutinized the agency's enforcement practices as well as its controversial changes to the EEO-1 report. In his opening statement, Chairman Byrne [criticized](#) the agency's “misguided focus on fishing expeditions,” saying it “consistently took its eye off the ball and pursued flawed enforcement policies at the expense of workers.” Chairman Byrne was also critical of the new EEO-1 report, which he said “is estimated to cost American job creators \$1.3 billion and more than 8 million hours of paperwork each year.” He also commented, “we don't even know how the EEOC intends to use all of this new data and whether or not it can help combat pay discrimination in the first place.” The U.S. Chamber of Commerce has submitted a request to the White House Office of Management and Budget (OMB) to review and reject the revisions to the EEO-1 form.

Paid Leave

The president's budget listed a number of “new priorities” for the administration, among them “Supporting Families and Children.” It is under this heading that the president has proposed paid parental leave, following up on a tenet of his campaign platform. According to the budget proposal:

The Budget delivers on this promise with a fully paid-for proposal to provide six weeks of paid family leave to new mothers and fathers, including adoptive parents, so all families can afford to take time to recover from childbirth and bond with a new child without worrying about paying their bills.

Using the Unemployment Insurance (UI) system as a base, the proposal requires states to provide six weeks of paid parental leave, but gives the states flexibility about structuring the program “in a way that is most appropriate for their workforce and economy.” According to the budget request, the paid leave proposal is fully offset – or paid for – by a package of reforms to the UI system. Among the reforms mentioned are reducing improper payments, helping unemployed workers find jobs more quickly, and encouraging states to maintain reserves in their Unemployment Trust Fund accounts. Though details of the parental paid leave proposal remain sparse, the proposal's appearance in the budget request offers proof of its importance to the White House. Yet, the ultimate fate

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and form of the parental paid leave proposal – and how it relates to broader federal paid leave initiatives – is unclear.

As an increasing number of states and localities adopt their own paid leave requirements, the compliance challenge for employers has grown along with the momentum for federal paid leave legislation that may set a uniform standard for those employers that opt to participate. The American Enterprise Institute (AEI)-Brookings Working Group on Paid Family Leave recently issued a [report](#) analyzing the costs and benefits of implementing a national paid leave program, and laying out a compromise proposal for lawmakers to consider. The report likely adds further momentum to efforts to advance federal paid leave legislation.

Proposed Federal Legislation

The budget request represents just the first step in the process to fund the federal government. Although it reflects the priorities and policies of the Trump administration, it remains subject to negotiation with and approval by Congress, where some Democratic support is needed to pass the 60-vote, filibuster-proof threshold, and perhaps even in the House.

Members of Congress on both sides of the aisle have recently introduced a slew of bills that reflect their own workplace policy priorities. For example, Senator Al Franken (D-MN) has reintroduced the [Protecting America's Workers Act](#) (S. 1000), longstanding legislation to amend the Occupational Safety and Health Act.

Senate and House Democrats have [introduced legislation](#) (HR 15, S. 1242) to raise the federal minimum wage to \$15/hour by 2024, and index it to median wage growth thereafter.

Congresswoman Carolyn B. Maloney (D-NY) and Senator Bob Casey (D-PA) have reintroduced the Flexibility For Working Families Act to “ensure that working Americans can ask their employer for modified schedules so they can balance the demands of their jobs and their home life.” Reintroduction of these bills in Congress come as the number of states and localities acting to increase the minimum wage or to impose scheduling and other requirements on employers is increasing. Although the prospects for federal legislation are dim in these areas, the prospects for state and local action will likely increase.

The second 100 days of President Trump's term may see a shift in control of the NLRB with the nomination and confirmation of two vacant Board seats. Although a more pro-management stance by the Board is expected to come, members of Congress have reintroduced legislation to reverse existing decisions that have come under fire from the business community. For example, Senator Johnny Isakson (R-GA) reintroduced the [Representation Fairness Restoration Act](#) that would overturn the *Specialty Healthcare* “micro bargaining unit” decision. Rep. Francis Rooney introduced a companion bill in the House. (HR 2629). Sen. Phil Roe (R-TN) reintroduced the [Employee Rights Act](#) (HR 2723) to require secret ballot elections. The bill would also require opt-in permission from union members for the use of their union dues for any purpose other than collective bargaining and periodic union re-certification elections to ensure current employees have the ability to decide if they wish to remain represented by a union.

Like the Democratic-sponsored bills noted above, these Republican-sponsored bills are generally seen as messaging. But with the control of the Board set to shift, the policies may indeed change.

On-Demand Economy

As the on-demand economy continues to grow, so too does the divide between the industrial-age labor and employment laws and the realities of the 21st century workforce. Policymakers are increasingly focused on this disconnect and how to bridge this divide in a way that provides a safety net for on-demand workers without stifling innovation, flexibility and opportunity. On May 25, Senator Mark Warner (D-VA) [introduced legislation](#) to test and evaluate innovative ways to offer portable benefits to workers in the on-demand economy. Rep. Suzan DelBene (D-WA) introduced a companion bill in the House. The bill “seeks innovative ways to provide these workers with access to many of the social insurance protections typically provided to workers through traditional full-time employment.” Specifically, the Portable Benefits for Independent Workers Pilot Program legislation establishes a \$20 million grant fund within the U.S. Department of Labor to incentivize states, localities and nonprofit organizations to experiment with portable benefits models for the independent workers who move from job-to-job.

Regulatory Delays

On the regulatory front, the reexamination of Obama-era rules continues at the Department of Labor since Secretary Acosta has assumed office. The DOL intends to withdraw the prior administration's controversial "persuader rule" – already the subject of a nationwide injunction. On May 22, the DOL submitted to OMB a proposed rule to rescind the rule interpreting the "Advice" Exemption in Section 203 (c) of the Labor-Management Reporting and Disclosure Act. The submission puts in place the process for formally withdrawing the rule.

OSHA [announced](#) that it is delaying the compliance date for a recordkeeping and reporting requirement that calls on employers to electronically submit information about workplace injuries and illnesses. According to its website "OSHA is not accepting electronic submissions of injury and illness logs at this time, and intends to propose extending the July 1, 2017 date by which certain employers are required to submit the information from their completed 2016 Form 300A electronically. Updates will be posted to this webpage when they are available." No additional details of the delay have been posted to date, nor has a *Federal Register* notice regarding the delay been published.

In contrast to the delay of the electronic recordkeeping requirement, the DOL [announced](#) that it will not delay the June 9, 2017 applicability date for certain provisions of the fiduciary rule dealing with conflicts-of-interest for retirement investment advice. The DOL, did, however, announce a temporary enforcement policy during the phased implementation period ending on January 1, 2018, during which the Department will not pursue claims against fiduciaries who are working diligently and in good faith to comply with the fiduciary duty rule and exemptions, or treat those fiduciaries as being in

violation of the fiduciary duty rule and exemptions. In an op-ed published in the *Wall Street Journal*, Secretary Acosta wrote: "We have carefully considered the record in this case, and the requirements of the Administrative Procedure Act, and have found no principled legal basis to change the June 9 date while we seek public input." The enforcement policy guidance also explained that it is possible, based on the results of the examination of the rule called for in President Trump's memorandum, that additional changes will be proposed and that the Department intends to issue a Request for Information (RFI) in the near future seeking additional public input on specific ideas for possible new exemptions or regulatory changes based on recent public comments and market developments.

With respect to sub-regulatory guidance, on June 7, the DOL [announced](#) that 2015 and 2016 informal guidance on joint employment and independent contractors were withdrawn, effective immediately.

Health Care

In Congress, the second 100 days will likely be a make-or-break time for the president and congressional Republicans' efforts to repeal and replace the Affordable Care Act. After narrow House passage of the legislation last month, Senate Republicans are facing the difficult task of making changes that can garner the support of at least 50 senators. This task was surely made even more difficult by the Congressional Budget Office's [estimate](#) that there would be 23 million more uninsured under the House-passed American Health Care Act in 2026 compared to current law.

Littler's Workplace Policy Institute will keep you informed about important developments during the second 100 days of the Trump administration and beyond.

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