



INSIDER BRIEFING



Monthly Newsletter | May 2017

The Trump Administration's First 100 Days

BY ILYSE SCHUMAN AND MICHAEL J. LOTITO

On April 29, 2017, the first 100 days of the Trump administration came to an end. A government shutdown was averted after the White House and Congress reached a spending deal, and the U.S. Supreme Court seat left vacant by the death of Justice Antonin Scalia over a year ago was finally filled upon the Senate confirmation of Neil Gorsuch. However, for those expecting dramatic changes in workplace policy, much of the new administration's agenda remains to be presented and executed.

Health Care

On Day 105 of President Trump's term, House Republicans finally garnered the votes to pass legislation repealing or modifying key provisions of the Affordable Care Act (ACA). Although it fell outside of the 100-day mark by a few days, House passage of the American Health Care Act by a vote of 217 to 213 was a significant legislative win for House Republican leadership and the White House. An earlier effort to pass the American Health Care Act in the House failed when the bill was

pulled from a vote after Republicans fell short of the 216 votes needed for passage. Although House Republicans were finally able to find the sweet spot to satisfy enough conservatives and moderate Republicans over the issue of coverage for people with pre-existing conditions, the House health care bill faces procedural and political challenges in the Senate. Whatever bill may emerge from the Senate is likely to be significantly different. Although the fate of the bill in the Senate is therefore uncertain, House passage was no doubt a major step towards dismantling the 2010 sweeping health care reform law.

Changes at the Department of Labor

Progress on reversing course set by the Obama administration and charting a new course in labor and employment policy was no doubt slowed by key political appointments remaining unfilled more than three months after President Trump was sworn into office. The U.S. Department of Labor, through which much of the prior administration's workplace policy agenda was implemented, remained without a Secretary of Labor

until Alexander Acosta was confirmed by the Senate in a 60 – 38 vote on April 27 and sworn-in the following day. The confirmation of Secretary Acosta completes President Trump’s Cabinet. With a confirmed Secretary at the helm, the DOL may begin in earnest the process of reviewing and reshaping the Department’s regulatory and enforcement policy.

In the time between the departure of former Secretary of Labor Thomas Perez and the confirmation of his successor, the DOL did undertake several notable regulatory actions, including delaying the applicability date of the controversial fiduciary rule by 60 days. In addition, the Occupational Safety and Health Administration (OSHA) again delayed enforcement of the crystalline silica standard until Sept. 23, 2017. However, Secretary Acosta’s arrival at the Department likely enables more broad or substantive changes to these and other regulatory and enforcement policies in the months ahead.

Executive Orders

Secretary Acosta assumes his position with a full plate of matters before him. In his [remarks](#) upon his swearing-in, Secretary Acosta made clear that: “Supporting Americans’ ability to find good jobs, safe jobs” will be a priority. Echoing the sentiment of the President Trump’s April 18 “[Buy American and Hire American](#)” executive order, Acosta said:

Too many Americans have seen jobs go overseas. Too many Americans have seen jobs filled by foreign workers. And too many Americans see that jobs are available, but that they don’t have the skills or the experience to fill those jobs. The skills gap is real and needs to be addressed.

The executive order sets forth the administration’s “Hire American” policy “to rigorously enforce and administer the laws governing entry into the United States of workers from abroad.”

The DOL, along with the Secretary of Commerce, Director of the Office of Management and Budget, Secretary of State, United States Trade Representative, and the Federal Acquisition Regulatory Council, will play a role in implementing the executive order.

In addition to the Buy American and Hire American executive order, Secretary Acosta will also be charged with implementing other White House directives dealing with the regulatory process that could shape the Department’s rulemaking agenda. Executive Order 13771, issued on January 30, 2017, requires that two existing regulations be withdrawn for every new rule issued, which could limit the number of new regulatory requirements issued by the DOL and ensure their overall cost neutrality (the so-called “2-for-1” executive order). On April 5, the White House Office of Management and Budget (OMB) issued a [memorandum](#), M-17-21, to implement the order.

The memorandum explains that the 2-for-1 order applies to a “significant guidance document” that has been reviewed by OMB in addition to a “significant regulatory action.” The term “significant” generally includes guidance documents that are reasonably anticipated to have an annual effect on the economy of at least \$100 million.

While Executive Order 13771 refers to “new” regulatory actions issued after noon on January 20, 2017, a subsequent executive order (No. 13777) issued on February 24, 2017, calls for the review of existing regulations issued prior to President Trump’s inauguration to “alleviate unnecessary regulatory burdens places on the American people.” The review required by Executive Order 13777 may lead to these regulations’ eventual revocation or modification. The DOL’s “regulatory reform task force” is charged with identifying regulations that are still on the books to determine if they “eliminate jobs, or inhibit job creation; are outdated, unnecessary, or ineffective; [or] impose costs that exceed benefits.”

The DOL task force will no doubt be carefully scrutinizing a number of Obama administration workplace regulations for potential repeal, replacement or modification. With a confirmed Secretary of Labor in place and in conjunction with this regulatory review process, the new administration’s next steps on regulations issued by the prior administration and challenged by the employer community will begin to unfold. Employers awaiting the new administration’s direction on the overtime rule,

currently the subject of a nationwide injunction, could see some answers in the coming months. Employers may also begin to see the formal reversal of other controversial Obama-era workplace regulations, such as the DOL's "persuader" rule under the Labor-Management Reporting and Disclosure Act.

Yet, even though a new Secretary of Labor has been confirmed, that still does not mean the changes many employers are anticipating will or can come overnight. The Administrative Procedure Act governs the process through which federal agencies can issue, rescind or modify regulations. Thus, a formal notice-and-comment period may be required before a rule issued by the prior administration can be officially withdrawn or replaced. Just as the business community challenged a number of Obama-era regulations—such as the overtime, persuader and blacklisting rules—in court, so, too, may labor or other stakeholders target new changes.

Other labor-related initiatives authorized by the prior administration's executive orders can be more readily reversed by the stroke of a pen. As of May 1, 2017, President Trump had signed 33 new executive orders. Yet, some controversial executive orders signed by his predecessor remain on the books. Notably, the executive order requiring certain government contractors to provide paid sick leave remains in effect, as does the order on the use of project labor agreements for federal construction contracts. Many expected these and other executive orders to be quickly reversed after inauguration day. That these orders have not yet been rescinded has left some employers subject to their requirements in a quandary, although the expectation remains that they will, indeed, be reversed.

Secretary Acosta takes the helm at the DOL as his Department and others are subject to a mission by the White House to reform the federal government and reduce the civilian workforce. On April 12, the Director of OMB issued a [memorandum](#), M-17-22, *Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce*. This document, which provides guidance on the president's directives to impose a federal hiring freeze and reorganizing the federal government,

has budgetary and staffing implications for agencies. The memorandum explains that the objective of these reform efforts is to:

- Create a lean, accountable, more efficient government that works for the American people;
- Focus the federal government on effectively and efficiently delivering those programs that are the highest needs to citizens and where there is a unique federal role rather than assuming current programs are optimally designed or even needed;
- Align the federal workforce to meet the needs of today and the future rather than the requirements of the past; and
- Strengthen agencies by removing barriers that hinder front-line employees from delivering results.

The practical impact of these reform plans at the DOL and other departments remains to be seen. Yet, it could serve to limit the scope of regulatory and enforcement initiatives, or at least redirect resources to other priorities.

Other Agency Changes

Defining the contours of the Department's regulatory and enforcement agenda and priorities may still be months away. Although the DOL at last has a confirmed Secretary, key positions at the Department remain unfilled. The heads of the Department's Wage and Hour Division, OSHA, and Employee Benefits Security Administration (EBSA) have yet to be nominated, let alone confirmed. The reversal and, in some cases, replacement, of many Obama-era policies may well have to wait until these and other critical political slots are filled. However, the reversal of some controversial policies of the prior administration has already begun. Notably, OSHA's 2013 letter of interpretation giving union representatives permission to accompany OSHA inspectors on walk-around inspections at non-union sites has been withdrawn.

Meanwhile, changes at the National Labor Relations Board and Equal Employment Opportunity Commission still look to be months away. Both the Board and Commission remain under Democratic control until current vacancies are filled and/or current terms expire. Although it does not

alter the control of the NLRB, President Trump named the lone Republican on the Board, Phil Miscimarra, as Chair on April 24. Miscimarra had been serving as Acting NLRB Chair since January 23, 2017. The five-member Board currently has two vacancies to be filled by Republican slots, although President Trump has not yet announced his nominees. At the EEOC, Democrats retain a 2-1 edge on the five-member Commission, and will until the expiration of Former Chair Jenny Yang's seat in July 2017.

Resolutions of Disapproval

The swearing-in of the Secretary of Labor comes as another tool used to reverse the Obama administration's regulatory agenda expires. Under the Congressional Review Act (CRA), Congress, with the president's signature, can nullify recently-finalized regulations and prohibit an agency from promulgating a "substantially similar" rule absent congressional action. A CRA resolution of disapproval requires a mere majority vote in the Senate, but it can only be used within 60 legislative days of its submission to Congress, a period that resets at the beginning of a new Congress. Thus, the window for Congress to use the CRA is about to expire.

So far during this congressional session, the CRA has been successfully used to overturn the "Fair Pay and Safe Workplaces" or blacklisting rule, the Occupational Safety and Health Administration's "Volks" rule, and guidance that would have allowed cities to set up retirement programs for private-sector workers. On May 3, the Senate approved 50-49 a resolution of disapproval (H.J. Res. 66), already passed by the House, to revoke a rule submitted by the EBSA regarding savings arrangements established by states for non-governmental employees. This latest resolution looks to be the last one in which an Obama-era workplace policy rule is overturned using the CRA.

A Senate floor schedule crowded by slow-moving confirmation procedures for President Trump's nominees left limited time for consideration of CRA resolutions. With all the Cabinet positions finally confirmed and the CRA clock expired, there is some question about whether the confirmation process for sub-Cabinet positions will continue to be as slow and contentious as in the first 100 days of President Trump's term. With ongoing executive branch confirmations to contend with and looming budget deadlines, the Senate's legislative calendar will likely continue to be tight, leaving a limited window for passing the legislative priorities of congressional Republicans and the White House.

Workplace Flexibility

As the White House and House Speaker Paul Ryan scrambled for votes on the health care bill, the House voted on and passed the Working Families Flexibility Act (H.R. 1180) on May 2. The bill would amend the Fair Labor Standards Act to allow employers to offer employees a choice between cash wages and compensatory time off ("comp time") for overtime hours worked. Introduced by Rep. Martha Roby (R-AL), the bill passed by a vote of 229-197, with six Republicans joining all Democrats in opposing the measure. A comp-time bill has been introduced in prior Congresses, yet has never passed both chambers and is expected to meet the same fate this Congress. Even though the Working Families Flexibility Act is very unlikely to pass the Senate and become law, the issue of workplace flexibility is one that is expected to continue to attract the attention of policymakers, employers and workers.

With the first 100 days of the Trump administration now behind us and much on the workplace policy to-do list remaining, employers will likely watch the next 100 days with even greater interest.

ABOUT LITTLER'S WORKPLACE POLICY INSTITUTE®

Littler's Workplace Policy Institute® (WPI™) was created to be an effective resource for the employer community to engage in legislative and regulatory developments that impact their workplaces and business strategies. The WPI relies upon attorneys from across Littler's practice groups to capture—in one specialized institute—the firm's existing education, counseling and advocacy services and to apply them to the most anticipated workplace policy changes at the federal, state and local levels. For more information, please contact the WPI co-chairs Michael Lotito at milotito@littler.com or Ilyse Schuman at ischuman@littler.com.