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# New President, New Congress, New Direction in Workplace Policy

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President Donald J. Trump was sworn into office on January 20, 2017, ushering in a new balance of power in Washington and what is expected to be a dramatically different era of workplace policy. On his first day in office, the president took action to begin reshaping President Obama's regulatory agenda and fulfilling his campaign promises with respect to the Affordable Care Act. White House Chief of Staff Reince Priebus sent a memorandum to the heads of the executive departments and agencies placing a temporary halt on pending or new, but not yet effective, regulations of the prior administration. The regulatory freeze, similar to the one issued when President Obama began his term, gives incoming political appointees a chance to review, and perhaps rescind or modify, items in their predecessor's regulatory pipeline.

Subject to exceptions for emergencies, the Priebus memorandum directs departments and agencies to delay sending any regulations to the Federal Register pending a review by incoming political appointees.

The memorandum further directs the departments and agencies to withdraw regulations that have been sent to the Office of Federal Register but not yet published. Furthermore, the administrative action delays the effective date of final rules that have been published but have yet to take effect for 60 days from the date of the memorandum. Additional delays may be in order, the memorandum notes, to "review questions of fact, law, or policy." On January 24, Mark Sandy, the Acting Director of the White House Office of Management and Budget (OMB) issued guidance on implementation of the Priebus regulatory freeze memorandum.

For rules that are final but not yet effective, the January 24 memorandum to acting heads of the departments and agencies describes steps to take for their review. If during the review the agency determines that a regulation raises a substantial question of fact, law, or policy, it is to notify the OMB Office of Information and Regulatory Affairs promptly and consider whether the agency should perform additional rulemaking or take other further actions.

## Rulemaking Executive Order

While the regulatory freeze is directed at rulemaking initially undertaken by the former Obama Administration, a January 30, 2017 executive order (EO) is aimed at reducing the volume and burden of administration rulemaking during the Trump presidency.

The purpose of the January 30 EO, titled, "Reducing Regulation and Controlling Regulatory Cost," is to "manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations" – a theme President Trump promoted on the campaign trail. For fiscal year 2017, unless prohibited by law, whenever an executive agency publicly provides notice of, invites comment on, or otherwise begins the process of promulgating a new regulation, the agency must make the proposed regulation cost-neutral and identify at least two existing regulations to be repealed.

On February 2, 2017, the OMB issued interim guidance on the implementation on the fiscal year 2017 regulatory cap set forth in the January 30 EO. In general, agencies may comply with those requirements by issuing two "deregulatory" actions for each new significant regulatory action that imposes costs. The savings of the two deregulatory actions are to fully offset the costs of the new significant regulatory action. The EO's requirements for fiscal year 2017 apply only to those significant regulatory actions, as defined in Section 3(f) of Executive Order 12866, an agency issues between January 20 and September 30, 2017. Significant guidance documents may also be covered on a case-by-case basis. The EO does not apply to independent agencies, such as the National Labor Relations Board (NLRB) or Equal Employment Opportunity Commission (EEOC). However, such independent agencies are "encouraged" to identify existing regulations that, if repealed or revised, would achieve cost savings that would fully offset the costs of new significant regulatory actions.

Regulatory actions issued before January 20 that are vacated or remanded by a court after that date do not qualify for the savings requirement. However, regulatory actions overturned by the Congressional Review Act (CRA) qualify for savings. Regulatory and deregulatory actions can be bundled in the same regulatory action. The net cost impact (the difference between costs imposed and cost savings) of such rules will generally determine whether they are regulatory actions that need to be offset.

Even with the additional guidance from OMB, questions about the application of the January 30 EO are likely to remain. It is a clear signal that the Trump administration will take a very different approach to workplace policy rulemaking than did the prior administration, with an emphasis on reducing the regulatory burden on employers.

## Legislative Actions

Even before President Trump was sworn in, the House of Representatives passed bills that would reform the regulatory process and give Congress more control over the fate of agency rulemaking. The bills were aimed at curbing what Republican sponsors characterized as burdensome and costly regulations. On January 7, the House passed the Searching for and Cutting Regulations that are Unnecessarily Burdensome (SCRUB) Act (H.R. 1155), by a vote of 245-174. The legislation, introduced by Rep. Jason Smith (R-MO), would establish a bipartisan commission to review existing federal regulations and identify rules that should be repealed. Specifically, the legislation, according to its sponsor, "ensures a system of checks and balances in the review process and prioritizes review of regulations that are major rules, are more than 15 years old, impose paperwork burdens that can be reduced substantially without significantly diminishing effectiveness, or impose disproportionately high costs on small businesses."

It is unclear when or even if the Senate will take up the bill. Given the expected opposition from Senate Democrats, the bill seems unlikely to garner the 60 votes needed to make it to the president's desk.

In addition, the House passed a comprehensive regulatory reform bill making additional changes to the regulatory process on January 11 by a vote of 238-183. Among other things, the Regulatory Accountability Act of 2017 (H.R. 5), introduced by House Judiciary Chairman Bob Goodlatte (R-VA), combines a series of regulatory reform initiatives reported out of the House Judiciary Committee and passed by the House during the 114th Congress. Notably, the bill would end the Chevron deference doctrine whereby the courts defer to federal agency interpretations, giving regulators wide latitude in rulemaking. According to a summary from Chairman

Goodlattte, the bill would also:

- Require agencies to choose the lowest-cost rulemaking alternative that meets statutory objectives and require greater opportunity for public input and vetting of critical information—especially for major and billion-dollar rules.
- Require agencies to account for the direct, indirect, and cumulative impacts of new regulations on small businesses—and find flexible ways to reduce such impacts.
- Prohibit new billion-dollar rules from taking effect until courts can resolve timely-filed litigation challenging their promulgation.

Like the SCRUB Act, the chances of the Senate considering, let alone passing, this package of bills are slim.

Although these House-passed regulatory reform bills are largely messaging pieces, Congress is poised to act to rescind some controversial Obama administration rules through the CRA. The 1996 law gives Congress a tool to overturn a federal agency rule through a special expedited procedure not subject to a Senate filibuster. The CRA requires a federal agency promulgating a rule to submit the rule to both chambers of Congress and the Comptroller General of the Government Accountability Office before the rule can take effect. From the date that the agency submits its report, Congress has 60 days in which to pass a joint resolution disapproving of the rule. Only regulations submitted to Congress on or after the 60th session day in the Senate or the 60th legislative day in the House before it adjourns without assigning a day for a further meeting or hearing (an adjournment "sine die") can be subject to the CRA. If within that 60-day period Congress adjourns sine die, the periods to submit and act on a disapproval resolution "reset" in their entirety in the next session of Congress. The CRA deadline in the 114th Congress was in mid-June, meaning that any Obama administration regulations issued after that date are now subject being overturned upon a CRA resolution passing Congress and approved by President Trump.

Because of the rarity of the political stars aligning in a way favorable to a CRA resolution, the CRA has been successfully used only once. In the early months of President George W. Bush's first term, a Republican Congress passed, and President Bush approved, a CRA resolution to overturn OSHA's controversial ergonomics rule, issued in the last days of the Clinton administration.

On February 2, the House passed a resolution of disapproval (H.J. Res 37) to block the final rule issued pursuant to the "Fair Pay and Safe Workplaces" executive order. The so-called blacklisting rule would require federal contractors to disclose violations and alleged violations of enumerated labor laws as part of the procurement decision-making process. In October 2016, a federal district judge in Texas issued a preliminary injunction blocking key provisions of the rule from taking effect. The Senate is expected to take up and pass the blacklisting rule CRA shortly, followed by approval from President Trump. Upon the President's approval of the resolution, not only is the blacklisting rule nullified, but the agency is precluded from promulgating a substantially similar rule without congressional approval.

## Fiduciary Rule

For Obama administration regulations that were issued before the CRA deadline, Congress and the Trump administration must turn to other means to revoke or modify those regulations. Last Congress, Republicans passed a CRA resolution to block the Department of Labor's rule on conflict-of-interest regarding retirement investment advice, but President Obama vetoed the resolution. Although the fate of the CRA resolution on the fiduciary rule during the 114th was never in doubt, it nonetheless signaled Republicans' opposition to the rule.

With the change in power, one of the seminal achievements of former Department of Labor Secretary Thomas Perez's "middle class economics" agenda is set to be rescinded, or at least substantially changed. On February 3, 2017, President Trump signed a presidential memorandum on the fiduciary rule. The presidential memorandum directs the Department of Labor to review the fiduciary rule to "determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice." As part of this review, the presidential memorandum instructs the DOL to prepare an updated economic and legal analysis, which considers the harm to investors and retirees from reduction of access to retirement savings offerings, disruptions in the retirement savings industry, and litigation.

## Affordable Care Act

President Trump and congressional Republicans campaigned on the promise to "repeal and replace" the Affordable Care Act (ACA). As congressional Republicans seek consensus among themselves and the White House about the contours of legislative action and timing, President Trump made his intent to fulfill his campaign promise clear on his first day in office. One of the President's first official acts on Inauguration Day was to sign an executive order "Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal" (ACA Order).

The ACA Order states that it is "the policy of my Administration to seek the prompt repeal" of the ACA. Pending repeal, the ACA Order announces "it is imperative for the executive branch to ensure that the law is being efficiently implemented, take all actions consistent with law to minimize the unwarranted economic and regulatory burdens of the Act, and prepare to afford the States more flexibility and control to create a more free and open healthcare market." Specifically, the ACA Order directs:

> To the maximum extent permitted by law, the Secretary of Health and Human Services (Secretary) and the heads of all other executive departments and agencies (agencies) with authorities and responsibilities under the Act shall exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the Act that would impose a fiscal burden on any State or a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications.

The inclusion of the phrase "to the maximum extent permitted by law" is recognition that the power of the regulators to nullify or modify the ACA in whole or in part is limited by the contours of the statute itself and the rulemaking requirements of the Administrative Procedure Act (APA). A change of the enforcement policy as contemplated by the executive order can come without congressional action, yet cannot revoke the underlying statutory requirements without legislative action.

Furthermore, as the ACA Order notes, to the extent that carrying out the directives requires revision of regulations issued through notice-and-comment rulemaking, the agencies must comply with the APA and other applicable statutes in promulgating any regulatory revisions. Even though limited and subject to the public notice-and-comment process, these regulatory changes could be important to stakeholders waiting for lawmakers to flesh out the future of the ACA. Indeed, the Health and Human Services (HHS) department has already sent to OMB for review a proposed rule on insurance market stabilization.

The pace of regulatory and subregulatory action is expected to increase once the nominee for the Secretary of HHS, Rep. Tom Price, and other agency heads are confirmed and in place.

Action taken by the federal agencies pursuant to the ACA Order will be one of the three buckets that has been described as comprising repeal and replacement of the ACA. Repealing portions of the ACA and replacing it with what proves politically and procedurally viable through the reconciliation process is another bucket. Congress has already begun this process by passing a budget resolution that sets the stage for the use of reconciliation to pass legislation in the Senate through an expedited process requiring mere majority approval. The ACA reconciliation bill passed by the Republicans in the last Congress and vetoed by President Obama serves as a marker for the bill. Among other things, it eliminated the penalties for the ACA employer and individual mandates and the unpopular "Cadillac" tax. In response to a growing call to repeal and replace as much of the ACA as possible along with rising concerns about disruptions to individuals, the insurance market and health care industry, Republicans are exploring what components of the "replace" legislation can be included in the reconciliation bill. Looking to prior Republican proposals, the legislation may contain provisions on Health Savings Accounts (HSAs), tax credits for purchasing health insurance and high-risk pools. Capping the exclusion for the favorable tax treatment of employer-provided health coverage also appears to be on the table as a way to help pay for the legislation and reduce healthcare costs.

The use of the budget reconciliation process to achieve fully the GOP vision for repealing and replacing the

ACA is limited. Only provisions with a budgetary impact can be included in the filibuster-proof reconciliation bill. Thus, provisions of the ACA that do not change the level of federal spending or revenues or the debt limit cannot be eliminated or modified through this expedited process. While the onerous employer mandate penalties can be eliminated, it appears that the reconciliation process may not be used to revoke the onerous employer reporting requirements. Provisions that fall outside of the reconciliation process fall within a third bucket of actions. These require congressional action, but must be considered through "regular order" – meaning that 60 votes are needed for Senate passage. Accordingly, such standalone bills will require bipartisan support. Thus far, Senate Democrats have remained united in their opposition to dismantling the ACA. Whether this will extend to subsequent bills to fill out the parameters of what comes in its stead remains to be seen.

## Confirmation Process

Lawmakers, the White House and federal departments have begun to put plans in place to reverse President Obama's legislative and regulatory legacy. Congress began this march with passage of the budget resolution. Significant changes in regulatory direction will have to wait until key political appointments are filled at the departments. As the Senate confirmation process for the Cabinet nominees and lower-level nominees plays on, agencies are in somewhat of a holding pattern. The nomination of Judge Neil M. Gorsuch to fill the Supreme Court seat left vacant by Justice Scalia's death, will consume much of the Senate calendar, as mention of the so-called "nuclear option" re-emerges. With partisan tensions high, the confirmation process for executive branch nominees could drag on.

## Agency Activities

The focus of workplace policy developments during January has been on Republican control in Congress, the White House and the federal agencies. The NLRB and EEOC are independent agencies, and remain under Democratic control until Trump appointees can fill open slots. In the case of the NLRB, there are two vacancies, which, when filled with Republican nominees, will change the balance on the Board. Until such time, the 2-1 Democratic majority remains, even though the lone Republican, Philip A. Miscimarra, has been named Acting Chair. Furthermore, the term of office of Obama appointee Richard Griffin as NLRB General Counsel extends to November 4, 2017. It appears that Griffin will continue to try to pursue his agenda through the remainder of his term. On January 31, for example, the general counsel's office issued a Report on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context.

At the EEOC, Republican Commissioner Victoria Lipnic has been names Acting Chair of the Commission. Lipnic takes over from Jenny Yang, a Democrat, who will stay on as a Commissioner until her term expires on July 1, 2017. Until such time as President Trump can fill the current vacancy and Yang's eventual vacancy on the five-member Commission, the appointment of an Acting Chair may be largely symbolic.

In an apparent effort to beat the inauguration deadline, the EEOC issued proposed enforcement guidance on harassment on January 10, when Yang was still Chair. Yang included in her statement accompanying the enforcement guidance that "[h]arassment remains a serious workplace problem that is the concern of all Americans. It is important for employers to understand the actions they can take today to prevent and address harassment in their workplaces." The public can submit comments the proposed enforcement guidance until March 21, 2017.

## What's Ahead?

Although President Trump and the 115th Congress have been in place only a few weeks, it is clear that the reshaping of President Obama's workplace policy legacy has already begun. As the administration moves from transition to implementation and vacancies on the NLRB and EEOC are filled, significant changes to the labor, employment and benefits law landscape lie ahead.

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