

# **Seventy-Five Days In: New Administration, New Initiatives and What it All Means for Employers**

---

**J. Travis Hockaday**

**April 4, 2017**

# Reminder...



- **HR Certification has been approved for today's webinar. Your certificate will be emailed to you if you attended the entire webinar.**
- **A PDF of today's PowerPoint is available now for print at [SmithLaw.com/Webinars](http://SmithLaw.com/Webinars).**
- **Today's webinar recording will be available on [SmithLaw.com/Webinars](http://SmithLaw.com/Webinars) by Friday and all past recorded webinars are also available to view.**



## Overview

---

- New administration and new Congress
- New (and TBD) regulators and other key players – USDOL, EEOC, NLRB, SCOTUS
- White House priorities
- Regulations – new directives, status of Obama-era regulations and Executive Orders, and agency forecasts
- Immigration update
- Potential state and local government action
- Final thoughts...

## New Administration / New Congress

---

- President Trump / Vice President Pence
- Congress – GOP control
  - Senate (52-48)
    - Appointments and nominations
    - HELP Committee
  - House (241-194)
    - Education and Workforce Committee

## New Regulators - USDOL

---

- Secretary of Labor nominees
  - First: Andrew Puzder – withdrawn
  - Second: Alexander Acosta
    - Approved by HELP on March 31, 2017
    - Advancing to Senate for confirmation vote
    - Background – law clerk for Alito, NLRB, Civil Rights Division, US Attorney, law school dean
- Acting Solicitor (DOL's top lawyer)
  - Nicholas Geale

## New Regulators - EEOC

---

- Victoria Lipnic
  - Acting Chair
  - Currently only Republican on five-member Commission
- One vacant seat now; two Democratic members' terms expiring July 2017 and July 2018
- President Trump will appoint General Counsel

## New Regulators - NLRB

---

- Acting Chair – Philip Miscimarra (sole GOP member)
- Two open seats
- GOP will control
- General Counsel's term expiring late 2017

## New judges – SCOTUS (and other federal courts)

---

- Judge Neil Gorsuch (10<sup>th</sup> Circuit)
  - Nominated to replace Associate Justice Scalia
  - Originalist, not a judicial activist; not deferential to agencies
  - Full Senate action expected this week
- Other SCOTUS vacancies during first Trump term?
- U.S. Courts of Appeal and U.S. District Courts
  - More than 100 vacancies



# SCOTUS

---

- Key labor and employment questions:
  - Review of district court decisions to quash or modify EEOC subpoenas (decided April 3)
  - Does Title VII prohibit sexual orientation discrimination? (question currently on appeal before Second, Seventh and Eleventh Circuits)
  - Do class action waivers in arbitration agreements violate NLRA?

## Regulations – New Directives

---

- Priebus memo
  - Freeze unpublished regs
  - 60-day postponement for effective dates of published but not yet effective regs
- OMB
  - “Two for one” rule – agencies must identify two regulations for repeal for every new rule proposed
  - Must assess how new regulations will help with / impact job creation

## From The White House

---

- Proposed budget
  - Significant cuts for USDOL
  - Funding for mandatory E-Verify
- Ivanka Trump platform
  - Paid maternity leave
    - Six to twelve weeks for new mothers funded through UI
    - Fathers, adoptive mothers, same sex couples?
  - Paid sick leave
  - Incentives for employers providing child care at work
  - Closing the pay gap
  - LGBTQ rights

# Regulations – The Overtime Rule

---

- Status
  - December 1, 2016 – effective date, but...
  - November 22, 2016 – injunction entered in federal court in Texas; Obama administration appealed
  - January/February 2017– Fifth Circuit allows two delays in briefing at government’s request to “allow incoming leadership personnel adequate time to consider the issues”
- Unlikely that rule will move forward “as is”
- Options?

# Status of President Obama's Executive Orders

---

- Safe
  - EO 13672: Regulations Prohibiting Discrimination Based on Sexual Orientation and Gender Identity (amended EO 11246)
    - January 31, 2017 – White House announced it will continue to enforce
- Don't know
  - EO 13706: Establishing Paid Sick Leave for Federal Contractors
    - Effective January 1, 2017
    - Applies to certain new contracts granted post-effective date

# Status of President Obama's Executive Orders

---

- Goodbye (again)...
  - EO 13673: Fair Pay and Safe Workplaces (the “blacklisting rule”)
    - March 27 – overruled by congressional resolution and revoked by Executive Order
    - Would have imposed new requirements on federal contractors:
      - Disclosure of violations of labor laws when bidding on certain new or renewed contracts
      - Paycheck transparency
      - Restrictions on arbitration
      - Notices to independent contractors

# Regulatory Forecast

---

- USDOL / Wage and Hour
  - Minimum wage increase?
  - Continued focus on joint employment?
- USDOL / OSHA
  - Recordkeeping rule (effective July 1, 2017)?
  - Whistleblower protection?
- EEOC
  - EEO-1 reporting / pay data (effective March 2018)?
  - LGBTQ protections?
  - Enforcement and litigation priorities?

# Regulatory Forecast

---

- NLRB
  - “Quickie elections” – time between petition and union election
  - *Browning-Ferris* – joint employment
  - *Banner Health* – confidentiality of workplace investigations
  - *Lutheran Heritage* – scrutiny of employer policies and practices under Section 7
  - *Purple Communications* – use of employer’s email system for protected activity
  - *D.R. Horton* and *Murphy Oil* – class action waivers in arbitration agreements



# Immigration

---

- Intense focus on immigration policy
- Update on Executive Orders
- H1B Visa programs?
- Deferred Action for Childhood Arrivals (DACA) program?
- Mandatory E-Verify?
- Increased workplace enforcement efforts?

## State and Local Governments

---

- Keep an eye on states and localities
- May enact measures in response to changes at the federal level
  - Minimum wage
  - Paid leave (sick, parental)
  - LGBTQ rights
  - Misclassification of workers as independent contractors
- Compliance will be a challenge – especially for multi-state employers
- Preemption options?

# Final thoughts...

---

# Don't forget...

---



- **HR Certification has been approved for today's webinar. Your certificate will be emailed to you if you attended the entire webinar.**
- **Today's PowerPoint presentation and webinar recording will be available on [SmithLaw.com/Webinars](http://SmithLaw.com/Webinars) by Friday and all past recorded webinars are also available to view.**



# Seventy-Five Days In: New Administration, New Initiatives and What it All Means for Employers

---

J. Travis Hockaday

[thockaday@smithlaw.com](mailto:thockaday@smithlaw.com)

919-821-6757