



Top 10 Workplace Law Developments To Expect From The Trump Presidency

Insights

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It's official: Donald Trump will soon be our nation's 45th president. Now the work begins to forecast what the next four years will bring. We've spent some time gathering our firm's collective wisdom on what the next administration will mean for workplace law and the nation's employers.

1. Immigration

Candidate Trump made immigration reform the centerpiece of his winning campaign. How will he deliver on his promises? Kim Thompson, chair of the Fisher Phillips Global Immigration Practice Group, expects to see a ramp-up in workplace enforcement actions, including both I-9 audits and raids by the US Immigration and Customs Enforcement agency. "I also anticipate that Trump will move to cancel the work authorization granted under DACA (Deferred Action for Childhood Arrivals) and counteract any immigration reform measures put in place by the Obama administration."

During the campaign, Trump promised that he would mandate E-Verify to check the employment eligibility of all workers in the country if elected. He also said that he would alter temporary work visa programs (such as H1-Bs) which allow employers to bring on highly skilled foreign workers. While Thompson predicts that we can expect movement in these areas early on in the Trump administration, it is unclear whether he will attempt to accomplish this by either significantly decreasing the number of visas issued or increasing prevailing wages for such workers and otherwise encouraging the hiring of Americans.

2. Labor Relations

Steve Bernstein, a partner in the Fisher Phillips Labor Relations Practice Group, says that it is difficult to predict what the Trump presidency will truly mean in the labor relations arena. "It's probably safe to forecast that his victory will likely slow down the tide of aggressive pro-union and anti-employer developments at the National Labor Relations Board (NLRB), and in time will probably lead to a more employer-friendly panel of Board members," says Bernstein. Specific examples of current NLRB doctrine that could be slowed include the encroachment on employer property rights, the expansion of the concerted protected activity doctrine, and the enlargement of the concept of employee status as it plays out within the context of joint employer and temporary worker cases, supervisory status matters, and for higher education students.

"It's also fair to assume that Trump will be inclined to repeal a host of executive orders supporting unions at the expense of federal contracts, including the so-called 'blacklisting' order and other

unions at the expense of federal contractors, including the so-called Beckley order and other provisions that impose contractual obligations on successor employers doing business with the federal government,” says Bernstein.

However, he cautions that Trump could feel compelled to “throw some bones” to organized labor given his historically friendly relationship with unions while in the private business world, and given that constituents of organized labor may, in hindsight, be credited for salvaging his prospects in key rust belt states.

The Republican Party platform spent a great deal of time criticizing the role that labor unions enjoy under the Obama administration, and the proposals put forth by the GOP seek to minimize their influence. It promised to bring labor law into the 21st century by requiring transparency so that union members know how their dues are being used, limiting veto power of union officials, and supporting right-to-work laws permitting workers to opt-out of forced membership. Trump himself signaled his agreement with these concepts during the campaign, specifically stating that the country needs to be “very careful” with public sector unions, especially when they force unwilling workers to join.

3. Pay Equity

“Even under President Trump, we anticipate that pay equity will remain a hot issue in employment law,” says Kathleen Caminiti, co-chair of the Fisher Phillips Pay Equity Practice Group.” She notes that during the last year, many states have enacted equal pay laws, not to mention the EEOC’s adoption of new EEO-1 reporting requirements which will soon require employers with 100 or more employees to report pay data to the federal government.

While pay equity is not at the top of Trump’s agenda, according to Caminiti, it will remain a key issue in terms of legislation and litigation during his administration because “the die was cast under the Obama administration and pay equality has taken hold as an important workplace issue.” Trump did indicate during the campaign that he supports the concept of equal pay for equal work.

4. Privacy and Cyber

Trump has pledged to make cybersecurity a “major priority for both the government and the private sector,” says Risa Boerner, chair of the Fisher Phillips Privacy and Cyber Practice Group. This includes the creation of a Cyber Review Team consisting of individuals selected from the military, law enforcement, and the private sector. This team would provide recommendations for the creation of safeguards and also establish detailed protocols and mandatory cyber awareness training for all government employees.

Trump has stated that he will instruct the Department of Justice to create Joint Task Forces throughout the U.S. to coordinate on law enforcement responses to cyber threats. He has also stated that he will develop “offensive cyber capabilities,” while ordering the Secretary of Defense and Chairman of the Joint Chiefs of Staff to provide recommendations for enhancing U.S. Cyber Command “with a focus on both offense and defense.”

What does all of this mean? Throughout his campaign, Trump was sharply critical of Hillary Clinton for her use of a personal server as well as other practices that he claimed were inappropriate to safeguard government information. He also called for a boycott of Apple for refusing to share the security for the iPhones used by the San Bernardino shooters. According to Boerner, under the Trump Administration, this suggests increased pressure on public companies to share information with law enforcement to further national security interests, as well as an increased focus on securing government computers and developing offensive technologies capable of carrying out cyber-attacks considered beneficial to U.S. interests.

5. Supreme Court (SCOTUS)

It appears that President Trump will have an opportunity to fill at least one vacancy on the SCOTUS (the seat previously held by deceased Justice Antonin Scalia) unless the Senate acts quickly and confirms nominee Merrick Garland in the waning days of President Obama's term – a highly unlikely prospect. If Trump has the opportunity to nominate a replacement, it is fair to assume that the conservative status quo will be restored to the Supreme Court, especially if he nominates one of the individuals he has already touted as Scalia's possible replacement. This would move somewhat reliably conservative Justice Anthony Kennedy back to his familiar role as serving as the fifth swing vote in tight cases, according to Rich Meneghello, a partner in the firm who coordinates the Fisher Phillips Supreme Court Alert service.

Future vacancies cannot be predicted, but it is worth noting that the three oldest justices – Ruth Bader Ginsburg (83), Kennedy (80), and Breyer (78) – are liberal or moderate. Statistical models suggest a 40% chance that there will be one additional vacancy before 2020 and a 20% chance that President Trump will be able to appoint two additional Justices besides the current vacancy. "Therefore," says Meneghello, "President Trump should have an opportunity to shape the Court for years to come."

This becomes important when you consider the innumerable workplace law issues that could come before the Court over the next four years. Arbitration provisions, class action litigation (including class waivers), union agency shop fees, the reach of Title VII, immigration programs, wage and hour law, and administrative agency powers are just some of the issues likely to confront the SCOTUS in the near future.

6. Employment Leave

While Hillary Clinton's campaign included proposals for expanding the Family and Medical Leave Act (FMLA) to include up to 12 weeks of paid family and medical leave for parental leave purposes or to care for a seriously ill family member, and to implement an earned paid sick day plan for American workers, Trump did not provide specifics regarding any such plans. Therefore it is difficult to predict what the next four years will bring when it comes to employment leave for workers.

However, during the first presidential debate in September, after Clinton provided her plans for these proposals, Trump stated that he was generally in agreement with respect to her position. Specifically, on the topic of childcare and similar initiatives, he said “I think Hillary and I agree on that. We probably disagree a little bit as to numbers and amounts and what we’re going to do, but perhaps we’ll be talking about that later.” Employers across the country will continue to wait to see what proposals might spring forth from the Trump administration on this subject.

7. Workplace Safety

Travis Vance, a member of the Fisher Phillips Workplace Safety and Catastrophe Management Practice Group, has the following prediction for the approaching Trump presidency: “Based on his comments and the literature made available by his campaign, President Trump likely will streamline the Occupational Safety and Health Administration (OSHA), repeal some or all of its recent rules on increased penalties and reporting requirements, and refocus the agency on high-hazard enforcement.”

Vance believes that several OSHA initiatives will likely be in Trump’s crosshairs. By both working with a Republican-led Congress and making changes through the agency’s rulemaking process, Trump may repeal statutes governing the agency or alter several recent rules adopted by OSHA. First, it is likely he will reverse course on OSHA’s penalty increases, which in some cases recently saw penalty amounts rise by 80%. “Even if Trump decides to not repeal the penalty increase rule in its entirety,” says Vance, “look for him to at least remove the rule’s requirement that OSHA’s maximum penalties increase each year to account for inflation.”

Second, you will likely see an elimination of the electronic reporting rule slated to take effect on July 1, 2017. This rule will require certain employers to report injury and illness information to OSHA, which will then post this information online for public viewing on its website. Vance predicts that Trump likely will view this new rule as an unnecessary burden, as most employers must already track this information internally on their OSHA 300 logs. He may see the new electronic reporting rule as an example of “unelected bureaucrats” shaming certain employers into compliance masked as an effort to collect data about injuries and illnesses.

Vance also believes that Trump will take several other steps to reduce the role of OSHA. He may seek to create more state plans or provide existing state plans more jurisdiction. “President Trump may find expansion of state OSHA plan jurisdiction as an opportunity to shrink the federal agency and save taxpayer dollars,” says Vance. Also, Trump may scale back the federal whistleblower oversight of OSHA, which currently enforces the whistleblower provisions of approximately 22 statutes.

These claims demand a significant amount of federal resources, especially because many of these complaints are unfounded (perhaps only one in every 30 whistleblower claims may have merit). Trump may attempt to eliminate OSHA’s jurisdiction over many of these statutes, heighten the threshold for a claimant to establish a prima facie whistleblower claim, or both. These changes

would allow OSHA to focus on high-hazard industry enforcement, accident and fatality inspections, and safety outreach consultations with employers.

8. Wage And Hour

“The Trump administration might immediately do what it can to reverse or suspend the coming exemption changes,” says John Thompson, a member of the Fisher Phillips Wage and Hour Practice Group, referring to the impending changes to Fair Labor Standards Act’s “white collar” exemption (sometimes known as the “overtime rule”), currently scheduled to take effect on December 1.

Thompson says we might see a repeat of what took place with the Reagan administration in 1980 when it reversed similar revisions set in motion during the waning days of Jimmy Carter’s presidency. However, this could implicate some knotty administrative procedure matters, and it is difficult to predict how extensive Trump’s reversal could be.

While it is easy enough to predict how President Trump will act with respect to the overtime regulations, other wage and hour positions discussed by or in conjunction with the Trump campaign make it more difficult to predict what else employers might expect. For example, says Thompson, it appears that the Trump administration will at least be receptive to, or perhaps even enthusiastic about, a federal minimum wage increase.

9. Affirmative Action And Federal Contractor Compliance

Cheryl Behymer, co-chair of the Fisher Phillips Affirmative Action and Federal Contractor Compliance Practice Group, says it is hard to know what’s in store for the Office of Federal Contract Compliance Programs (OFCCP) under President Trump. “He sends conflicting messages about affirmative action,” says Behymer.

While some of his more inflammatory statements would suggest a general resistance to expanding diversity and perhaps a lack of affection for affirmative action, his attempts to gain union support may mean that he will support some of the OFCCP’s initiatives that are favored by unions. These include such initiatives as the union organizing posters required to be posted by federal contractors, and the first right of refusal for some union employees after a federal contract is assumed by a successor.

Behymer understands that Trump’s background as a businessman might lead employers to believe he will resist affirmative action data collection, seeing it as an interference with the business of doing business. However, Behymer sees another possibility. “President Trump may want to back female-supportive programs in an effort to repair some of the issues raised during the campaign,” she says.

10. Non-Competes And Other Post-Employment Restrictive Covenants

The White House recently issued a “call to action” encouraging states to gut the power of non-competes. Robert Yonowitz and Christopher Stief, co-chairs of the Fisher Phillips Employee

Defection and Trade Secrets Practice Group, predict that the Trump administration will no longer be exhorting the states to legislate in this area.

“Given his business background,” commented Yonowitz, “it seems unlikely that President Trump will support legislation that is designed to take a tool out of the hands of business owners and managers.” Employee restrictive covenants, including non-compete agreements, are enforceable in most states throughout the country so long as they are reasonably tailored to the specific threats posed by the employee, and are not overly broad or unduly lengthy in their duration. As a seasoned business person, “Trump not only seems unlikely to continue pushing states to dial back on the use of non-competes,” Stief noted, “but we suspect that he would veto congressional efforts to limit the use of non-compete agreements against low wage workers.”

While Trump did not specifically address this issue during the campaign, Yonowitz points out that the candidate reportedly required his campaign staffers and even volunteers to sign confidentiality and non-compete agreements. Stief and Yonowitz both agreed that this sends a strong signal that President Trump will be extremely unlikely to support legislation designed to limit or ban non-compete clauses.

Yonowitz notes that “the recent call to action is only the latest in a steady stream of reports and policy statements from the White House that have been pointedly critical of non-compete agreements.” With respect to possible state legislative action, Yonowitz notes, “it may not matter what President Trump’s view is on this topic because the White House has spent almost two years exhorting states to take action against non-competes, and many legislators in state capitols around the country have been doing just that.”

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This Legal Alert provides an overview of presidential positions and predictions. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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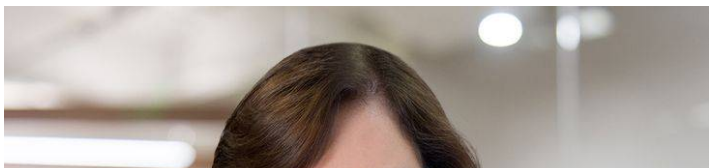


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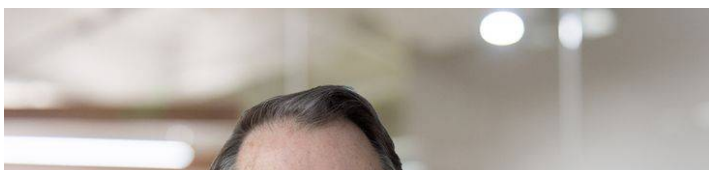


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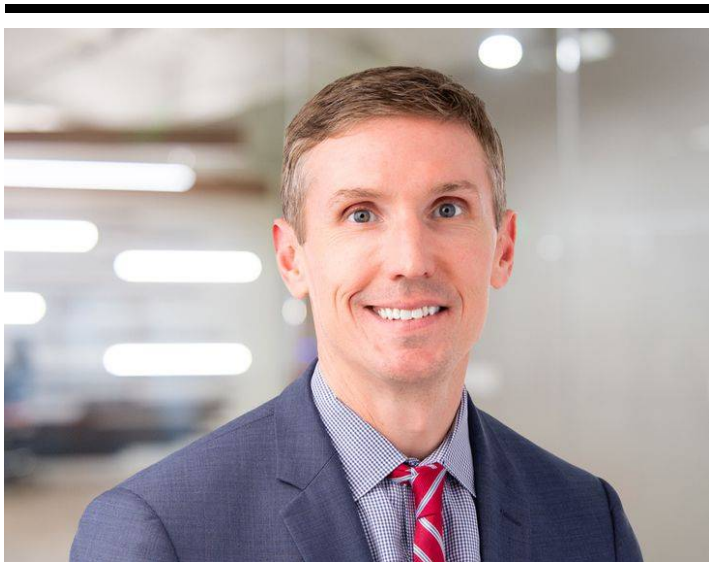
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