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BOWLING ALONE: OBAMA'S LABOR AND EMPLOYMENT REGULATORY AGENDA IN THE NEW REPUBLICAN CONGRESS

By Jeremy B. Merkelson

Recently, President Obama sat down for an interview with Stephen Colbert in which he was asked about his 2008 campaign mantra that presidents tended to grab too much power. "Then you became president, and you seemed to hold a lot of power," Colbert said. "Does that happen to every president?"

Obama's response revealed a president resigned to going it alone on his most important priorities: "For the first time, you're asking a sensible question," he chided. "The structure of our democracy is checks and balances and every president, even if on the outside they were complaining, there's always the temptation to want to go ahead and get stuff done."

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Whether that temptation will yield to compromise in the final two years of the Obama Administration is a fate yet to be foretold. But if the past is prologue, we already know the answer to this equation: Republican majority in Congress plus Obama Administration ≠ a likely recipe for compromise.

So what are the Administration's labor and employment priorities in the next year before presidential politics removes any hope of legislative compromise? This article explores the following non-exhaustive list of those initiatives: (1) the Administration's forthcoming revisions to the Fair Labor Standards Act (FLSA) overtime exemption regulations; (2) the President's recent executive actions concerning immigration and their impact on the employment of high-skilled workers; (3) the re-issued "quickie election" rules of the National Labor Relations Board (NLRB) and their prospects for survival with the new Congress; (4) new developments in prohibiting sexual orientation discrimination, including regulations re-defining the term "spouse" under the Family and Medical Leave Act, and the prospects for passage of the landmark Employment Non-Discrimination Act; (5) the Labor Department's use of its "hot goods" authority to crack down on farmers who ship agricultural goods produced in violation of child labor and wage laws; and (6) the potential Republican responses to these initiatives, including use of spending riders, oversight hearings, legislation, and lawsuits.

FLSA Overtime Exemptions Overhaul

On March 13, 2014, President Obama issued a Presidential Memorandum to update overtime regulations under Section 541 of the FLSA. The Memorandum specifically directs the Secretary to "modernize and streamline the existing overtime regulations" while taking into consideration "how the regulations could be revised to update existing protections consistent with the intent of the Act; the changing nature of the workplace; and to simplify the regulations to make them easier for both workers and businesses to understand and apply."

The proposed rulemaking, which was first expected earlier this summer and postponed multiple times, is slated to finally become public in February 2015, according to a December filing by the Department of Labor (DOL) with the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA).

Although yet to be released, the Presidential Memorandum and comments earlier this year from Secretary Perez regarding the proposed rulemaking give the impression that the Administration will revise the salary threshold and the "primary duties" criteria for an employee to be considered exempt under the administrative, professional, outside sales, or computer professional exemptions (the so-called "white collar" exemptions). The salary threshold ($455/week) is very likely to be raised (one study proposes more than twice that amount as the appropriate salary basis), and some form of quantification analysis for determining how much time an employee spends on "primary duties" may also be in the cards (i.e., replacing the flexibility and functional analysis of the current test with a specific time percentage). The proposed changes could also prevent employers from claiming exempt status for a number of positions that have been spotlighted in FLSA litigation in the last decade, including loan officers and retail store managers.

The new regulations still face a long road ahead. Proposed changes are subject to the Administrative Procedure Act, which means the release of the proposed regulations in February 2015 will be followed by a public comment period (at least 30 days, but likely more given the impact of these changes), DOL hearings, drafting of a final rule, and approval by OIRA (limited by Executive Order to 90 days with the possibility of a single 30-day extension). Thus, in light of the average review schedule for DOL regulations (and the 18-month period for review of the 2004 FLSA regulations), the new regulations likely will not be finalized until at least the fall of 2015. And, even if the Administration is successful in getting the regulations through the process during the President's final term, there likely will be court challenges to the regulations that may delay them.

The President's Executive Actions on Immigration and Changes to the Laws Affecting Employment of High-Skilled Workers

On November 20, 2014, the President announced a series of executive actions to modify enforcement of the nation's immigration system, including measures to crack down on illegal immigration at the border, to prioritize deporting felons, and to set up a process for certain undocumented immigrants to pass a criminal background check and pay taxes in order to temporarily stay in the United States without fear of deportation.

Notably for employers, the President's executive actions also targeted changes to the immigration laws affecting high-skilled immigrants, graduates, and entrepreneurs. Specifically, the President announced changes to the following critical areas of high-skilled worker immigration:

- **Switching Jobs or "Porting."** Under current law, foreign-born workers with approved

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employment-based immigrant visa petitions (Form I-140) who have been waiting more than 180 days to apply for a green card can change jobs in the "same or similar" occupational classification without affecting their green card applications in a process known as "porting." In reality, workers are frequently unable to exercise their porting rights due to uncertainty regarding what constitutes the "same or similar" occupational classification. The President's order directs United States Citizenship and Immigration Services (USCIS) to issue guidance to make clear that a foreign-born worker can accept a promotion to a supervisory position or otherwise transition to related jobs "within his or her field of endeavor" without risking the worker's green card application.

- **Green Cards**. Employers may sponsor immigrant workers for green cards based on permanent employment in the United States. Under the current system, workers can wait years to receive a green card even with approved employment-based immigrant petitions. The President's directive requires USCIS and the State Department to ensure that all available green cards are issued each year, to revise the content and format of the State Department's Visa Bulletin to make it more easily understood, and to change regulations as appropriate.

- **Establishment of Enforcement Group**. The Obama Administration has announced the creation of an interagency working group on immigration, including the Department of Labor, the Department of Homeland Security, the Department of Justice, the Equal Employment Opportunity Commission, and the National Labor Relations Board. The group's mission is to:

  - Ensure that consistent federal enforcement of immigration and worker protection policies, and promote workers' cooperation with labor and employment law enforcement authorities without fear of retaliation; and

  - Ensure federal enforcement authorities are not used by parties seeking to undermine worker protection laws by enmeshing immigration authorities in labor disputes.

- **H-4 Visa Holder (Spouse) Authorization to Work**. Under current law, spouses of H-1B visa holders (persons working in specialty occupations or with advanced degrees) are not permitted to work in the United States. The President's executive actions direct USCIS to finalize proposed regulations to permit spouses of H-1B visa holders (classified specifically as H-4 visa holders) to work if the H-1B visa holder has applied for a green card.

- **Clarification of "Specialized Knowledge" in Intra-Company Transfers**. The L-1 visa program for "intracompany transferees" allows multinational companies to transfer employees who are managers, executives, or have "specialized knowledge" to the United States from foreign operations. Companies have had a difficult time utilizing this program in light of vague and inconsistent guidance regarding the term "specialized knowledge." The President has directed USCIS to issue a memorandum that provides clear, consolidated guidance on the meaning of "specialized knowledge" to bring greater clarity and integrity to the L-1 visa program, improve consistency in adjudications, and enhance companies' confidence in the program.

- **Optional Practical Training (OPT) for Foreign Students**. Certain foreign nationals studying in the United States on a non-immigrant F-1 student visa may be permitted to stay in the United States for temporary employment in their field of study under the OPT program. The President has directed USCIS to draft new regulations to expand the degree programs eligible under the OPT program and to extend the period of time for OPT beyond the current 29 months for students in the fields of science, technology, engineering and mathematics. USCIS is additionally expected to issue regulations ensuring that OPT employees are protected under U.S. labor laws, which could include a prevailing wage requirement for OPT employment.

- **Visas for Eligible Foreign Inventors, Researchers, and Entrepreneurs**. USCIS has also been directed to devise a program that authorizes inventors, researchers, and start-up entrepreneurs to temporarily pursue research and development opportunities in the United States if they have been awarded substantial U.S. investor financing, or if they can demonstrate the promise of innovation and job creation through the development of new technologies or the pursuit of cutting-edge research.

NLRB "Quickie Election" Rules

On December 12, 2014, the NLRB announced its adoption of a final rule amending its regulations on union representation cases, including the so-called

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"quickie elections" rules. The new rules will:

- Require that all pre-election hearings take place eight days after the filing of a hearing notice.
- Require an employer to file a "Statement of Position"—a new requirement—that must be filed no later than by noon the day before the hearing begins. Any legal issues not raised in the Statement of Position may result in a waiver.
- Eliminate an employer's right to request pre-election review of the Regional Director's decision, making such review discretionary.
- Permit electronic filing of election petitions, and potentially allow the use of electronic signatures to sign union authorization cards.

A prior similar proposed rulemaking was struck down in *Chamber of Commerce v. NLRB*, 879 F. Supp. 2d 18 (D.D.C. 2012), when the U.S. District Court for the District of Columbia held that the NLRB lacked a quorum when it decided to propose them initially in 2011. The revised rules are substantially similar.

Prohibiting Sexual Orientation Discrimination

In March 2015, the DOL's Wage and Hour Division is expected to issue final regulations revising the definition of "spouse" under the Family and Medical Leave Act of 1993 in light of the U.S. Supreme Court's decision in *United States v. Windsor*, which found Section 3 of the Defense of Marriage Act to be unconstitutional. The regulation will define "spouse" to include "all legally married spouses," without regard to sexual orientation.

While the Obama administration proceeds with expanding FMLA protections to same-sex spouses, it is unlikely that Congress will take the more expansive step of passing the Employment Non-Discrimination Act (ENDA), which would prohibit employment discrimination based on sexual orientation. A bipartisan Senate supermajority passed ENDA on November 7, 2013, but the legislation died in the Republican House. ENDA's prospects in the next Congress are unclear.

DOL's "Hot Goods" Enforcement and Congressional Opposition

The "hot goods" provisions in Sections 15(a)(1) and 12(a) of the FLSA make it illegal to ship goods in interstate commerce that were produced in violation of the minimum wage or overtime requirements of the FLSA or that were produced in or about an

Those German Authorities Awarding Public Contracts Cannot Hold Tenderers from Other EU States to National Minimum Wage Requirements

By Dr. Lawrence Rajczak, MoFo Berlin

The CJEU has recently decided that the principle of freedom to provide services under Art. 56 TFEU ("Treaty on the Functioning of the European Union") precludes the application of legislation that requires a tenderer for services under a public contract to pay a fixed minimum wage if the company that will provide the services is based in another member state. ("Bundesdruckerei GmbH v. Stadt Dortmund," C-549/13)

In the case at hand, a German government authority had issued a call for tenders for a public contract regarding the digitalization of documents. The tendering procedure was subject to a state law that required all tenderers to pay a minimum wage of at least EUR 8.62 per hour to all employees involved in performing the contract, regardless of by whom and where those employees were actually employed. One of the tenderers intended to perform the services through a wholly owned subsidiary located in Poland. The tenderer refused to commit to the requested minimum wage and argued that the requirement could not be applicable if the services are performed in another EU member state where the average wages and cost of living are considerably lower than in Germany.

The CJEU has subsequently decided that legislation requiring the tenderer to pay a minimum wage constitutes an unjustified restriction on the freedom to provide services within the meaning of Art. 56 TFEU. It therefore held the legislation to be in breach of EU law, insofar as it applies to services that are performed in other member states that have lower or no minimum wage requirements at all.

The CJEU reasoned that, even though, in principle, measures aiming to ensure reasonable wages may

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establishment where a child labor violation occurred in the past 30 days. The "goods" covered by the "hot goods" provision can include manufactured goods, agricultural goods, or any other product sold or shipped in interstate commerce. The FLSA authorizes the DOL to seek a court order preventing the shipment of "hot goods."

There is currently a brewing dispute between some members of Congress and the DOL about whether DOL has increased its "hot goods" enforcement authority in recent years or exceeded its statutory authority. Proposed legislation sponsored by Rep. Kurt Schrader (D-Ore.) in the 113th Congress will likely be re-introduced in the new Congress that convenes in January. The legislation would amend the FLSA to prevent the DOL from applying its "hot goods" authority to perishable agricultural products.

The legislation was spurred, at least in part, by the high-profile cases of two blueberry growers in which the DOL delayed shipment of hundreds of thousands of rotting berries (rather than allowing the growers to place money in escrow while shipping the goods). A federal court vacated the consent judgments obtained by the DOL enforcement actions, finding that the DOL's use of its hot goods authority to perishable goods, as well as its requirement of immediate admission without recourse to the courts, amounted to economic duress. See *Pan-American Berry Growers LLC v. Perez*, Case No. 6:13-01439 (D. Ore. Apr. 24, 2014) (adopting magistrate's recommendation and report).

While it is unclear whether the DOL is actually doing anything different than it always has done in this area, it is likely that Rep. Schrader will continue to press this issue in the coming months.

Potential Republican Responses to Administrative Actions

The Administration's controversial rulemaking with respect to immigration, union organizing, and the FLSA is likely to spur Congressional opposition as well as legal challenges. Indeed, the President's recent creation of a deferred action program for the parents of U.S. citizens and lawful permanent residents was recently challenged and held to be unconstitutional by a federal judge in Pennsylvania. *United States v. Juarez-Escobar*, Case No 2:14-cr-00180 (W.D. Pa. Dec. 16, 2014). Similar legal challenges to the President's executive actions have been filed around the country and will continue to wind their way through the courts.

On the Hill, high-ranking Republican members of Congress have already promised to use the budget process to prohibit the NLRB from implementing its new rules, similar to actions it has taken earlier in the

German Authorities Awarding Public Contracts

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generally be justified in light of the legitimate goal of protecting employees and preventing so-called "social dumping," imposing the minimum wage was, nevertheless, not an appropriate measure in this case to achieve these objectives. By trying to impose an across-the-board minimum wage requirement that did not relate to the actual average cost of living of the member state in which the services would eventually be performed, the legislation – in the Court's opinion – went well beyond the means necessary to ensure an appropriate social standard. In doing so, it illegitimately hindered subcontractors and competitors from other member states from gaining a competitive advantage out of the differences of the respective rates of pay in the member states.

The CJEU's decision will apply to the state law in question and to similar legislation that thirteen out of the sixteen states in Germany have passed, each requiring tenderers for public contracts to pay differing minimum wages. As a result of the CJEU decision, these laws may not be applied, insofar as they require minimum wages for services that are performed in other member states. Also, although the scope of the present decision was limited to a tenderer that was planning to use a wholly owned subsidiary to perform the required services, based on the reasoning of the CJEU, it seems highly likely that the same rules would also apply if the tenderer itself was based in another member state.

All in all, the decision of the CJEU is not very surprising. Its rationale flows directly from one of the core principles of the European internal market: the freedom to provide services in other member states without restrictions. Notably, however, the decision clarifies that this freedom also consists of the possibility to legitimately exploit the differences between the wage levels in different member states in order to gain a competitive advantage. Also, the decision further establishes the general principle that the authority of a member state to enforce a minimum wage is strictly limited to its own territory.

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Obama administration. To accomplish this strategy, the Republicans would need some Democratic support to garner the 60 votes necessary in the Senate to pass agency-funding riders restricting spending.

In addition, the stalemate between the Administration and Congress on immigration issues remains center stage, following Congress's recent passage of an omnibus budget bill that omitted longer-term funding for the Department of Homeland Security over opposition to the President's announced immigration executive actions. It is highly probable that Republicans will attempt to use the power of the purse to limit the President's administrative rulemaking capacity in these controversial areas.

House and Senate committees also will be expected to take additional action to limit the President's ability to move ahead with other key employment and labor initiatives. Senator Lamar Alexander, the likely incoming chairman of the Senate Health Education, Labor and Pensions Committee, has been a frequent critic of the Equal Employment Opportunity Commission (EEOC) and is likely to hold future oversight hearings examining the Commission, among other actions.

Battles over the minimum wage, the Paycheck Fairness Act, workplace safety and health standards, and other key labor and employment initiatives of the Administration are not likely to move through the Republican-controlled Congress. It is unclear what proposals Republicans may have in store on their own employment and labor agenda in the 114 Congress, though they are unlikely to be favorably received by the Obama Administration.

Conclusion

The clock is ticking on President Obama's final term in office. Whether the Republicans on Capitol Hill will find common ground with the President on his most high-profile employment and labor initiatives is unknown but unlikely. Regardless, it is likely that the President will push ahead with many new policy initiatives using the administrative rulemaking process. Employers can expect many of these initiatives to have a significant impact on their operations and should be careful to monitor these developments in the year to come to ensure compliance.

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