

Trump Spells Trouble For Obama's Employment Legacy

By Vin Gurrieri

Law360, New York (November 9, 2016, 2:40 AM EST) -- Donald Trump's ascendance to the presidency could be good news for employers looking to roll back employee-friendly initiatives of the Obama administration that they saw as being overly burdensome, experts say.

While Trump's surprise victory could spell doom for some of President Barack Obama's signature employment policies — including the U.S. Department of Labor's expanded overtime rules and the National Labor Relations Board's revised joint-employment test — attorneys who spoke with Law360 prior to the election said his appointments to those agencies could also shape employment law for years to come and curtail the aggressive enforcement practices they adopted under Obama.

"With the various appointments Trump will make to federal agencies such as the Equal Employment Opportunity Commission and the DOL, employers can likely expect a friendlier climate," said Steven W. Moore of Constangy Brooks Smith & Prophete LLP. "These federal agencies, under a Trump administration, will likely take a more circumspect approach before any litigation is filed."

Michael Lotito, co-chair of the Workplace Policy Institute at Littler Mendelson PC, added that the appointment that could have the most far-reaching effect on employment law will be Trump's choice to lead the DOL.

"The DOL up to [outgoing Labor Secretary Thomas Perez] was seen as a secondary Cabinet position," Lotito said. "But that has changed, and it's become a prime position in the Cabinet."

Regulatory Rollbacks

The Obama administration's final years were marked by what some management-side lawyers called overly aggressive actions by federal labor regulators.

Among the key actions that caused great consternation among employers was the DOL's rollout earlier this year of new overtime rules. Those revised the Fair Labor Standard Act's so-called "white collar" exemption by raising the salary threshold to \$47,476, allowing employees who make up to that level to be covered by the law's minimum wage and overtime requirements.

The NLRB, for its part, recently revised its framework for analyzing joint employment, making it easier for companies to be held liable for violations committed by franchisees and contractors.

"Employers over the last six years ... have had to worry about federal agency [actions], executive orders and initiatives from unelected bureaucrats," Lotito said.

Ricki Roer, chair of Wilson Elser Moskowitz Edelman & Dicker LLP's employment and labor practice, believes the overtime and joint-employer rules are at the forefront of employers' minds, even if they didn't receive much attention during the campaign.

"There has been little discussion [during the campaign] of joint-employer or FLSA [overtime] regulations, and Trump has not been questioned about them, but he might want to backtrack on those," Roer said. "They are big issues forcing employers to devote huge amounts of time and effort to comply with changing laws. If Trump's administration backs off [the regulations], it's a big-ticket item."

A More Conservative High Court

One of the central tenets of Trump's presidential campaign was the need to fill the U.S. Supreme Court seat vacated by Justice Antonin Scalia with a like-minded conservative. And once Trump officially enters the Oval Office, an appointment to the high court likely won't be far behind.

Nixon Peabody LLP's Jeffrey M. Tanenbaum, who leads the firm's occupational safety and health practice, told Law360 that with the likelihood of continued gridlock in Congress, employers are more likely to see greater change as a result of Supreme Court actions. In particular, he says, issues like affirmative action and mandatory class waivers in arbitration agreements could be among those that come before a presumably more conservative high court.

Similarly, McDermott Will & Emery LLP partner Kristin E. Michaels believes the outcome of the class waiver issue is among those that may have tilted toward employers with Trump's election.

"If Trump appoints a conservative justice, it's likely that the use of class waivers will be upheld," Michaels said, adding that the joint-employment issue could similarly be upheld if it finds its way to a conservative-leaning high court.

But beyond just those two issues, Constangy Brooks' Moore believes Trump's power to appoint the next justice and restore a conservative majority on the high court "will impact the landscape of labor and employment law for years to come."

Support for Paid Leave and Child Care

On the final night of the 2016 Republican National Convention, Ivanka Trump introduced her father by telling the delegates assembled in Cleveland that he would strongly support women's issues.

"As president, my father will change the labor laws that were put into place at a time when women were not a significant portion of the workforce," Ivanka Trump said. "And he will focus on making quality child care affordable and accessible for all."

Trump subsequently touted a plan that offers six weeks of paid maternity leave to mothers who do not already receive leave from their employer.

Among the additional features of Trump's plan, he called for revising tax laws to allow working parents to

deduct caregiving expenses from their income taxes for up to four children and elderly dependents, and for incentivizing employers to offer child care services in the workplace.

The plan also calls for making low-income households eligible for an expanded earned income tax credit in the form a child care rebate, and for establishing tax-free dependent-care savings accounts.

Trump touted the plan along the campaign trail, including a September stop in Aston, Pennsylvania, where he categorized child care as the single largest expense most families face, while adding that his plan would serve as "a crucial safety net" for working mothers whose employers don't provide paid maternity leave.

"When it comes to family leave, we can expect some sort of expansion," said Eric Tate, who co-chairs Morrison & Foerster LLP's global employment and labor group. "It's just a matter of how much."

Tate also referenced Ivanka Trump's role in advocating for the policy, observing that "it'll be interesting to see what the 'Ivanka Effect' will be."

"Some would say she is a great example of an intelligent businesswoman who, as a working mom, may have more sensitivity to these issues," Tate said. "He respects her and may let her guide the way."

Closing the Pay Gap

Although Trump's campaign website offers no statements about equal pay, the candidate has nonetheless expressed some support for the idea that women should be paid the same as men, with Ivanka Trump noting in her RNC speech that he would fight for pay equity for women.

"He will fight for equal pay for equal work, and I will fight for this too, right alongside of him," she said, to loud cheers.

Nixon Peabody's Tanenbaum, however, believes that implementing equal pay policies may be difficult.

"A significant change in equal pay laws would have to come as part of a legislative action," Tanenbaum said. "Short of a substantial change in Congress, I don't see that happening."

That change didn't materialize, however, as Republicans held control of both houses.

Tanenbaum also noted that Trump's running mate, Vice President-elect Mike Pence, has a record indicating he'd be "quite unlikely" to support equal pay legislation, but added that Pence's influence on legislation will largely depend on the amount of power he is given within the administration.

"Ivanka at the Republican National Convention said he'd support equal pay and she seems to wield influence and have his ear," McDermott's Michaels said. "If you look at his public statements, he seems to [be] far more centrist [on equal pay issues] than someone who traditionally runs on the Republican ticket."

Union Views Unclear

Even though one of the key constituencies that propelled Trump to the White House was blue collar workers, many of whom are union members, Trump was largely vague during the campaign on various union-related issues.

The Republican nominee said in June that he would "fight harder for American workers than anyone ever has." But Trump's website does not have a stated policy on unions, and he hasn't talked much about issues like collective bargaining or workers' rights.

Nearly all the major unions, including the AFL-CIO and the SEIU threw their support to Clinton during the campaign.

But while Trump has offered vague views on unions, his running mate, Mike Pence, has a more substantive track record on the issue. While governor, he fought to keep Indiana a right-to-work state. And as a member of Congress, he opposed the Employee Free Choice Act, which was designed to strengthen workers' right to organize.

For Roer, Trump's past as a businessman offers clues as to the positions he will take on unions.

"Based upon his business practices, he has not been supportive of union positions," Roer said, noting that his hotels have generally been nonunion. "He appears to have a more laissez-faire approach and leaves it to employers and contractors to fashion business relationships."

Push for Expanding E-Verify

When it comes to business immigration, Trump has called for boosting the prevailing wage that's used to set the bar for H-1B workers. He has also advocated for a nationwide E-Verify system, which would electronically screen all new hires for eligibility to work in the U.S.

Constangy Brooks' Moore says the country can expect that Trump will push for a major rewrite of the H-1B visa program, which permits foreign nationals to work in the U.S.

Although Trump has vacillated between eliminating the program altogether or raising the prevailing wage for workers under the program to make American workers more competitive with their H-1B counterparts, Moore says a call for some sort of change may be on tap.

"Given that Trump's immigration viewpoints have been front and center with his campaign platform, employers can expect a sea change with immigration policies and enforcement," Moore said.

--Additional reporting by Matthew Bultman. Editing by Mark Lebetkin and Rebecca Flanagan.