

Obama Administration Ramps up Employer Regulatory and Enforcement Efforts

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As it enters the last half of its second term in office, the Obama administration is ramping up its enforcement and regulatory efforts in key areas affecting employers. You will need to monitor these efforts in the coming years, and you should expect these changes to impact how you manage your employees in the future.

NLRB Update.

Proposed new “quickie” election rules. The National Labor Relations Board has resurrected its efforts

to pass regulations shortening the unionization process through expedited (“quickie”) representation elections. At present, the NLRB is considering comments to its proposed regulations, which should become final in the Summer or Fall of 2014. Once final, we will provide a detailed look at how the new rules will impact employers in their efforts to remain non-union in an increasingly unionized healthcare industry.

NLRB invalidates health care firm’s enforcement of rule prohibiting employees from wearing union buttons in patient care areas. Meanwhile, in a 2-1 decision, the NLRB held that a Connecticut health care firm could not lawfully stop employees at its nursing homes and retirement centers from wearing union protest buttons in patient care areas, finding the employer selectively enforced its rules and that the employer failed to show any patients would be upset by the insignia. Under established NLRB case law, there is a presumed validity of rules that limit union displays in patient care areas. The NLRB ruled, however, in *Heathbridge Mgmt., LLC*, that the employer was not entitled to such a presumption

when it singled out stickers worn by employees in support of New England Health Care Employees Union District 1199. In a troubling holding, the majority also found the employer failed to demonstrate any facts or special circumstances to justify limits on employees displaying union-related stickers at work. In short, there was no direct evidence of patient or family concerns about the buttons. In reaching this conclusion, the NLRB disregarded testimony from the firm’s labor relations director and an expert witness that showed the firm’s concern for its patients justified the restriction on union buttons in patient care areas. It’s clear from this decision that a hospital or other health care employer must be prepared to offer direct evidence of patient and family concern over union buttons to withstand any union claim that enforcement of a rule prohibiting such buttons in patient care areas is unlawful.

New FLSA Overtime Regulations on the Horizon.

The NLRB, however, is not the only agency that intends to act on major issues before the Obama administration comes to an end in

2017. On March 13th the President directed the Secretary of Labor to re-write overtime regulations under the Fair Labor Standards Act. The Department of Labor last updated those regulations in 2004, much to the chagrin of organized labor and employee advocacy groups who saw the new regulations as narrowing employee rights to overtime. In his March directive, the President calls the 2004 regulations “outdated,” with “millions of Americans lacking protections of overtime and even the right to the minimum wage.” The President called on the Labor Secretary to propose revisions to “modernize and streamline” the existing overtime regulations, in part to “address the changing nature of the workplace.” In his public comments announcing his directive, the President stated he wants to “give more Americans the chance to earn the overtime pay that they deserve.” It is expected that the regulatory re-write process will take a year to eighteen months, and will focus on the \$455 salary threshold, the salary basis test, and the duties test under the executive, administrative, professional and outside sales exemptions.

2013-2014 EEOC Enforcement Priorities.

But wait, there’s more. In December 2013 the Equal Employment Opportunity Commission (EEOC) approved a strategic plan for fiscal years 2013-2016, containing six strategic enforcement priorities. They are: eliminating barriers in recruitment and hiring; protecting

immigrant, migrant and other vulnerable workers; addressing emerging and developing employment discrimination issues; enforcing equal pay laws; preserving access to the legal system; and preventing harassment through systemic enforcement and outreach. The plan also directs the EEOC to pursue a coordinated approach to ensure “consistent and integrated enforcement” throughout the private, public, and federal sectors over which the agency has jurisdiction. To carry out this plan, each district office director and regional attorney submitted a plan by March 29th to identify local enforcement priorities, and to identify strategies for collaborative legal and enforcement efforts.

New OFCCP Disability-Related Regulations and Other Initiatives.

Meanwhile, at the Office of Federal Contract Compliance Programs (OFCCP), the federal agency administering affirmative action requirements for federal contractors, the agency’s top priorities include an examination of federal contractors’ compensation practices, and implementation of the new affirmative action regulations under Section 503 of the Rehabilitation Act. The Section 503 regulations are directed towards individuals with disabilities. In part, the rules will require federal contractors to establish a nationwide seven percent utilization goal for disabled individuals in each job group of their workforce. If a contractor has fewer than 100 employees, the final

rules require the seven-percent goal to be applied to its entire workforce. Contractors also must record and analyze data on job openings, applicants and hires, as well as invite job seekers to voluntarily self-identify as disabled at the pre- and post-offer phases of the hiring process. These rules became effective March 24, 2014.

In addition to these initiatives, the OFCCP continues its efforts to shrink the gender pay gap and otherwise prevent sex and race discrimination in compensation. In 2013, the agency rescinded Bush-era compensation guidelines and issued Directive 307, which is intended to provide the agency with more flexibility in examining and evaluating contractors’ compensation systems.

Stay tuned as more decisions, initiatives and proposed regulations come out of “the other Washington.”

Matt Lynch is a shareholder with Sebris Busto James. Matt represents private and public sector health care and other employers in all aspects of labor relations, including in collective bargaining, grievances and labor arbitrations. He has handled many cases in front of the NLRB and PERC, and also advises employers on day-to-day and strategic employee relations issues, including discipline and discharge, employee leaves, employment agreements, policy development, handbooks, wage and hour and discrimination. Contact Matt at mlynch@sebrisbusto.com or 425-450-3387.

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