LABOR & EMPLOYMENT

REPEALS AND ROLLBACKS ARE LIKELY

Although much of the Trump administration's labor and employment agenda has yet to crystalize, the agenda will likely include repealing or rolling back pro-employee regulations and executive orders implemented by the Obama administration. There is much evidence that the new administration will chart a more business-friendly course.

"We are likely to see efforts to repeal and replace many of these laws. But even if some of these laws and regulations remain on the books, a big unanswered question is whether we'll see active enforcement under the administration," says Trina Fairley Barlow, a partner in Crowell & Moring's Labor & Employment and Government Contracts groups.

RETREAT FROM THE OBAMA ERA

President Obama's Fair Pay and Safe Workplaces Executive Order was the first on the chopping block. On March 27, President Trump signed a joint resolution under the Congressional Review Act disapproving the FPSW Final Rule. Though most of the rule's requirements had been put on hold in October 2016 when a U.S. District Court judge in Texas granted a preliminary injunction, the rule's paycheck transparency requirements became effective on January 1, 2017. The president's signature eliminated the entire rule and negated the need for further court action. Contractors are relieved they will not be subjected to what many viewed as unnecessary, overly burdensome compliance obligations, says Rebecca L. Springer, counsel in the Labor & Employment Group at Crowell & Moring.

Other Obama-era laws have also faced judicial roadblocks. On November 22, 2016, a federal judge temporarily enjoined implementation of Obama's revised Fair Labor Standards Act overtime rule, which raised the minimum salary an employee must earn to be exempt from overtime pay. The revised rule included automatic upward adjustments to the requisite salary level every three years. These revised rules would require employers to either pay overtime to larger segments of their workforces or increase the salaries of white collar workers above the salary level threshold. Critics argued that these requirements would undermine the growth of small and mid-sized businesses.

"It is very unlikely that the revisions to the FLSA issued by the Obama administration will be implemented in their current form regardless of how the court rules. We are likely to see more employer-friendly FLSA amendments or the dispensing of efforts to amend the FLSA altogether," Barlow says. "Employers who already spent time and resources preparing for implementation are asking what they should do now. Legally, employers have no obligation to implement the changes to the FLSA while they are temporarily enjoined. Yet employers may face morale and operational problems if workers were notified of wage increases in anticipation of the new rules."

CONTRACTOR SICK LEAVE UNCERTAIN

The Trump administration is also likely to take a fresh look at another regulatory imposition enacted by its predecessor: the requirement of up to seven days of paid sick leave each year for covered employees performing work on or in connection with covered government contracts.

The paid sick-leave obligations apply to certain types of federal contracts entered into after January 1, 2017, and the Trump administration has not yet moved to negate the rule. Ivanka Trump, the president's daughter and a leading advisor, expressed her support for parental leave during the campaign, and President Trump highlighted it during his first address to Congress. It is possible we will see some "tweaking, rollback, or reversal of the federal contractor requirements, with the federal government (or states) then implementing new paid sick-leave rules," Barlow says. In any event, any new labor direc-

"A big unanswered question is whether we will see active enforcement of the laws [that remain on the books] under the Trump administration." —*Trina Fairley Barlow*

"We suspect much of [the fight on pay equity issues] may be in the state legislatures and through private litigation."

—*Rebecca Springer*

tives are likely to be aimed broadly at the business community, Springer adds, rather than just at federal contractors.

PAY EQUITY REMAINS A KEY CONCERN

Pay equity, a key focus of the Obama administration, will likely remain a significant issue for employers. Companies have experienced pressure not only from the federal government, but also from state legislatures, corporate shareholders, and the general public to provide more pay transparency and address the perceived gender gap in wages. This drumbeat is likely to continue, though it is unclear what role the federal government will play in enforcement efforts given Trump's stated intentions to reduce the Department of Labor's budget. "We're going to see the fight on pay equity issues continue," Springer says, "but we suspect much of that activity may be in the state legislatures and through private litigation."

Though pay equity concerns will remain at the forefront, the fate of the recent revisions to the EEO-1 report remains unclear. The requirement that all employers with 100 or more employees provide aggregate annual compensation data on their EEO-1 reports was introduced by the Obama administration last year to further its pay equity enforcement efforts. Numerous employer groups expressed concerns that this was an overly burdensome obligation and worthless for enforcement purposes. The revised EEO-1 reports are not due until March 2018, so the administration has time to decide if it will take any action to roll back these changes.

JOINT EMPLOYER DOCTRINE UNLIKELY TO EXPAND

Trump's appointments to fill vacancies at the National Labor Relations Board are likely to have a huge impact on another high-profile matter left over from the Obama years: the joint-employer standard. The NLRB currently is deciding whether McDonald's should be considered a joint employer in labor and wage complaints brought against its franchisees. Among other things, a board decision that the fast-food giant indeed exercises determinative control over franchisees' employment practices could make it easier for labor unions to organize quick-serve workers.

ERISA GETS TIED UP WITH HEALTH CARE

One area that will gain more attention is the impact of ERISA on health and welfare plans. Regardless of the fate of the Affordable Care Act, expect heightened litigation against employers and their boards of directors and officers as both corporate and individual fiduciaries of health and welfare plans under ERISA.

"Historically, plan sponsors, the courts, and the DOL have been focused on ERISA's application to retirement plans, but there are equal protections for health and welfare plans. With the passage of the ACA seven years ago there's been greater focus on compliance, governance, and ERISA's fiduciary requirements for health and welfare plans," says David McFarlane, a partner in Crowell & Moring's ERISA & Employee Benefits Group.

Whatever health care plan emerges from Congress, McFarlane explains, "it will be subject to the fiduciary and other requirements of ERISA, and health and welfare plan sponsors will be increasingly exposed" to litigation, with significant personal exposure to the plan sponsor's board of directors and officers.

"[Any health care plan] will be subject to requirements of ERISA, and plan sponsors will be increasingly exposed [to litigation]."

—*David McFarlane*