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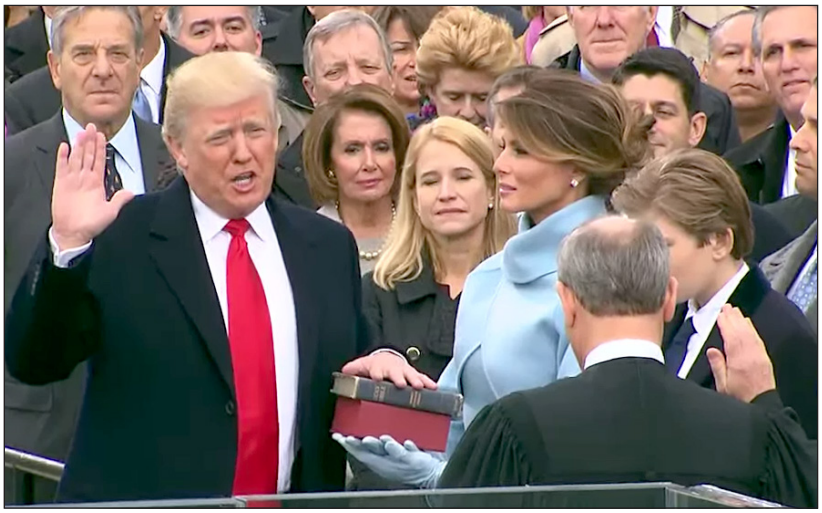
What should employers expect from a Trump Administration?

Since the moment he announced his candidacy nearly two years ago, nothing about Donald Trump has been predictable. So trying to determine what the Trump Administration might mean for employers is guesswork at best.

Still, we can probably expect his overall policies to be quite a bit different than they've been for the past eight years, and if he has any intention of keeping his campaign promises it wouldn't be surprising to see him reverse certain workplace policies that the Obama Administration put into place.

One big area Trump may target is Obama-era executive orders that affect government contractors, since he may view them as hindering economic growth and job creation and it won't take an act of Congress to undo them.



By White House via Wikimedia Commons

For example, Executive Order 13502, which Barack Obama signed in 2009 as one of his first actions upon taking office, strongly encourages government agencies to use "project labor agreements" on federal construction projects costing more than $25 million. These agreements enable construction unions to determine wage rates and benefits for everyone on a project before a single worker is hired. They apply to all contractors and subcontractors and replace any existing collective bargaining agreements.

Opponents say these agreements undermine competition in the construction bidding process and lead to higher costs. As real-estate developer himself, it's not hard to see Trump revoking this order, along with another executive order that requires contractors to inform employees of their right to unionize or refrain from unionizing.

Executive Order 13672, which forbids federal contractors and subcontractors from discriminating based on sexual orientation or gender identity, could also be vulnerable.

continued on page 3

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EEOC updates guidance on 'national origin' discrimination

Title VII of the federal Civil Rights Act bars employers from discriminating based on national origin. In other words, employers cannot fire, refuse to hire, demote or take any other negative action against a worker or job candidate based on where that person or his or her ancestors come from. Employers also can't take negative employment actions against someone who seems to have physical, cultural or language traits that they associate with a particular ethnic or national group (i.e., having an Italian accent, wearing traditional Indian garb or having a stereotypically Jewish last name or facial features).

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This area can be a minefield for employers, so the Equal Employment Opportunity Commission recently issued updated guidance for employers on how to stay out of trouble.

For example, with respect to job openings, the EEOC urges employers to advertise and recruit in ways that attract the most diverse candidate pool possible, such as posting online, advertising at job fairs and publicly posting job announcements with various community organizations, instead of using techniques that may "screen out" certain groups, such as word-of-mouth advertising or only posting in places that will reach a homogeneous audience.

Similarly, with respect to hiring, promotion and job assignments, the EEOC warns against using "customer preference" as a basis for discriminatory action. That means it's important to be careful about deciding who will be the "face of the company" based on appearance or accent. Instead, employers must develop more objective criteria for public-facing positions like cashiers, greeters, hosts/hostesses or retail floor workers.

Finally, be aware that the EEOC will take a harsh view toward English proficiency requirements or "English-only" policies unless they are legitimately necessary to effectively and safely perform the job.

These are complicated issues, so it's important to go over your policies with an employment attorney to make sure you're not doing anything that could land your company in hot water.

Single day of FMLA abuse is grounds for termination

United Airlines did not violate the federal Family and Medical Leave Act when it fired a worker for putting in for family leave on a scheduled workday in the middle of an extended out-of-country vacation, a federal appeals court recently ruled.

Masoud Sharif, who worked for United at Washington-Dulles International Airport, decided to take a 3-week vacation to South Africa in March 2014. However, United had scheduled him for two customer-service shifts right smack in the middle of his time off. Using United's shift-swap website, Sharif found someone to cover the second day, but not the first. Then Sharif — who'd been previously diagnosed with an anxiety disorder and had been authorized to take FMLA days intermittently to deal with panic attacks — requested a day of medical leave for the first day.

The airline found it odd that Sharif took FMLA leave for the only shift he was scheduled to work those three weeks and that his time off coincided with that of his wife, also a United employee. It also noticed he'd taken FMLA leave under similar circumstances a year earlier. In an interview with human resources when Sharif returned, he claimed he tried to get back to Washington the day of his scheduled shift but couldn't get on a flight and suffered a panic attack that caused him to use FMLA leave, although records showed he flew to Italy the next day to see his niece.

After Sharif was fired for FMLA abuse, he sued United, saying its accusation of lying was a pretext for retaliation.

The court ruled for United, saying that if Sharif's case went forward, FMLA abuse would "spread like wildfire."

But employers should take note: FMLA retaliation is a serious issue. While this case seems to show a clear case of abuse, other cases may not be so clear-cut. That's why it's important to talk to an employment lawyer before taking any negative action against a worker over leave.

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The Trump Administration: What should employers expect?

continued from page 1

In addition to the foregoing, the new administration could set its sights on certain positions taken by the National Labor Relations Board.

One such area is the use of class-action waivers in employment arbitration agreements. The NLRB views such waivers, under which employees agree to submit all employment disputes to a neutral third party instead of taking them to court, and to do so on an individual basis and not as a class, as violating federal labor law. But Trump will have the opportunity to fill two current vacancies on the board and a third coming up in late 2017 with members he views as more pro-management, which could result in the NLRB taking a different position going forward.

A reconstituted NLRB could reverse last year's "joint employer" decision under which companies are considered joint employers of workers provided by staffing firms. This also extends to companies that rely on subcontractors or have franchisees and is seen as boosting the ability of workers to organize.

Finally, certain Department of Labor rules imposed by the Obama Administration might not survive a Trump presidency. The most controversial was the new overtime rule that raised the salary level below which workers are entitled to overtime pay and made many white-collar workers eligible for overtime. This rule hasn't taken effect, because a federal judge in Texas ruled that the DOL didn't have the power to put it in place. An appeal of his decision was still pending as of January, but many employers oppose the rule and one could easily imagine a new Secretary of Labor pulling it off the table.

Given how much is up in the air with a new administration coming in, consider contacting an employment attorney where you live to discuss how you can best prepare.

Employer can't fire worker for refusing to share tips

A server at a restaurant who was fired after refusing to share more of his tips with other workers could sue the restaurant for wrongful discharge, the Minnesota Court of Appeals recently decided.

Todd Burt, the server in question, worked at a restaurant where wait staff had to split tips with the people who bussed tables. When Burt refused to share his tips, his employer warned that "there would be consequences" if he didn't do so. He still refused and was fired.

After his employer terminated him, he filed suit. Specifically, Burt claimed firing him was illegal under Minnesota's wage and tip law, which prohibits mandatory tip pooling or tip sharing. His resulting unemployment caused him lost wages, he alleged.

A trial judge dismissed the case, ruling that state law didn't recognize his claim. The judge found that Minnesota's wage and tip law didn't expressly authorize wrongful discharge claims.

But the Court of Appeals reversed the decision. Acccording to the higher court, the state law "implied" that workers could bring claims like Burt's.

While this ruling only applies in Minnesota, it's still important for employers to be aware of it elsewhere. That's because the federal Fair Labor Standards Act (FLSA) bars employers from wrongfully discharging employees for exercising rights guaranteed by FLSA's minimum wage and overtime provisions. Additionally, other states may have laws of their own that operate just like the law in Minnesota, and some may even be stricter. Talk to an employment lawyer in your area to learn more about the law where you live.

NYC imposes new rules for freelance contracts

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The nation's largest city just passed a law that will change the way employers do business with independent contractors.

Under the new law, any agreement with an independent contractor for services that pays more than $800 in a 120-day period must be in writing. The contract must contain the name and mailing address of both the hiring party and the contractor, an itemization of all services to be performed, the value of the services, the rate and method of pay and the date by which the hiring party must pay. If no date is specified, the contractor needs to be paid within 30 days of the job being done.

Hiring parties that violate this law can face fines and lawsuits and can even be ordered to pay double damages and attorney fees.

While this law only applies in New York City, there's no good reason to think other places won't follow suit.

The law provides the occasion for another reminder that if you are supplementing your workforce with independent contractors, you need to be sure they're really "independent." In other words, if you're exercising significant control over them in terms of scheduling and how they're paid, and restricting who else they can work for, they're employees. Employers that misclassify employees as contractors in order to avoid complying with minimum wage, overtime and benefits laws will get hit hard by the law everywhere.

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Beware the use of 'big data' in hiring decisions

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As technology has advanced in recent years, so have hiring tools. Among these tools are "algorithms" — formulas developed by data analysts and computer programmers to help employers cut the hundreds or even thousands of online job applications down to a smaller number that meet certain stated job qualifications. This could include educational requirements or particular skills necessary for the position.

These algorithms also enable employers to subject applicants to personality tests and find online information about potential candidates, and even help the employer reach out to people who might be a good fit but haven't actually applied.

However, these tools can also pose a danger. Employers may set the algorithms to look for candidates who look like their idea of a "top performer," but this could lead to weeding out women, racial minorities, people with disabilities or other groups protected by antidiscrimination laws.

Use of such tools could potentially open an employer up to a lawsuit by members of these groups who claim they've been "disparately impacted." Even if the employer can show that what they're doing is "job related," would-be employees might still have a case under federal law if they can prove another tool would have been as effective without discriminating.

One complicating issue is that this technology is very hard to understand and employers might not know their algorithms are having a discriminatory effect. Meanwhile, it can be difficult for potential employees to show they've been victimized in a discriminatory manner. However, these issues are out there, so if you're thinking of deploying "big data" tools to aid your hiring efforts, talk to an attorney to make sure you're not walking into dangerous territory.