



Employment and Benefits Law Alert: Developments of the First 100 Days

February 28, 2017

Since the days of former President Franklin D. Roosevelt, the United States has closely tracked a new president's first 100 days in office. Here at Gray Plant Mooty, our employment and labor law teams have been monitoring and will continue to track activity by the Trump administration in the employment and benefits law area. This alert is the first in what we intend to be a series of updates to our employer clients on key developments during the first 100 days.

Department of Labor Developments

When President Trump was elected in November 2016, the U.S. Department of Labor (DOL) was fighting multiple legal battles over rules it had promulgated during President Obama's term in office. With President Trump's election, the DOL's commitment to moving forward with those rules is uncertain. We expect to know more if and when Alexander Acosta, the nominee for Secretary of Labor, is confirmed, but here is where the DOL lawsuits and related rules stand:

- **FLSA Overtime Rule** - Last year, the DOL issued a Fair Labor Standards Act (FLSA) rule to increase the minimum weekly salary threshold for the FLSA "white collar" overtime exemptions from \$23,660/year to \$47,476/year. The rule was set to become effective December 1, 2016, but, before that date, a federal judge in Texas enjoined the rule. The DOL filed an expedited appeal before President Trump took office. After Trump took office, the DOL filed a request for a briefing extension in its appeal, citing the need to assess the impact of the new Presidential administration on the appeal. The Fifth Circuit granted the DOL's request and its brief is due on May 1, 2017. The DOL's filing signals the possibility that the DOL may abandon or seek to modify its FLSA overtime rule.
- **Persuader Rule** - The DOL also passed the "persuader rule" last year. This rule would require companies and their consultants (including law firms) to disclose amounts spent on efforts to persuade employees not to unionize. In November 2016, a federal judge in Texas enjoined the rule, and the DOL appealed before President Trump took office. The DOL has not yet taken any action on its appeal since President Trump took office.

National Labor Relations Board

The National Labor Relations Board (NLRB), which oversees union-employer relations and non-management labor rights, has been the subject of minimal activity so far. The lone Republican member of



the NLRB, Phil Miscamarra, was named acting Chairman of the NLRB by President Trump. Miscamarra currently serves on the NLRB with two Democrat members, both appointees of President Obama. The NLRB General Counsel is also currently a President Obama appointee. The NLRB currently has two vacant seats, which are both Republican-controlled. It is rumored that Trump is considering the following candidates as nominees: William Emanuel, Partner at Littler Mendelson, P.C. (Los Angeles); Doug Seaton, Senior Counsel at Seaton, Peters, and Revnew, P.A. (Minneapolis); Marvin Kaplan, Counsel at the Occupational Safety and Health Review Commission (Washington, D.C.); and Zachary Fasman, Partner at Proskauer Rose L.L.P. (New York).

The Equal Employment Opportunity Commission

In January, President Trump named Equal Employment Opportunity Commission (EEOC) commissioner Victoria Lipnic to be the acting chair of the commission. While President Trump's plans for the EEOC are not yet clear, predictions have been made that his administration may scale back on the EEOC's strategic enforcement agenda to extend Title VII protections to LGBTQ applicants and employees. Despite these predictions, President Trump announced in late January that he intended to leave in place an executive order of President Obama that protects LGBTQ employees of federal government contractors from discrimination. The EEOC has asked, however, for an extension in one of its LGBTQ lawsuits to assess the direction of the case. In addition, on February 22, 2017, the Trump administration withdrew an Obama-era guidance issued by the U.S. Department of Education that provided for schools to allow transgender students to use bathrooms corresponding to gender identity. The EEOC has issued similar guidance on workplace bathroom access. GPM will be continuing to track EEOC related developments under the new administration and the impact on potential employer obligations.

Employee Benefits

The Trump administration has made it clear that it has big plans for employee benefit plans, issuing promises to repeal and replace the Affordable Care Act (ACA), to revisit the DOL's fiduciary rule, and to undertake tax reforms that could change the landscape for retirement plans. In its first month, the Trump administration issued some benefits-related executive orders, but, as to what employers need to do so far, it's essentially "Hurry up and Wait!"

- ***The ACA (aka Obamacare):*** President Trump issued an executive order on his first day in office related to the ACA. The order doesn't change any legal requirements, but it does require that federal agencies use their discretionary authority to waive or defer requirements that impose a fiscal burden on individuals, states, providers, insurers, purchasers of health insurance, and the like. Interestingly, employers are not specifically mentioned in the order as needing a waiver from fiscal burdens, but many employers fall into the category of "purchasers of health insurance." Following the order, the IRS has used its discretionary authority to announce that it will accept individual tax returns even if they don't include information about health insurance coverage. Importantly, employers should remember that, for

the time being at least, the ACA's individual and employer coverage mandates are still in effect. As such, GPM is advising employers with 50 or more employees to continue complying with the employer mandate, including the obligation to file Form 1095-C.

- **Health-Insurance-Related Proposals:** So far in President Trump's first 100 days, there have been a number of proposals for ACA replacements. House Republicans are suggesting increases to the amount that can be contributed to a Health Savings Account (HSA), substituting a per-person tax credit for the need-based subsidies on the exchanges, capping the amount of employer-sponsored health coverage that can be excluded from income (a Cadillac tax by another name?), gradually eliminating the Medicaid expansion under Obamacare, and turning Medicaid into per-person or block grants to the States. Stay tuned - these ideas are just proposals at this time.
- **Fiduciary Rule:** The DOL's "fiduciary" rule would require all financial professionals who work with retirement plans or provide retirement planning advice to act in a fiduciary role when advising such plans, regardless of whether they are being paid for such advice. On February 8, 2017, a federal judge in Texas upheld the legality of the rule and denied a request for the rule to be enjoined. No appeals have been filed, but President Trump has asked the DOL to delay implementation of the rule to allow time for further analysis of its practical effects. The rule was set to be effective in April 2017, but is now expected to be delayed until at least October 2017. Most commentators anticipate that the rule will be withdrawn, although that process would take some time. So, again, stay tuned.

If you have questions about your employment or benefits law needs, please contact a member of the firm's employment law or employee benefits teams.