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

April 5, 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, labor, and benefits 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 third in a series of updates to our employer clients on key developments during those first 100 days. To access the first alert in our series, click here. To access the second alert in our series, click here.

Employee Benefits

Since our last 100 Days alert, the Republican effort to repeal and replace the Affordable Care Act (ACA) fizzled out, and the delay in the fiduciary rule has become a bit more concrete. As to what employers need to do, our advice is still "Hurry up and Wait!"

- *The Affordable Care Act (aka Obamacare)*

With the American Health Care Act proposal off the table, the focus in Congress is expected to shift to tax reform. Nevertheless, there is still Congressional interest in making changes to the system that the ACA put into place—as we can see from current conversations between the Trump Administration and the House Freedom Caucus. So far that has not produced any actual legislative language, but stay tuned.

One way changes can be made — without getting Congress members to agree — is through guidance from the three federal agencies with responsibility for ACA implementation: Health and Human Services, Department of Labor, and IRS/Treasury. What could they do? Lackluster enforcement of the employer mandate could reduce an employer's risk of ACA penalties without actually taking away the requirement to comply. It will, however, take some time to determine if enforcement efforts wane and, in the meantime, the possibility is likely not of much comfort to the cautious employer. On the other hand, the federal agencies could use their regulatory authority to simplify or clarify requirements. As of right now, the biggest potential changes are likely to be in the individual market, which is struggling in some areas. Stay tuned, but for now, keep tracking employee hours, offering coverage, and filing Form 1095.

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Fiduciary Rule

The US Department of Labor (DOL) recently announced that the final fiduciary rule's effective date will be delayed by 60 days, to June 9, 2017. The rule was originally scheduled to become effective next week. President Trump's February 3, 2017, Memorandum directed the DOL to determine whether the rule and its accompanying prohibited transaction exemptions (PTEs) will harm investors or retirees. The 60-day delay is intended to allow for that review to be done.

The delay also affects the requirement under the PTEs to provide specific disclosures and make specific representations of fiduciary compliance in written communications. Those requirements will now apply as of January 1, 2018, when the Department will have completed its analysis directed by the President's Memorandum, unless the Department decides to revise or eliminate them.

In the interim, from June 9, 2017, until January 1, 2018, "Impartial Conduct Standards" will apply to those covered by the PTEs.

The prohibition on imposing arbitration requirements on class action claims will also be delayed until January 1, 2018. This was a chief concern of the financial services industry.

For employers sponsoring retirement plans, the delay will have little effect on the current operations of your plans. For the next few months, we can expect to hear a lot more discussion of the virtues and vices of the requirements now delayed until 2018.

EEOC Strategic Enforcement Plan

One question that has been on employers' minds is whether the Trump administration will alter the enforcement priorities of the Equal Employment Opportunity Commission (EEOC). Under the former Obama administration, the EEOC released a Strategic Enforcement Plan in October 2016 that outlined agency priorities for 2017-2021. These priorities include eliminating barriers in recruiting and hiring; protecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination; addressing selected emerging and developing issues; ensuring equal pay protection for all workers; preserving access to the legal system; and preventing systemic harassment. As part of these priorities, the EEOC has been actively seeking to have federal courts recognize discrimination protections for LGBTQ workers under the sex discrimination provisions of Title VII of the Civil Rights Act of 1964.

At a recent SHRM conference in Washington, D.C., EEOC Commissioner Chai Feldlbum indicated that the 2016 Plan priorities will stay intact unless the EEOC commissioners later vote to change them. Given that President Trump still has two commissioner appointments to make, changes could occur in the future. For the moment, however, the enforcement priorities remain unchanged. Indeed, while the EEOC had

previously asked for an extension of time to file an appeal brief in a federal court case involving transgender workplace protections, the EEOC has now filed its brief and signaled its intention to continue litigating the case. *See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*

Labor Secretary Confirmation Hearings

After the failed confirmation of Andrew Pudzer (who withdrew before his confirmation hearings began), confirmation hearings finally took place for Alexander Acosta, the new nominee for Secretary of Labor. It has been reported that, during the hearings, Acosta largely provided neutral or benign answers and was hesitant to commit to certain positions or agency priorities. For example, when grilled about whether he supported the Fiduciary Rule, Acosta reportedly stated he would follow his "boss's orders" on that issue. On March 31, 2017, the Senate Committee on Health, Education, Labor, and Pensions approved Acosta's nomination, which will now advance to the full Senate for a confirmation vote.

President Trump Blocks Federal Contractor Blacklisting Rule

Last week, President Trump signed off on a bill of particular interest to employers who are federal contractors. The bill, enacted under the Congressional Review Act, permanently blocks federal regulations aimed at implementing the "Blacklisting" rule (also known as the Fair Pay and Safe Workplaces Order). That rule was designed to bar companies with serious or repeated employment and labor law violations from receiving federal contracts and to address wage theft and other pay violations, including gender pay equity issues.

The Blacklisting rule originated with an Executive Order signed by President Obama in 2014. A final rule and guidance implementing the Order were published in the Federal Register last August. The rule, if it had not been blocked, would have done the following:

- The rule would have required federal contractors to self-report recent violations --- and *alleged* (non-final and non-adjudicated) violations --- of labor and employment laws when bidding on a new or renewed federal contract worth at least $500,000.The Rule provided that employers could face being barred from federal contracting or being required to enter into labor compliance agreements based on their violations and alleged violations.
- The rule would have restricted the use of arbitration provisions for sexual harassment, sexual assault or discrimination claims.
- The rule would have required federal contractors to provide certain wage information to the government, presumably so that the government could better identify wage gaps based on gender or other discriminatory criteria.

In October, 2016, a federal judge in Texas issued an order temporarily prohibiting implementation of most parts of the Blacklisting rule. The implementation of the rule is now permanently blocked by the recent

legislative action approved by President Trump. Read More on the Modern Workplace Blog >>

President Trump Signs Measure Revoking OSHA "Volks" Rule

On Tuesday, April 4, 2017, President Trump signed off on a Congressional revocation of the "Volks" rule previously authorized by the federal Occupational Safety and Health Administration (OSHA). The Volks Rule extended OSHA's enforcement authority over OSHA recordkeeping violations from six months to five years. While companies subject to OSHA recordkeeping obligations must continue to track and maintain logs of injuries and illnesses for the past five years, they can no longer be cited by OSHA for recordkeeping violations beyond the six-month mark.