January 2017

A New Year and a New Administration: Five Employment, Labor & Workforce Management Issues That Employers Should Monitor

President Donald J. Trump has given few details regarding his administration's plans for new policies; however, employers can expect several areas to be impacted based on his campaign platform.

In this issue of *Take 5*, we examine five employment, labor, and workforce management issues that will continue to be reviewed and remain top of mind for employers:

For additional information, please visit Epstein Becker Green's web page *The New Administration: Insights and Strategies* and our blogs.

1. Change in Labor Landscape Is Not Likely to Come Quickly

By Adam C. Abrahms and Christina C. Rentz

Employers may expect the incoming administration to claw back many of the arguably "pro-union" and anti-employer decisions handed down by the National Labor Relations Board ("NLRB" or "Board") in the Obama era. While this anticipated change may eventually materialize, employers should not expect dramatic change to come quickly as the legacy of the pro-union Obama Board will likely endure for some time yet.

Former President Obama's Imprint on the Board Will Continue

The most immediate change that employers will likely see is to the composition of the Board. There are presently two vacant seats on the five-member Board, which currently has one Republican and two Democratic members. President Trump can fill these openings immediately, and, if his nominee for Labor Secretary is any indication, he will almost certainly appoint individuals critical of the decisions under the Obama-era Board and tilt the majority to the Republicans. However, a Republican majority would still have to contend with the Board's two Democratic members, including the Chairman, whose terms do not expire until 2018 and 2019.

More importantly, the Democratic General Counsel will remain in his appointment until October 31, 2017. The General Counsel decides which cases to prosecute before the Board, so he can delay meaningful change simply by declining to pursue cases that will give a Republican majority the opportunity to overturn key decisions.

President Trump will likely appoint a General Counsel who is more sympathetic to employers' plights over the seemingly pro-union developments under the Obama Board, but it will still take time for cases brought by a new General Counsel to wind their way through the agency's administrative process and up to the Board. Indeed, former President Obama made his labor initiatives a focal point of his administration in 2008, yet major changes to the labor landscape did not come to fruition until 2011 and 2012, with many of the most dramatic changes occurring in the last couple of years. It is still unknown how President Trump will prioritize his labor initiatives, but one thing is certain: It will take time for President Trump's appointees to effectuate change within the agency.

Change to Key NLRB Decisions Will Take Time

In the last five years, the Board has greatly expanded employee rights and made it easier to organize with hotly debated decisions that have allowed unions to strategically craft micro-bargaining units that are easier to organize, dramatically relaxed the joint-employer standard, nullified class action waivers and mandatory arbitration agreements, and invalidated commonplace employment policies on a wide range of topics—from confidentiality to employee conduct to social media and use of employer email. These decisions have been harshly criticized by the business community, including President Trump's nominee for Labor Secretary, who publically denounced the Board's new joint-employer rule as a "lose-lose scenario for everyone—except for the labor unions that have long dreamed of organizing restaurant workers nationwide." Many have called for legislative repeal of some these developments, and there have already been two bills introduced in the Senate that would reverse the Board's decisions on micro-bargaining units and joint employers.

However, legislative amendments to the National Labor Relations Act have historically proven divisive and difficult to enact, and while the Republicans enjoy a majority in Congress, they will still need Democratic votes to move such bills out of the Senate, making the success of such legislation unlikely. Instead, reversal of these decisions will most likely come from new Board decisions, which is an inherently lengthy process that, for the reasons discussed above, probably will not begin in earnest until late 2017. In fact, the Supreme Court of the United States may very well weigh in on the class action waiver issue before a Republican-controlled Board does, as the nation's high court has agreed, at the urging of the current Board, to review a ruling by the U.S. Court of Appeals for the Fifth Circuit reversing the Board's invalidation of class action waivers.

New Election Rules Are Unlikely to Be a Top Priority

In 2015, the Board's new election rules took effect, which dramatically expedited elections and curtailed employers' ability to litigate important election issues and disseminate information to employees about the realities of unionization prior to an election so their employees can cast an educated and informed vote. While opponents bemoan the new rules as unfairly advantageous to unions, the Board is not likely to undertake the complex and time-consuming process to repeal and replace these rules early on, nor are employers likely to push this as a top priority given the host of other detrimental decisions that more immediately impact business.

What Employers Should Do Now

Trump's presidency could ultimately bode well for employers impacted by labor developments that unreasonably favor unions and seem out of touch with workplace realities. However, the Board's decisions early in the new year show that it intends to continue to enforce the standards adopted in the last eight years. Therefore, employers must remain vigilant in complying with these standards unless and until the anticipated change materializes. If anything, employers can breathe a sigh of relief that things will not likely get worse, but they also will not get much better quickly.

2. For Wage and Hour Changes, Look Locally

By Maxine Neuhauser

In the areas of salary thresholds and minimum wages, employers may expect little to change at the federal level under a Trump administration; however, there's plenty of change afoot at the state and municipal levels:

Salary Thresholds

Federal Level

The final year of the Obama administration found employers' human resources ("HR"), finance, and legal departments busy preparing to implement, and generally lamenting, a final rule released by the U.S. Department of Labor ("DOL") that would increase the salary threshold for exempt executive, administrative, and professional employees from $23,660 (set in 2004) to $47,476, effective December 1, 2016 ("Final Rule"). However, those preparations came to a grinding halt on November 22, 2016, when, in a lawsuit filed by 21 states to overturn the Final Rule, Judge Amos Mazzant of the U.S. District Court for the Eastern District of Texas issued a preliminary injunction preserving the status quo, pending decision on the DOL's authority to have adopted the Final Rule, as well as the rule's validity.

During his presidential campaign, Donald Trump did not flat-out reject the Final Rule but was quoted as stating, "We would love to see a delay or a carve-out of sorts for our small business owners." Now, however, with the selection of Andrew Puzder, a critic of the Final Rule, as Labor Secretary and with the cover of federal court's injunction, it is virtually certain that the Trump administration will abandon the Obama administration's effort to uphold the Final Rule.

State and Municipal Levels

The Final Rule may be moribund, but the push to increase the salary threshold for exempt employees likely is not. While there do not appear to be any currently pending bills or proposed rules to increase state salary thresholds for exempt employees, the forces that led to the Final Rule may find traction at the state level.

On December 31, 2016, for example, New York's Department of Labor changed the state's salary threshold for exempt executive and administrative employees from a uniform $675 ($35,100 annually) per week throughout the state to a threshold that depends upon location and, in New York City, employer size as well. New York State's rule also provides for a period of annual increases to the thresholds—again, depending on employer size and location.

In California, the threshold for exempt status is set at twice the minimum wage, which, as of January 1, 2017, went up to $10.50. Thus, in California, the minimum salary for exempt employees is now $43,680/year.

Employers will need to remain vigilant in reviewing exempt positions in states with increased thresholds to determine whether (i) an employee's salary should be increased or (ii) the employee's position should be reclassified as non-exempt, keeping in mind that to be properly classified as exempt, the employee's job must meet the primary duties tests for exempt classification and the employee must otherwise be treated as an exempt employee (e.g., not subject to impermissible salary deductions).

It will also be ever more important for employers to stay abreast of the minimum wage requirements of the locations in which they do business, keeping in mind that not all changes happen on January 1.

Minimum Wages

Federal Level

Former President Obama's push to increase the federal minimum wage, which has been $7.25 since 2009, to $10.10 hit a predictable roadblock in Congress, which is unlikely to be challenged by the new administration. Puzder, CEO of the company that franchises the fast-food restaurants Hardee's and Carl's Jr., is on record as opposing an increase to the federal minimum wage, suggesting that the better economic policy would be an approach in which states and municipalities adjust minimum wages "based on regional economic conditions or local needs."

President Trump, for his part, has both supported and opposed a $10 federal minimum wage. He is also on record, however, for stating his preference for minimum wage hikes to happen at the state level, not through federal enactment.

State and Municipal Levels

The year 2017 brought minimum wage increases to 19 states and the District of Columbia. In November 2016, voters in Arizona, Colorado, Maine, and Washington approved ballot measures to raise their respective minimum wages. Following the recent trend, these new laws will raise the minimum wage incrementally through 2020. Arizona ($10), Colorado ($9.30), and Maine ($9.00) will each see annual increases to bring their minimum wage rates to $12 in 2020. Washington State's minimum wage ($11) will rise incrementally to $13.50 by 2020.

Currently, five states, Alabama, Louisiana, Mississippi, South Carolina, and Tennessee, have no minimum wage law, meaning that the federal rate applies. For the rest, cost-of-living disparities between and even within states—as well local politics—has led to a crazy quilt of laws regarding minimum wage rates and how they are calculated. Several states match the current federal minimum wage of $7.25 hour. Two states, Georgia and Wyoming, have minimum wages of just $5.15 (although, with limited exception, employees in those states must be paid the federal minimum wage). For states with minimum wages higher than the federal rate, the current rates range from $7.50 (New Mexico) to $11.00 (Massachusetts and Washington State). The District of Columbia tops all the states with a current rate of $11.50. Many states have legislated annual adjustments based on cost-of-living indices, and other states have annual increases to gradually raise their minimum wages to a legislated maximum.

In addition to higher minimum wages and mandated incremental increases, some states have also enacted minimum wage laws that set different rates depending on the employer's size and location. New York's minimum wage law, for example, offers a trifecta of different rates for small and large employers, annual changes to the minimum wage rate, and regional variations. Added to this, many municipalities across the country have passed their own minimum wage laws, which exceed the rates set by their respective state statutes.

More change may be expected. In New Jersey, for example, Republican Governor Chris Christie vetoed a minimum wage bill that would have pushed the state's minimum wage to $15 over time. If a Democratic governor is elected in New Jersey in November 2017, however, there is a good chance that the $15 minimum wage initiative will be revived and become law.

In conclusion, the state and municipal levels are where recent action has been in the areas of salary thresholds and minimum wages and, no doubt, where the action will continue to be, even after Trump takes office. Multistate employers may well need a scorecard to keep up.

3. Employer Group Health Plans Post-ACA: What's Next for Employers and Workers?

By Michelle Capezza, Gretchen Harders, and Sharon L. Lippett

The road for the Trump administration and Congress in the Affordable Care Act ("ACA") "repeal and replace" effort will be challenging. President Trump's administration has been clear about President Trump's mandate to repeal and replace the ACA simultaneously, without delay. President Trump signed an Executive Order on his Inauguration Day instructing the Secretary of Health and Human Services and the heads of all other executive departments and agencies with authorities and responsibilities under the ACA to "waive, defer, grant exemptions from, or delay the implementation of any provision" of the ACA to the maximum extent permitted by law. However, even certain Republican members of Congress favor delaying the repeal until a replacement plan can be more fully developed and implemented. While the speed and timing of the repeal-and-replace effort remains unpredictable, it appears that a key factor is the replacement legislation.

Expanded Use of HSAs

Various ACA-replacement ideas have been considered. In terms of insurance coverage, many have advocated that it would be important to (i) preserve the prohibition on pre-existing condition exclusions, (ii) continue to provide coverage for preventive services and dependents up to age 26, and (iii) protect the health care subsidies. Proposals for qualified group associations are also being recirculated that could offer coverage that is exempt from state insurance laws. Employers will need to consider how any new minimum requirements impact the group health plans that they sponsor.

President Trump has advocated that the use of health savings accounts ("HSAs") should be expanded, allowing an individual to make tax-free contributions to save for health care expenses that can accumulate, be used by any family member without penalty, and become part of the individual's estate that passes on to his or her heirs. One response to this mantra appeared on January 4, 2017, when certain Republican members of the House released the American Health Care Reform Act of 2017 ("AHCRA"). The AHCRA would repeal all aspects of the ACA, effective January 1, 2018, and contains a provision for enhanced HSAs that include such features as allowing spouses to make catch-up contributions to the same HSA and increasing the contribution limit to match the limitation on deductibles and out-of-pocket expenses.

It is possible that an ACA-replacement program would redesign the current eligible expenses, contribution, and out-of-pocket limitations on HSAs (as well as the coupling with a high-deductible health plan), flexible spending accounts, and health reimbursement arrangements ("HRAs"). When President Obama signed the 21st Century Cures Act on December 13, 2016, the complex HRA integration rules were relaxed, allowing small employers to offer and fund HRAs, subject to certain rules, if they do not offer any group health plan to employees. Thus, the full array of approaches to replace the ACA remains to be seen.

Clearly, the expanded HSA approach would obligate individuals to anticipate health care expenses, spend wisely in their health care choices, and, more importantly, save money in the first place—which is not something that the majority of Americans have demonstrated they can do well (especially in the retirement savings front). Further, given that HSAs are mainly established with a bank or custodian independent of any employer administration, these types of programs fit squarely in the movement for portable employee benefits that workers can manage, regardless of where they are employed. Nevertheless, there needs to be a balance between employer-provided benefits and vehicles that permit individuals to save and manage their own costs, which includes a safety net.

Tax Reform

Tax reform is also a central component of the ACA debate. President Trump has proposed a personal tax deduction for the full cost of health insurance to individuals, which was included under the AHCRA as a standard deduction of $7,500 for individuals and $20,500 for family coverage. Furthermore, given the widespread unpopularity of the Cadillac tax (including union opposition) and its likely repeal, the focus has turned to revenue replacement measures, including the tax exclusion for employer-provided health insurance.

Central to many tax reform proposals addressing the tax exclusion for employer-provided health insurance is to replace the tax exclusion with a refundable tax credit or to retain the tax exclusion, but cap the maximum amount that may be excluded. Proposals to cap or eliminate the employer exclusion would require the inclusion in income for the cost of coverage, essentially compelling employers to provide the coverage on an after-tax basis, which could then perhaps be offset by tax deductions or tax credits. Capping the exclusion also has parallels to the use of HSAs, which cap the level of fixed contributions. However, notably absent from discussions of the exclusion for employer-provided coverage is any discussion of the employer self-funded group health plan as an alternative for employers from the cost of commercial health insurance and as an efficient, cost-effective, and innovative player in the health coverage marketplace.

The existing ACA taxes, including the individual and employer responsibility penalties, the 3.8 percent tax on net investment income, and the additional 0.9 percent on Medicare payroll tax on high-income earners are being used to pay for Medicare and subsidies for families to purchase coverage on the insurance exchanges. The longer the time to repeal the ACA, the more likely that ACA taxes will impact the budget and the projected value of tax cuts, once made. From a political perspective, if ACA taxes are immediately repealed, the loss to the budget will not factor into any later tax reform, which will be more difficult to achieve without the ACA tax revenue. Also, proposals have been made to reserve any tax savings incurred from repealing the costly aspects of the ACA to fund a replacement plan.

Looking Forward

A replacement plan or action timeline may be issued at any time. Once a final course of action is defined on a legislative front, and as various relief measures are released, it will be important for employers to determine the actions they must take to be in compliance with the new rules governing employer-provided health benefits, and evaluate the level of support they should continue to provide to their workforce when it comes to health care benefits. In some industries, it may make sense to move to a more portable model depending on the types of workers that are retained by the employer (e.g., common law employee versus independent worker). But, in other industries, it may be necessary for employers to continue to sponsor a traditional, high-quality group health plan to stay competitive and assist in ensuring the health of their workforce.

Workers need to realize the real potential of increasing the level of individual responsibility to save for health care, in addition to retirement. Former President Obama noted in his farewell address that the increases in automation in our society will lead to job loss and a new social compact will be necessary. However, under the current administration, the onus may fall more on the individual to plan for health care needs and save for their costs.

With all of the controversy over the ACA, which was years in the making, and the path that appears to lie ahead in its aftermath, perhaps it was just perfectly designed to fail and serve as another event ushering in a new and unprecedented future workplace. Whatever the ultimate outcome, it appears clear that changes are coming; it remains to be seen, however, whether the current administration will be able to materially change course.

4. Examination of Retirement Plans Under a Trump Administration Microscope

By Christopher A. McMican and Mark M. Trapp

While the incoming Trump administration will likely have its hands full dealing with numerous and varied labor and employment issues, events may force it to face several issues of concern for retirement plans. The effects of a multiemployer system stressed nearly to the breaking point may manifest in more employers seeking to cut benefits for participants and/or partition their plans in an effort to remain solvent. This will place further pressure on the Pension Benefit Guaranty Corporation ("PBGC"), the government backstop for insolvent pension plans, which is itself in dire financial shape. Additionally, the Trump administration will likely be proactive in addressing the fiduciary rules. Early indications are that President Trump's nominees and delegates will have more authority to enact change than the nominees and delegates of his predecessors.

An Uncertain Future for Multiemployer Funds

Many multiemployer pension plans are severely underfunded, a problem that has grown worse in recent years. In an effort to forestall the looming insolvency of many of these plans, in December of 2014, then-President Obama signed the Multiemployer Pension Reform Act of 2014 ("MPRA"), which allowed pension funds in "critical and declining status" to reduce the accrued benefits of plan participants. The MPRA requires plans seeking to cut benefits to file an application with the U.S. Department of the Treasury ("Treasury") for approval.

Although nearly 70 plans have declared themselves to be in "critical and declining status," so far only 10 plans have filed applications to cut benefits. Treasury denied the first four applications, but, last month, it approved the application of the Iron Workers Local 17 plan to suspend benefits, although actual suspension must be put to a vote of the participants.

As more plans approach or enter "critical and declining" status, or those already in such status slide inevitably toward insolvency, the Trump administration will likely see more such applications, especially since Treasury's recent approval provides some guidance to these plans on how to craft an application. Like the Iron Workers plan that was recently approved for benefit cuts, most of the plans currently in critical and declining status are small plans with less than 5,000 participants. Such plans are more likely to file applications to cut benefits, and many will also seek to partition their plans in an effort to stay afloat.

The probable increase in pension funds applying to cut benefits and partition their plans under MPRA may result in additional pressure to enact legislation to shore up the severely underfunded multiemployer pension fund system.

PBGC Insolvency

This leads to another issue that is reaching a crisis point—the PBGC recently saw its multiemployer plan insurance program's deficit rise to a record high of almost $60 billion. In other words, the government insurer of multiemployer plans is itself going broke—the PBGC is projected to become insolvent by 2025.

The dire financial condition of the PBGC highlights the plight of the underfunded pension plans, as it makes clear that the distressed plans cannot (at least in the long term) rely on the PBGC to make pension payments if the plans fail. With additional funds expected to run out of money or apply for PBGC assistance and the PBGC's own insolvency looming on the horizon, the pressure on Congress and the new administration to "do something" will likely ratchet up.

But options are limited. If the PBGC further increases the premiums for its multiemployer program, those premium increases could cause more employers to exit the system, exacerbating the problem. According to a Congressional Budget Office study, recapitalizing the PBGC's multiemployer insurance fund to cover claims filed by distressed plans over the next 20 years would cost $34 billion.

The multiemployer funding crisis could prove to be a significant headache for President Trump, who received the votes of many of the union members likely to see their pensions reduced one way or the other. Epstein Becker Green will continue to monitor these issues.

In the meantime, employers that participate in multiemployer plans should educate themselves on these issues and consult with counsel about proactive steps to consider.

The DOL Fiduciary Rule—What's Next?

The DOL's fiduciary rule has been controversial since its onset—with challenges coming from various parties, including the financial industry and various political figures. This rule generally addresses the definition of fiduciary "advice" (and what may or may not meet that definition), sets forth parameters for advisers to act in their client's best interest, lays out rules on accepting compensation (and sheds additional light on types of compensation), and provides for some accountability when incorrect fiduciary advice is provided. With the increased volume of assets in individual retirement accounts and 401(k) plans in recent years, the fiduciary rule has shown a spotlight on relationships surrounding those vehicles. However, the rule could have far-reaching implications and change the way that financial advice is given in other contexts, including considerations for services provided with respect to multiemployer and other pension plans, which are also subject to preexisting fiduciary rules.

There have been various attempts by Republicans to derail the rule, including a measure to repeal the rule and a joint resolution disapproving and nullifying the DOL

fiduciary rule (and a veto of such resolutions, coupled with an attempted override of the veto). After this activity, the rule generally was scheduled to be operative in April of this year, with some of the provisions transitioning into effect shortly thereafter. Many Republicans believe that instead of providing more accessibility to better financial advice for Americans, the rule is too complex, it adds costs, and otherwise negatively impacts the investor relationship. Early indications are that the Trump administration will continue to take aim at this rule as Republicans have already introduced legislation to delay the implementation of the rule for two years. If that legislation is enacted, one would think that further ammunition would be aimed at the fiduciary rule (if not from the

President, then likely from Republican lawmakers) during the implementation delay, perhaps to completely rewrite it or repeal it altogether. Prior to any repeal, financial advisors, investors, and retirement plans should continue to prepare for the rule and examine their relationships and service agreements.

5. Cyber Threats Are Front and Center for Employers as the Trump Administration Takes Office

By Brian G. Cesaratto and Adam S. Forman

One need only look as far as today's headlines—where the presidential inauguration and hacking are receiving equal billing—to understand that the threats from technology are escalating. The Democratic National Committee now joins a long list of companies in various industries that have been victims of hacking, including financial services and health care, among many. The risks to proprietary and confidential information, affecting hundreds of millions of people, and the resulting public fallout escalate each year. The dramatic end to the 2016 election year foretells an even further increase in hacking events targeting companies and institutions of all sizes in 2017. To protect employees and assets, companies must become even more vigilant. It is critically important, therefore, that HR and IT become "best friends forever" in 2017 and work together to train employees and take other collective steps to protect against the loss of data from cyber threats.

Most HR departments are currently in various stages of identifying and scheduling their 2017 compliance training schedule. Equally important to addressing challenges and potential changes in labor and employment laws and regulations at the Equal Employment Opportunity Commission, DOL, and NLRB is preparing your workforce to protect employee and customer data and important organizational data from cyber threats. HR departments already offer training on, for example, the proper use of company technology and codes of conduct, and specific training in cyber threats is a natural addition. Indeed, the proper use of the company's email system can include training on guarding against spearfishing and other social engineering attacks—one of the highest vulnerabilities. In addition, HR's mission is to know its workforce and personnel, so it is best equipped to take complex concepts and break them down to digestible nuggets of information, disseminate the information across the workforce, track the training, and provide follow up. Trained in the science of people, HR can help IT identify and avoid "real world" ways that employees may utilize "work arounds" to avoid IT's well-intentioned security and policy protocols (e.g., logging in as a coworker, text messaging for work-related purposes instead of using a Virtual Private Network ("VPN") to get to secure email or documents, and noting their passwords on post-it notes). HR is well equipped to impress upon employees that they are the best defense to protect the company and their colleagues from harm. On the other hand, failure to follow proper procedures may result in HR disciplinary action. These capabilities, when added to IT's understanding of the organization's systems and likely vulnerabilities, make HR and IT the perfect match for 2017.

* * * *

For additional information about the issues discussed above, please contact the Epstein Becker Green attorney who regularly handles your legal matters or any of the authors of this *Take 5:*

Adam C. Abrahms
Los Angeles
310-557-9559
aabrahms@ebglaw.com

Michelle Capezza
New York
212-351-4774
mcapezza@ebglaw.com

Brian G. Cesaratto
New York
212-351-4921
bcesaratto@ebglaw.com

Adam S. Forman
Detroit (Metro) / Chicago
248-351-6287 / 312-499-1468
aforman@ebglaw.com

Gretchen Harders
New York
212-351-3784
gharders@ebglaw.com

Sharon L. Lippett
New York
212-351-4630
slippett@ebglaw.com

Christopher A. McMican
Detroit (Metro) / Chicago
248-515-4245 / 312-499-1438
cmcmican@ebglaw.com

Maxine Neuhauser
Newark
973-639-8269
mneuhauser@ebglaw.com

Christina C. Rentz
Los Angeles
310-557-9543
crentz@ebglaw.com

Mark M. Trapp
Chicago
312-499-1425
mtrapp@ebglaw.com

About Epstein Becker Green

Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in offices throughout the U.S. and supporting clients in the U.S. and abroad, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit www.ebglaw.com