

Obama Vs. Romney: How The Elections Will Affect Employers

Law360, New York (October 29, 2012, 2:53 PM ET) -- It goes without saying that much of what is promised in political platforms never comes to fruition once a candidate assumes office. This is especially true in the adversarial, ideological climate in which we find ourselves. So, given the likelihood of continued legislative gridlock, what will be the real difference for employers between Democratic President Obama achieving a second term versus Republican candidate Mitt Romney unseating him to become the 45th president of the United States of America?

Below, we highlight four key areas that we can expect the next president to actually differentiate himself from his opponent.

The Judiciary

The U.S. Supreme Court has four justices aged 74 and older; two in the conservative wing and two in the liberal wing. The oldest justice, Justice Ginsburg, is 79; Justices Kennedy and Scalia are 76; and Justice Breyer is 74. The next president therefore stands a good chance of either further entrenching the current court's tilt to the right or reversing the trend and bringing about the first liberal court in recent memory.

Although the current court may be the most conservative since 1937, it is also closely divided. The John G. Roberts court has decided several important cases in the labor and employment arena by a 5-4 margin. These include: *Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156 (2012) (overruling the U.S. Department of Labor and holding that pharmaceutical sales reps were exempt employees under the Fair Labor Standards Act); *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012) (holding that states enjoyed sovereign immunity from certain Family Medical Leave Act lawsuits); *New Process Steel v. National Labor Relations Board*, 130 S. Ct. 2635 (2010) (invalidating scores of NLRB rulings reached while the board consisted of only two members); *Rent-A-Center, West v. Jackson*, 130 S. Ct. 2772 (2010) (limiting employees' ability to challenge the validity of mandatory arbitration agreements covering employment claims); and *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (interpreting Title VII to require employees challenging disparate pay to bring their claims within 180 days of the compensation decision). This last decision was, of course, overturned by the Lily Ledbetter Act – the first statute signed into law by President Obama upon taking office.

Beyond the highest court, however, it remains unclear how much the reelection of President Obama would alter the composition of the judiciary as a whole. A recent analysis has shown that President Obama has appointed fewer and more centrist judges in the district courts and circuit courts of appeal than his predecessors. This stems at least in part from a conscious decision not to spend political capital on this particular front.

As a governor, Mitt Romney had a mixed ideological record in his judicial appointments. Early in his term, he appointed many democrats with his appointments growing more conservative toward the end of his governorship. The conventional wisdom, however, is that Romney will cater to his conservative base in making judicial appointments. Indeed, his website promises that “[a]s president, Mitt will nominate judges in the mold of Chief Justice Roberts and Justices Scalia, Thomas, and Alito.” We therefore predict a substantially more conservative judiciary if Romney is elected.

The EEOC

During the Bush presidency, the Equal Employment Opportunity Commission's funding and staffing diminished by 30 percent even as the number of charges exploded. After assuming office, Obama restored the EEOC's funding to pre-George W. Bush levels.

The EEOC has used that increased funding to increase its staff and more vigorously pursue a strategy, first articulated in 2006, of de-emphasizing single plaintiff cases in favor of high-impact “systemic cases.” The EEOC described these as “pattern or practice, policy, and/or class cases where the alleged discrimination has a broad impact on an industry, occupation, business, or geographic area.”

For example, the EEOC has recently instituted systemic sex discrimination lawsuits against an oil drilling company and against a discount tire retailer, both of which allegedly refused to hire women for certain classes of jobs and obtained a one million dollar settlement for a class of approximately 70 Filipino-American hospital workers, who alleged national origin discrimination and harassment.

According to its 2011 Performance and Accountability Report, at the end of fiscal year 2011, the EEOC pursued 580 systemic investigations. During that fiscal year, EEOC field units filed 23 lawsuits involving systemic claims. At the same time, the EEOC has had to contend with ever-increasing discrimination charges, having received nearly 100,000 private sector charges in fiscal year 2011.

In conjunction with the emphasis on systemic cases, the EEOC also intends to focus on combating hiring discrimination, including intentional discrimination and disparate impacts on protected classes resulting from the application of facially neutral policies such as background checks; protecting immigrant, migrant and other vulnerable workers; and emerging topics, such as the use of certain Americans with Disabilities Act defenses, discrimination against LGBT persons and pregnancy discrimination. Thus, employers can expect more scrutiny from the EEOC in these areas.

Romney has not spoken about his plans for the EEOC. But, his pro-business and anti-regulatory agenda — coupled with a Congress looking to contract the size of the federal government — lead us to predict a considerably less active EEOC during a Romney presidency.

The National Labor Relations Board

The NLRB has inspired much Republican outrage during the Obama presidency. The House of Representatives has even attempted to defund it, and Romney campaign ads have condemned the NLRB as “pro-union stooges.”

Certainly, President Obama provided a boost to organized labor with his appointments of union-friendly individuals to the NLRB. During the Obama presidency, the board has aggressively worked to safeguard employees' right (under Section 7 of the National Labor Relations Act) to act collectively to better their employment terms and conditions. Section 7 covers non-supervisory and non-managerial employees of most private sector employers, whether or not represented by a union.

Specifically, the board has adopted novel positions to ensure that employers do not chill employees' right of concerted action, including by rejecting employment policies that require the confidentiality of employment investigations; spell out employment-at-will relationships in an allegedly overly broad manner; unduly restrain employees' use of social media; and wholly preclude employees from pursuing class or collective actions against their employers.

The last four years, however, has marked a decline in union membership. In 2011, 11.8 percent of workers belonged to a union, which is down from 12.4 percent in 2008. Although President Obama's pro-labor board tried to encourage unionization, the board's efforts faced particularly strong headwinds from both its opponents and the courts.

For example, the board unsuccessfully attempted to streamline union elections, require businesses to post notices in the workplace informing employees of their rights to form a union and pursue unfair labor practice charges against a company for choosing to locate a new aircraft production line in a right-to-work state.

Romney, if elected, has pledged to "[a]ppoint to the NLRB experienced individuals with respect for the rule of law" and to not favor unions at the expense of employers. Given the board's propensity for politicization, an NLRB staffed by Romney appointees will undoubtedly pursue a pro-business agenda and will likely reverse much of what President Obama's board has accomplished.

The Office of Federal Contracts Compliance Programs (OFCCP)

Nearly one out of four Americans works for a federal government contractor or subcontractor. President Obama has had more success in promoting union organizing in the realm of federal contractors than he has had for private employers. Within two weeks of taking office, President Obama used his power to issue executive orders to further efficiency in procurement to sign several pro-labor executive orders.

These included requiring federal contractors to notify their employees of their rights under the NLRA, including to organize (reversing a Bush-era order to the contrary); barring the use of funds received under government contracts to persuade employees about union membership or bargaining; and requiring companies that enter into certain service contracts with the federal government to offer continued employment to the employees of the contractors they are replacing (including in many cases recognizing and bargaining with such employees' union representatives).

In signing the orders, President Obama said, "I do not view the labor movement as part of the problem, to me, it's part of the solution." In sharp contrast, Romney pledges to "[r]everse executive orders issued by President Obama that tilt the playing field toward organized labor."

The OFCCP, which enforces the union notice requirements, is the Department of Labor's section that carries out "the contractual promise of affirmative action and equal employment opportunity required of those who do business with the Federal government." Along with the EEOC, the OFCCP's funding and staff increased during the Obama presidency.

The OFCCP used these resources to pursue its mission aggressively including by upping the number and scope of its investigations and compliance audits, which often involve expansive data requests. Among its central substantive priorities have been efforts, including rulemaking, to reduce the gender pay gap and to increase affirmative action in the construction industry and with respect to persons with disabilities. Federal contractors have vociferously complained about the intrusive and burdensome nature of the OFCCP's demands.

Although Romney has not specified his plans for the OFCCP generally, he did not support state affirmative action efforts while he served as governor of Massachusetts. In 2003, then-Gov. Romney reportedly issued an executive order that replaced the state's Office of Affirmative Action — along with its stringent guidelines and enforcement mechanisms — with a much less powerful state diversity office. Although he signed the order with little fanfare, it sparked such an outcry that he eventually retreated.

Since then, candidate Romney has spoken in favor of workplace diversity and against quotas. He has also stated that he encourages companies to release data reflecting the number of women and minorities inhabiting top positions. Despite these pronouncements, it is doubtful that a Romney OFCCP will have the staff or zeal of the Obama OFCCP. Accordingly, it seems likely that federal contractors would find some relief from burdensome audits and enforcement actions if he were elected.

The difference between a second Obama term and a Romney presidency is stark. The biggest difference for employers, however, will likely be seen in the composition of the judiciary and the funding, personnel and agendas of government agencies that regulate employers.

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