Elections Have Consequences: Hot-Button Employment Law Issues In 2017 | **SMALL BUSINESS**

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Hot-Button Employment Law Issues in 2017

by **Attorneys William E. O'Gara and Matthew C. Reeber**

In a few short weeks, President-elect Donald J. Trump will take charge of running the country. Undoubtedly, a Trump presidency will result in a change in direction at the National Labor Relations Board ("NLRB"). The NLRB is the government agency that makes labor relations policies and has enforcement authority. Under the Obama administration, the NLRB made numerous decisions that have been perceived as pro-labor and its policy changes have been widely criticized by employer groups. All indications are that a Trump administration will break with Obama's NLRB, but change may not be swift and employers are cautioned to stay informed and vigilant as the country heads into the next four years with Mr. Trump.

Some controversial policy changes employers are cautioned to pay attention to include:

- "Quickie Elections." The Board changed long-established procedure to shorten the time between when a petitioner for union organizing election is filed and the date the NLRB conducts the election. The process followed before the change was that when an election request was filed, the employer would have at least a full month to campaign. As a practical matter, the change has reduced that period to a couple weeks so it is often impossible to effectively campaign. Employers have criticized the change as effectively denying employers the opportunity to educate workers. Many observers have concluded that the change has benefited unions by resulting in more election victories. Look for a change in the election process that may return to the pre-Obama process.

- "Persuader Rule." This requires law firms that offer advice to employers dealing with union organizing efforts to disclose information regarding the activities. Employer groups have criticized the rules as intrusive and designed to discourage employers from utilizing expertise when confronted with a union organizing drive.

- Decisions Expanding NLRB Jurisdiction. The Obama Board has issued decisions that have effectively expanded its jurisdiction to graduate assistants at colleges and franchises. The changes have been controversial and at odds with positions taken by the NLRB in the past.

- Social Media. The NLRB under the Obama administration embarked on a campaign invalidating provisions of employers' social media policies. Look for a Trump Board to have much less interest in this issue.

A challenge for anyone predicting what the Trump administration will do with respect to the NLRB is that he did not run on any particular platform. What is clear is that Mr. Trump has been engaged in several high-profile battles with the NLRB during his career in business and that may translate into change.

Wage and Hour Laws

It appears that employers should also expect that a Trump administration will be friendlier to employers than the Obama administration with regard to wage and hour laws. For instance, on December 1, 2016, the United States Department of Labor ("DOL") was set to enact long awaited changes addressing the "white collar" exemptions to the overtime provisions of the Fair Labor Standards Act ("FLSA").

The FLSA carves out exemptions for executive, administrators and professional, outside sales and computer employees – the "white collar" exemptions. The new regulations substantially increased the minimum salary a white collar exempt employee must be paid from $23,660.00 to $47, 476.00 in order to be exempt from overtime requirements. The proposed rule changes were to lead to approximately four million Americans becoming eligible for overtime compensation for all hours worked over forty hours in a week.

On November 22, 2016, a Federal District Court Judge issued a temporary restraining order that blocked implementation of the amended rules. With the Trump administration taking office on January 20, 2017, it appears unlikely that the DOL will ultimately make the Obama administration's proposed changes to the FLSA overtime exemptions.

For employers who completed an audit of their exempt employees, this is a pyrrhic victory; employers may have given certain employees a raise of up to $24,000.00 to comply with the Obama administration's changes to the FLSA regulations and are now faced with the difficult decision of whether to claw back that pay raise. Employers must be wary if they intend to suspend or reduce a pay raise given to come into compliance with the Obama administration's amended FLSA regulations. Firstly, the Obama administration appealed the Federal District Court Judge's order enjoining the implementation of the amended regulations. The appeals court could reverse the trial court and allow the enactment of the regulations. Employers should then look to the Trump administration to see how it will address the proposed regulations.

To the extent that the Trump administration drops the Obama administration's rule changes, employers must be careful when reducing or suspending any pay raise given to comply with the proposed regulations. Suspending pay raises may subject employers to litigation, especially if a decision is made to keep certain employees at the new salary level but decrease other employees. A cautious employer will look at whether their employees fall into protected categories – age, sex, race and national origin – when reaching this decision.

These are only a few of the hot-button employment law issues that employers need to monitor as President-elect Trump steps into power on inauguration day on Friday, January 20, 2017. If you have questions about how your organization may best prepare for the new administration, contact employment law attorneys William E. O'Gara or Matthew C. Reeber at 401-824-5100 or email wogara@pldw.com or mreeber@pldw.com.

William E. O'Gara,
Principal
Pannone Lopes Devereaux & West LLC

Matthew C. Reeber
Partner
Pannone Lopes Devereaux & West LLC