



## Obama Administration 2.0: *What's at Stake for Employers*

During Barack Obama's first term as president, most of his pro-employee legislative agenda was stymied by Congress. Undeterred, the Obama Administration turned to administrative agencies such as the Department of Labor, National Labor Relations Board, and the Equal Employment Opportunity Commission to move forward its workplace agenda. The stakes continue to be high for employers during President Obama's second term, particularly in the diversity-focused areas of equal employment opportunity and immigration.

### **Equal Employment Opportunity: The EEOC's Top Priorities**

The Equal Employment Opportunity Commission (EEOC) is definitely in enforcement mode, increasing its charges filed from 75,000 in 2006 to nearly 100,000 in 2012, with over \$36 million in recoveries against employers during

last year alone. In fact, the EEOC resolved 111,139 charges during the 2012 fiscal year, which resulted in larger recoveries against employers: \$36.2 million compared to \$9.6 million just the year before.

On December 17, 2012 the EEOC issued a Strategic Enforcement Plan with six priorities:

- Hiring and recruitment discrimination, including the use of such screening tools as background and credit checks, which disproportionately impact applicants from protected groups
- Equal Pay Act claims
- Retaliatory practices or policies, especially those aimed at employees who pursue legal rights
- Emerging discrimination claims involving disparate age impact, leave policies that violate the Americans with Disabilities Act (ADA), and gender-stereotyping
- Systemic harassment
- Human trafficking

Based on the EEOC's new strategic plan, and cases it has recently pursued, there is an expected emphasis on hiring and recruitment discrimination claims involving screening tools such as criminal background checks, tort policies, and under the Americans with Disabilities Act, leave policies that result in the terminations of employees without a determination of whether additional leave can be accommodated.

During the last two years alone, the EEOC has accomplished significant settlements (more than \$30 million total) and victories in a variety of cases, five of which involved ADA violations. These cases challenged discriminatory employer leave and attendance policies, (for example, an employer's failure to give reassignment preference to a disabled person), and obesity and obesity-related problems as a disability. As the EEOC carries out its Strategic Enforcement Plan, employers can

expect more aggressive and creative EEOC claims.

### **Immigration Law: New Reforms, More Enforcement**

The president's 2013 State of the Union address called for attracting more skilled labor and establishing a "responsible pathway to earned citizenship" for undocumented workers. This dovetails with the proposed Senate bill called the Immigration Innovation Act (I-Squared Act) that would make it easier for employers to recruit and retain highly skilled workers.

Key components of the I-Squared Act include:

- Increasing the annual cap on nonimmigrant employment-based H-1B visas from 65,000 to 115,000, which could be adjusted up to a 300,000 visa ceiling if economic needs dictate
- Eliminating the 20,000 per year cap on existing U.S. advanced degree exemptions
- Giving employers authorization to employ dependent spouses of H-1B visa holders
- Eliminating annual per-country limits for employment-based visa petitioners and adjusting per-country caps for family-based immigrant visas
- Rolling over unused green card numbers approved by Congress in previous years
- Exempting from the employment-based Green Card cap those immigrant workers with advanced degrees in science, technology, engineering, and math (STEM) from U.S. schools, dependents of employment-based immigrant visa recipients, outstanding professors and researchers, and others with extraordinary ability

Employers will still be obligated to verify the immigration status of their

employees. In this regard, there is a push for increased use of the government's E-Verify internet-based system that crosschecks I-9 employment eligibility verification forms with data from the Department of Homeland Security and the Social Security Administration. Use of E-Verify is not mandatory unless the employer is a federal contractor. An increasing number of states, however, have passed laws mandating that employers enroll in E-Verify. This could pose major problems for employers if it becomes a nationwide mandate, as the system's major accuracy problems could result in millions of errors.

Finally, immigration law compliance and enforcement will continue to be at the forefront during President Obama's second term. In 2012 alone, the U.S. government spent nearly \$18 billion on immigration enforcement, primarily targeting employers. Since January 2009, Immigration and Customs Enforcement (ICE) has audited more than 8,000 employers, debarred more than 700 companies, and imposed more than \$87 million in fines and sanctions for violations of the law. This increased immigration enforcement means employers must be proactive about employment verification by conducting internal I-9 audits and reviewing and revising current I-9 policies as needed. Above all, all human resources personnel and supervisors should know the I-9 form requirements, and companies should implement proper I-9 record-keeping rules.

### **Other Second Term Priorities**

Beyond diversity issues, other key workplace regulatory priorities loom

in the next four years:

- *Wage and Hour Law.* The Department of Labor (DOL) Wage & Hour Division (DOL) has made eradicating unpaid working time due to alleged misclassification of employees as independent contractors or as overtime-exempt.

- *Labor Relations.* On January 25, 2013, in *Noel Canning v. NLRB*, the D.C. Circuit Court of Appeals held that President Obama's three recess appointments to the NLRB early in 2012 were constitutionally invalid. The court's ruling jeopardizes the enforceability of nearly 1,000 mostly pro-union NLRB decisions issued by the Board since January 3, 2012. There is a good chance validity of the recess appointments will be addressed by the Supreme Court.

Meanwhile, the enforceability of the decisions issued after January 3, 2012 remains uncertain.

- *Healthcare.* The mandates and penalties imposed by the Affordable Care Act (ACA) will be a significant challenge for employers. Starting in 2014, employers with more than fifty full-time employees are required to provide health insurance or else pay a penalty if at least one employee joins the ACA's insurance exchange and receives a subsidy. And an employer that has fifty or more full-time employees, does not offer "qualified" coverage and has at least one full-time employee will be assessed a "free-rider" penalty.

The message is clear: every employer must prepare for major employment law changes that will have definite compliance impact during the Obama Administration's second term. **PDJ**

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