

ELECTION 2016

NEW YEAR,

NEW PRESIDENT,

NEW EMPLOYMENT LAWS

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The 2016 Election and its results brought much drama, controversy and frustration. We are going from a Democratic to a Republican White House. The big question is: How will President-elect Trump's Administration affect employment and labor laws for our future? Here is just a taste of where we are at and what operators can look forward to:

Department of Labor (DOL):

We already have the controversial DOL overtime rule placed on hold by the Judge in Texas wiping away the December 1, 2016 compliance date. Time will tell if the DOL will get to implement its \$913 per week salary increase for operators' white collar exempt employees (or, alternatively, transfer them to hourly with overtime pay). Did you already implement such changes, or did you wait? Remember: this change in law does NOT apply to your route drivers if you are paying them a salary based upon the Motor Carrier Exemption.

Will we see minimum wage increases? Most likely not at the federal level; however, many states and local municipalities have already joined the band wagon of increasing minimum wages significantly. For example, New York, Chicago, and San Francisco have increased minimum wage and have a plan to do so with steep increases over the course of the next few years.

401(k) Fiduciary Rule – Are you an operator that sponsors a 401(k) plan? Every employer offering a 401(k) plan is faced with the decision about what investment options to make available to participants through their plan.

Investment options carry different risks as well as different costs. In light of the DOL's final rule that aims to increase the level of responsibility for every third-party advisor to a 401(k) plan, every plan sponsor should clarify the status of their current advisor. Is that advisor a registered investment advisor? Is that advisor a fiduciary to the 401(k) plan? Once the answers to those questions are confirmed, plan sponsors should be prepared for receiving and reviewing more disclosures from third-party advisors and lengthier service contracts. This will probably remain as-is and will not be on the front burner for the new Administration to get overturned (i.e., hard to say your 401(k) plan sponsors should not be held to higher standards and responsibility).

Affordable Care Act (ACA):

The big uncertainty here is whether the new Administration will defend and just revise the current "Obama Care" or if it will take on the task of repealing and replacing this medical care program as President-elect Trump announced he would do. He basically campaigned that if you elect me, this ACA is gone. But, time will tell on how Trump is going to make good on that promise, since there are many ways he could attempt to dismantle the ACA.

Paid Family and Sick Leave:

With many states and local governments already requiring paid sick leave not only for employees but for the care of family members and domestic abuse victims, this is one area both candidates relatively agreed upon. In reality, this could become a federal requirement and apply to all companies. Be sure your state or

local municipality does not already have one in place, and we will wait to see if the federal government institutes such a requirement. From a political standpoint, President-elect Trump needed to show he has some compassion and supports a work-life balance. We should be looking at a federal requirement for at least a 6-week paid leave for new mothers as promised by Trump.

Supreme Court Nominee, Who Shall It Be?

The Supreme Court is currently one judge shy of a full panel of 9. The Republicans made it clear that President Obama would not be getting his nominee (Merrick Garland) on the bench prior to his departure from the White House. President-elect Trump has vowed to follow the mold of the late Justice Scalia – an originalist interpretation of the Constitution. This means we are going to look at what the text of the Constitution actually says to guide the rulings -- not what it ought to be. Moreover, Trump has the potential of appointing even more seats if they become available due to the ages of the presiding judges. Trump's short list includes several justices from state supreme courts and federal judges from flyover states. This may take some time, as the Democrats may reciprocate and draw out the process.

OSHA's Current Focus for the Future:

OSHA's not quiet about its pact to focus on the enforcement of OSHA regulations with increased penalties, more consideration of criminal sanctions, and increased Whistleblower/Retaliation Activity. This is very political and will change with the new Administration come 2017. Moreover, OSHA began enforcing

its Post-Accident Drug Testing And Safety Incentive Rules as of December 1, 2016. While the requirement to electronically submit data does not begin until 2017, an important part of this rulemaking is the requirement for employers to implement a reasonable procedure to ensure accurate reporting of illnesses and injuries. The concern about possible underreporting was highlighted during the rulemaking process and post-accident drug and alcohol testing was specifically targeted as an area which could deter accurate reporting of injuries. Specifically, the preamble to OSHA's final rule on electronic reporting states that blanket post-accident drug and alcohol testing policies deter accurate reporting and may constitute retaliation for reporting an injury. OSHA's current stance is that blanket post-incident drug testing policies deter proper reporting.

OSHA advises that drug testing policies should be revised to only require post-incident testing to situations in which employee drug or alcohol use is likely to have contributed to the incident and for which the test can accurately identify impairment. To muddy the waters further, OSHA explained that employers do not need to specifically suspect drug use before testing, but there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury before requiring the employee to test. OSHA then added that drug testing that may be perceived as punitive or embarrassing to the employee is likely to deter injury reporting. The only certain guidance OSHA provided on post-

incident testing is that if the employer is required to test to comply with state or federal law, the testing policy is not prohibited by its final rule. However, if post-accident testing is not required by state or federal law, employers should expect that use of such testing will now be open to challenge and possibly subject to an OSHA violation.

Practice Tips

No, the best practice tip is not to flee the country like many US citizens have voiced. The best practice tip to offer operators is to stay on top of these laws! It is a whole new ball game the next four years – anticipate many changes. Join employment law firm blogs and newsletters. Stay "InTouch" with NAMA, which has been a great resource for keeping members abreast of the new developments. When in doubt, contact your employment labor counsel or the undersigned so we can guide you on any new developments as they come. Ignorance is not bliss when it comes to labor and employment law compliance. ■



About the author: Heather A. Bailey, Esq., a partner with SmithAmundsen LLC and a NAMA Knowledge Source Partner for over a decade, focuses her practice on labor and employment law issues for employers. Look for Heather at NAMA's OneShow Educational

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