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Established 1977

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IMPORTANT ISSUE OF CONCERN FOR EMPLOYERS

ELECTION RESULTS SPECIAL EDITION

**“WHAT A TRUMP PRESIDENCY, REPUBLICAN CONTROLLED
CONGRESS, AND CONSERVATIVE SUPREME COURT MEANS
FOR EMPLOYERS”**

NOVEMBER 2016



After a long and grueling election, the last ballots have been counted and the results are in: The next President of the United States will be Donald J. Trump and both the Senate and House of Representatives will be Republican. Whether you voted for or against Trump, it is time to turn our attention to what a Trump presidency, Republican Congress, and conservative Supreme Court will mean for employers.

What changes should you expect? Will this be good for your business? What will Trump do with President Obama's prior Executive Actions, Policies and Directives to Cabinet Secretaries and Departments, NAFTA/TPP, and addressing regulations and rules made by previous appointees to employment related agencies and departments, such as the NLRB and Department of Labor? What will Congress do with Obamacare, immigration reform, corporate and individual taxes, entitlements, and employment related statutes such as the ADA, the Equal Pay Act, and various Anti-Discrimination statutes? What will a new Supreme Court look like with Trump possibly appointing as many as three (3) conservative judges to the Court and how will their decisions impact employers?

In this article, the firm will provide guidance on how a Trump Presidency, Republican controlled Congress, and a conservative Supreme Court will affect employers. By the end of this article, you should no longer be thinking of the results of the election, but instead start planning on how you will be able to benefit from these forthcoming changes and actions.

TRANSITIONING FROM OBAMA TO A TRUMP PRESIDENCY

After eight (8) years of President Obama attempting to change employment rules, regulations, and immigration related policy through Executive Actions which have been repeatedly halted by the Courts, in a few short months a new President will take the oath of office. What does this mean for employers?

First, all Executive Actions taken by soon to be former President Obama will likely be rolled back and rescinded within the first one hundred (100) days of a Trump presidency. Specifically, Obama's immigration related Executive Actions, which were struck down by the Courts, will be rescinded in a Trump presidency, and this may impact the eligibility of both existing and future employees to legally work for employers without running afoul of the law. Employers may have to exercise additional due diligence by utilizing the E-Service Verification system of ICE to ensure that its employees are legally compliant only in situations where there exists serious doubt about an individual employees ability to work. That does not mean that employers may run every Hispanic or foreign sounding name through the E-verify system without first establishing that good cause exists to do so. In addition, all employment related Executive Actions that affect any employers who do business as or with federal contractors and with the federal government will be rescinded during a Trump presidency. At same time California employers will have to be mindful of their obligations under California's Unfair Immigration Practices laws.

Second, all directives to cabinet level secretaries (such as the Secretary for the Dept. of Labor) regarding specific policies and directives that in the past favored employees and killed jobs will be closely scrutinized and may be modified or rescinded within the first one hundred (100) days of a Trump presidency. Specifically, any directives to cabinet level secretaries such as the

Department of Labor concerning changes to existing rules and regulations relating to misclassification, exemption, overtime, and wage requirement under the FLSA will be rescinded during a Trump presidency. This means that the newly implemented federal standards regarding the yearly salary necessary for employees to be considered exempt may likely be lowered from its existing threshold if not entirely rescinded with a return to the former threshold level being restored until further rulemaking is completed by the Department of Labor.

Third, the NLRB rules and decisions expanding the meaning “concerted activity in the workplace” to include the use of social media and the “quick 21-day union elections” rules will be impacted based on the appointment by President Trump of new Board members of the NLRB. The NLRB is composed of a five (5) member Board with each member serving a term of 5 years to be appointed by the President. Currently, there are two (2) vacancies on the Board that will be filled by President Trump with existing Board members at or near the expiration of their terms. This expected turnover at the NLRB, may lead to a complete reversal of prior NLRB decisions concerning “concerted activity in the workplace” and “quick 21-day union elections” which have expanded the scope of the Board’s involvement in the private sector workplace to new heights during the Obama presidency. Also, new NLRB Board appointments may lead to an appointment of a more “employer friendly” General Counsel who usually plays a critical role in both advising the Board regarding existing NLRB Board decisions and expanding the NLRB’s jurisdictional reach to non-union employers. The NLRB General Counsel is also in charge of producing advisory opinions sent to thousands of employers each year based on employer and union related concerns regarding potential violations of the National Labor Relations Act.

Fourth, under a Trump administration both the North American Free Trade Agreement (“NAFTA”) and Trans-Pacific Partnership Agreement (“TPP”) will either be scrapped, rescinded, amended, and/or re-negotiated for more favorable terms with America’s import and export trading partners. As such, employers should expect the cost of labor, materials, and goods to rise in the short term while falling in the long-term once the costs of these material changes in the nation’s trade agreements are fully absorbed into the economy. As such, employers would be wise to lock-in the existing prices of raw materials, goods, and labor now before President-elect Trump takes office in January 2017 when all of these items will rise in the short-term until new trade agreements are reached and the costs of those changes are absorbed into the U.S. economy over a period of time.

Finally, employers should expect many more changes including laws to encourage investment and employment from a Trump presidency through the ratification of legislation approved by a Republican controlled Congress as discussed below.

REPUBLICAN CONTROLLED CONGRESS

With both the Senate and House of Representatives under Republican control, what will the effect of Congress’s new acts during a Trump presidency be on employers? Well, the short answer is likely tax relief, Obamacare relief, changes to existing employment related statutes and tort reform that will make it harder for disgruntled former employees to file frivolous lawsuits in Court, as well as various other forms of relief for employers.

First, employers should expect a Republican Congress to rescind or significantly amend Obamacare by eliminating tax liability on employers who do not provide insurance and lowering premium payments for employers by eliminating comprehensive medical services that are not needed by all employees. The new health insurance law will eliminate the requirement for employees to register with state sponsored insurance exchanges, as well as stripping away penalties on employers and employees. This will create an incentive for employers to expand their workforce without concern for whether a decision to hire more than 30 employees will expand their insurance liability to employees and subject them to the mandate of the soon to be repealed and replaced Obamacare.

Second, employers should expect a Republican Congress to pass comprehensive immigration reform which will have both an indirect and direct effect on the existing and available workforce as well as the sale and transfer of goods across the border to the north in Canada and South into Mexico. Employers should also expect that any immigration reform may impact the eligibility of both existing and future employees to legally work for employers without running afoul of the law. Employers may have to exercise additional due diligence by utilizing the E-Service Verification system of ICE to ensure that its employees are legally compliant only in situations where there exists serious doubt about an individual employees ability to work. That does not mean that employers may run every Hispanic or foreign sounding name through the E-verify system without first establishing that good cause exists to do so.

Third, employers should expect a Republican Congress to make it harder for employees to file frivolous lawsuits under federal statutes against employers. Specifically, federal statutes such as the Fair Labor Standards Act, the American with Disabilities Act, the Equal Pay Act, and various Anti-Discrimination Statutes will likely be amended by a Republican Congress to shorten periods of time for former employees to file lawsuits, will amend these statutes to eliminate or curtail the ability of former or existing employees to file whistleblower lawsuits, and may eliminate, if not severely reduce, the ability of the Department of Labor and the NLRB, to impose significant monetary penalties for minor violations committed by employers.

Fourth, employers should expect a Republican Congress to reduce corporate and personal income tax levels not seen since the presidency of Ronald Reagan in the 1980s. Also, a Republican Congress will reduce, if not eliminate, the estate tax which has disproportionately and negatively impacted small family employers and their families. In addition, employers may expect other financial relief in the form of potential tax credits, expanded tax deductions, and through corporate finance and regulatory reform.

Finally, employers should expect more changes from a Republican Congress which should strengthen employers' bottom line and ability to run their businesses without continuing to be the target of costly and frivolous lawsuits.

CONSERVATIVE SUPREME COURT

Under a Trump administration, it is likely that the President will have the opportunity during his term to appoint up to three (3) new members of the Supreme Court. Based on comments made during the campaign, it is likely that President Trump will appoint conservative strict constitutional

constructionist members of the bench who take a fairly straight forward view to the law and will not apply their personal views to cases. So, how do these appointments affect employers?

First, a conservative Supreme Court would be less likely to allow liberal states to chip away the right of employers to insist that employees sign mandatory Arbitration Agreements. Prior to the election, there was concern among legal practitioners that the Supreme Court would overturn its recent decisions regarding mandatory Arbitration Agreements that employers required their employees to sign as a condition of new or continued employment. Now, it appears more than likely that a conservative Supreme Court will ensure the continued viability of mandatory Arbitration Agreements in the workplace.

Second, a conservative Supreme Court will make it harder for plaintiffs under the Federal Rules of Civil Procedure [“FRCP”] to seek and obtain class certification. Had Trump not won it is more than likely that a more liberal Supreme Court would have gutted the FRCP regarding the evidence necessary to pursue certification of a class in a class action thereby clearing the way for plaintiff attorneys to rush to the Courthouse to file substantially more lawsuits against employers. This would have led to many employers either deciding to enter bankruptcy or attempting to settle early rather than facing the likelihood of class certification. Now, with a conservative Supreme Court, employers should feel emboldened to have their attorneys challenge Plaintiff’s early on in a proposed class action based on the strict requirements of the FRCP knowing that relief is on the way.

Third, a conservative Supreme Court will make it harder for plaintiffs who miss administrative and court filing deadlines to seek to revive their claims and cases against employers. The current Supreme Court has taken a more expansive view regarding missed deadlines and filings by plaintiffs at the expense of certainty among employers. However, a more conservative Supreme Court will likely shut the door on many of these plaintiffs who for one reason or another missed federally mandated administrative and court filing deadlines.

Fourth, a conservative Supreme Court will make it harder for plaintiffs to prove a range of workplace violations, including but not limited to, changing the standard of proof regarding discrimination claims, whistle blower claims, and retaliation claims. Also, a conservative Supreme Court may role back rulings or precedent regarding the ability of plaintiffs’ attorneys to seek recovery of fees and costs for cases where they have either only won minor relief or where no real public benefit has been conferred by their action.

FINAL THOUGHTS

Now that the election is finally over, it is time for all employers to start making plans for how actions that will be taken by President Trump, a Republican controlled Congress, and a conservative Supreme Court will affect their businesses. In order to prepare for the many changes that are about to occur starting in January 2017, you should contact The Goldstein Law Firm, PC to devise a “Strategic Action Plan” [“SAP”] to be implemented as soon as possible. If you fail to act now knowing that these changes will be forthcoming you put yourself and your business at risk of not being able to take advantage of the legal, regulatory, and business bonanza that is about to begin.

For further information, please contact Charles H. Goldstein, Jonathan A. Goldstein, and/or Joseph A. Goldstein of The Goldstein Law Firm, PC at (310) 553-4746.

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