

# **AFFIRMATIVE ACTION UPDATE**

## **\*\* NEWS FLASH \*\***

Volume 16, No. 7

Douglas B. Brown, LLC

December 1, 2016

## **PRESIDENT-ELECT TRUMP AND THE PROMISE TO REPEAL EXECUTIVE ORDERS AND REGULATIONS**

A cornerstone of President-Elect Trump's election campaign was the promise to roll-back and eliminate regulations and Executive Orders (EOs) issued and implemented by the outgoing administration. In just the employment arena affecting federal contractors, this includes:

- EO 13658 – Minimum Wage for Federal Contractors
- EO 13665 – Pay Transparency
- EO 13672 – LGBT regulations
- EO 13673 – Fair Pay and Safe Workplaces (“blacklisting” – currently blocked by federal courts)
- EO 13706 – Paid Sick Leave
- New regulations for affirmative action for Veterans and the Disabled
- New regulations on discrimination on the basis of sex

In addition, there are regulations, rules, and expanded/new interpretations of existing rules affecting all employers regarding eligibility for overtime (blocked last week by a Texas district court); expedited union representation elections; “ban-the-box” limitations; increased OSHA fines; the Pregnant Workers Fairness Act; and the revised EEO-1 report requiring compensation data.

So, the questions are:

1. What priority will the new administration give to reviewing the regulations and EOs affecting employment put into place by the outgoing administration?
2. How easy will it be for the new administration and Congress to roll-back and eliminate not only these EOs and regulations, but all the other laws, EOs, and regulations put in place by the outgoing administration?

The answer is, not surprisingly, “It depends.”

In regard to question #1, the regulations and laws most frequently cited during the campaign focused on healthcare (the ACA); banking reform (Dodd-Frank); energy (Keystone Pipeline); and climate change (The Paris Agreement). There was little to no discussion of employment and labor matters.

In regard to question #2, as far as EOs are concerned, the incoming President can simply rescind them. So, to the extent that an order has been implemented by agency action, the EO will simply go away and no further action is required.

However, for regulations which have gone through the formal rulemaking process, including a Notice of Proposed Rulemaking in the Federal Register, an impact analysis has been conducted, comments have been solicited, and the final rules published in the Federal Register, then the process is more involved. At this point, the regulation has become law and there are more stringent requirements to undo/repeal a law.

For example, let's look at the Affordable Care Act (ACA or "Obamacare"). Can President Trump and the Republican House and Senate simply repeal the ACA? Surprisingly, it's not that easy. Both the House and Senate can draft new legislation undoing the ACA. However, in order to get the bill to President Trump for his signature, it would have to get past a certain Democratic filibuster in the Senate. In order to end the filibuster, it requires a vote of 60 senators. At the moment, the Republicans only have 52. This means that in order to get the bill to President Trump, there would have to be eight (8) Democratic senators to break ranks and join with the Republican majority. This is unlikely to happen.

What are the options to overturn/repeal/weaken laws and regulations put into place under the Obama administration? There are at least five (5) different tactics that the incoming administration can take to undo targeted regulations. They are:

1. Ask Congress to apply the Congressional Review Act (CRA) to regulations issued in the last 60 "session" days of the outgoing administration. The CRA provides that Congress can bypass a filibuster by Senate Democrats. However, the CRA has been successfully used only one time since being passed in 1996.
2. Congress can pass new laws overturning the regulations. These however, as noted with the ACA example above, remain subject to a Senate filibuster.
3. Appoint new agency heads and have them undertake the rulemaking process to develop and implement new regulations that essentially roll-back the provisions of the original regulations. This would not happen overnight.
4. Appoint new agency heads who will not be inclined to aggressively enforce the new regulations.
5. Congress can decline to provide the funds to administer and enforce the new regulations.

A regulation with neither the money nor the effort to enforce it is essentially the same as repealing the regulation.

Lastly, plaintiffs can challenge the legal authority to implement the regulations in court. This is what has happened with the lawsuits to enjoin the implementation of the Fair Pay and Safe Workplaces rules and the new overtime regulations (originally supposed to take effect December 1, 2016). In addition, the courts have now permanently enjoined the implementation of the NLRB's Persuader rules. If there are legal challenges to the other EOs and implementing regulations, the new administration may decline to defend the challenge, thereby increasing the likelihood of the court(s) enjoining their implementation.

Let's also keep in mind that there will be a new Secretary of Labor, Solicitor of Labor, and Director of the OFCCP. These individuals will likely have a very different agenda than the outgoing team and accordingly will bring a different focus to the departments and agencies they head. For example, we cannot predict whether compensation will remain the primary focus of the OFCCP during compliance reviews. And while nothing has been said, we do not know what might happen with EO 11246 itself and the OFCCP. Everything may be on the table.

Right now, it is simply too early to determine what steps/actions/directions the new administration will take with the outgoing administration's labor/employment/civil rights initiatives. There may be little change, some change, or great change. However, employers and government contractors will be seeing a very different landscape from the one that has been fashioned over the past eight years.

All we can say at this point is stay tuned for further developments.

If there are any questions or comments concerning anything contained above, they can be directed to this office by calling us at 440-564-7987 or sending an email to [dbb@dbbrown.com](mailto:dbb@dbbrown.com). The discussion of this matter is for the clients and friends of Douglas B. Brown, LLC and does not represent nor is intended as a substitute for professional legal advice.