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Lawyers expect second Trump administration to bring changes to labor law landscape

■ ERIN ACHENBACH

Labor and employment attorneys are bracing for shifts in federal workplace policy as recent court decisions and a second incoming Trump administration promise to reshape key areas of practice.

From overtime rules to noncompete agreements, practitioners will have to navigate an increasingly complex landscape while preparing their clients for potential changes in labor law enforcement and priorities.

OT SALARY THRESHOLD

The invalidation of the Department of Labor's overtime salary threshold rule by the U.S. District Court for the Eastern District of Texas in November has left employment attorneys managing uncertain client compliance strategies.

The rule, which had already implemented its first-phase increase to $43,888 in July, was set to reach $58,656 in January, before it was vacated nationwide.

James R. O'Connor of Phillips Lytle in New York expects the incoming administration to either withdraw any pending appeals or pause them while developing new regulations.

James R. O'Connor

"If the decision is appealed before the new administration takes the helm, I expect the new Department of Labor to eventually withdraw that appeal or request a stay until new rules can be passed to either undo or change the Biden administration's regulations," O'Connor said.

Instead, he sees potential for alternative approaches to overtime compensation.

"There could be an opportunity for the new administration to amend the [Fair Labor Standards Act] to allow overtime-eligible workers to take paid time off in lieu of overtime," O'Connor said. "That is something I have seen, and I think [has] a real chance of passing."

The nomination of Rep. Lori Chavez-DeRemer, R-Oregon, as secretary of the Department of Labor adds another layer of complexity. Salvatore G. Gangemi of Harris Beach in New York, which is merging with Murtha Cullina, noted the nominee's pro-worker reputation.

"I was caught by surprise over nominating Chavez-DeRemer to be the secretary of labor," Gangemi said. "She's a Republican, but she's very pro-workers' rights."

While Gangemi believes automatic threshold increases are likely dead, he suggests some modified overtime regulation might survive.

"The Trump administration might say ... let's issue a final rule increasing it from now, but I don't believe the rule's automatic increase provision will go forward — assuming the whole thing isn't dead," Gangemi said.

Meanwhile, employment attorneys are tracking changes to the Affordable Care Act penalties. The IRS announced new "pay or play" penalty amounts for applicable employers in 2025: $2,900 for not offering minimum essential coverage to 95 percent of full-time employees and $4,350

for not offering affordable, minimum-value coverage.

These monthly-calculated penalties create added compliance considerations just as practitioners prepare for potential health care policy shifts under the incoming administration. The timing puts employment attorneys in a particularly challenging position: They must help clients understand and prepare for the new penalty thresholds while anticipating possible changes to ACA enforcement priorities or requirements under President Donald J. Trump's second term.

FTC'S NONCOMPETE BAN

The legal landscape for noncompete agreements has grown increasingly complex following court decisions in Texas and Florida blocking the Federal Trade Commission's nationwide ban. An appeal was filed in October, but it is unclear how far it will make it before President Biden departs the White House.


Melissa C. Jones

Melissa C. Jones of Tydings Law in Maryland emphasized that employment attorneys must continue to focus on state-specific compliance strategies.

"Regardless of what the administration does when it comes in, many states have enacted some kind of a ban on noncompetes, whether it's income based like a low-wage worker ban, or basically banning noncompetes altogether," she said. "Employers will have to be aware of those state laws and their requirements of compliance."

The general counsel of the National Labor Relations Board, Jennifer A. Abruzzo, came out strongly against noncompetes and "stay-or-pay" situations, which add another layer of consideration. Federal labor laws are largely set by the NLRB, which is separate from the Department of Labor.

"Based on the positions the NLRB took during the first Trump administration, the tea leaves sort of point to his new administration fairly quickly removing her as the general counsel," Jones said. "We might see the board changing back to a more employer-friendly position."

Noncompete bans will likely be attacked from both the FTC and NLRB angles under Trump, Travis Kearbey of Quarles & Brady in St. Louis believes.

"Noncompetes could be subject to far less scrutiny as a result of the incoming administration," Kearbey said.

OVERTIME PAY TAXES

Trump also made headlines during his campaign for his pledge to eliminate taxes on overtime earnings for employees working more than 40 hours a week. Critics have raised concern about the potential economic impact, and O'Connor said eliminating taxes on overtime pay could lead to more salaried employees wanting to become hourly.

"The general consensus is if such an exemption was passed, it would encourage employees to take more overtime, and those hourly jobs ... would become more attractive," O'Connor said. "With the recent decision invalidating the overtime threshold ... the potential impact on this overtime tax exemption might not be as widespread as initially thought."

PREPARING FOR PATH FORWARD

While Chavez-DeRemer's labor secretary appointment could indicate some pro-labor leanings, practitioners should still prepare for policy shifts, according to O'Connor.

"It's possible that his new appointments will create some balance between the power of the employer and the employee, but that remains to be seen," he said. "In general, after four years of pro-employee, pro-labor policies, I expect to see a paradigm shift, which will be welcomed by most employers, most likely."


Travis Kearbey

For attorneys managing multistate employers, state-level compliance remains crucial.

"A concrete example in our area — Maryland, Virginia and D.C. — they each have enacted different statutes," Jones said. "A lot of employers in our area have employees in different states, so they really

have to navigate the different requirements."

Kearbey said the shift in federal policies under Trump could make it easier to classify workers as 1099 employees, while noncompetes are likely to be upheld at the federal level. However, practitioners must balance those changes against state-specific requirements and restrictions.

Immigration practice could see changes as well. Kearbey advises preparing for increased restrictions.

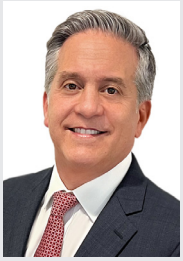
"With the first administration, there was a pretty dramatic increase in the number of visa denials. There's an anticipation for an increase in visa denials and potentially restrictions placed on the visas," he said. "Businesses that rely heavily on talent outside should be thinking about their immigration strategy."

ANTICIPATED CHANGE IN PRIORITIES AT EEOC, DOL

Once the new administration is in place, enforcement policies at the Equal Employment Opportunity Commission and Department of Labor are expected to shift away from diversity, equity and inclusion initiatives.

Enforcement of the Pregnant Workers Fairness Act is now underway but likely will not be a priority under President Trump.

Salvatore G. Gangemi of New York's Harris Beach, which is merging with Murtha Cullina, noted that funding for the EEOC and DOL traditionally goes down in conservative administrations, resulting in fewer bias cases pursued by the EEOC.



Salvatore G. Gangemi

"Although now, Trump really is a wild card," Gangemi said. "I think discrimination is going to become less of a priority for the incoming administration."

Both Travis Kearbey of Quarles & Brady in St. Louis and James R. O'Connor of Phillips Lytle in New York expect the EEOC under the new administration to examine DEI programs in such a way that they could be construed as discrimination against those who are not in a minority group. O'Connor also foresees an increase in religious bias cases.

Trump's expected EEOC appointment, Andrea Lucas, has openly come out against DEI initiatives and voted against the Pregnant Workers Fairness Act. She is the only Republican on the EEOC.

"We can expect to see the EEOC scrutinize such programs in the short term and potentially increase its litigation activity on those issues," O'Connor said. "The other issue I see is religious discrimination. Following the Dobbs decision, which overturned Roe v. Wade, Commissioner Lucas instituted charges against certain employers for offering employer travel benefits [for women seeking abortions], arguing that those practices could be discrimination against pregnant workers who choose to carry a pregnancy to term and potentially discriminatory against other disabled workers who are not afforded travel benefits to get medical care for their conditions."

O'Connor also expects the EEOC to reissue regulations governing the conciliation process to be more employer-friendly, which is in line with Trump's last term.

"The first Trump administration required the EEOC to more or less show its charge to employers prior to engaging in litigation," O'Connor said.

Changes to workplace harassment guidance can also be anticipated. Current guidance has a broad definition of sex-based discrimination, encompassing things like intentional misgendering or denying an individual access to the restroom that is consistent with their gender identity.

"The reason I believe that these broadened definitions may be narrowed is, again, Commissioner Lucas has openly criticized that updated guidance and voted against it, and characterized it as an assault on women's privacy," O'Connor said. "I do think that the new EEOC will similarly follow that mindset."