

## Labor and Employment Law Under the Trump Administration

By James D. Donathen and Christine Donovan Bub

Many employers enthusiastically greeted the election results and hoped that President Trump would “Make America Great Again” in the employment area. Now that the first 100 days have passed, some may be disappointed and ask if this is just more “fake news.” As in politics, the truth may lie somewhere in the middle.

Although broad policy changes were expected, many employment law issues may be largely unaffected by the new administration. This is particularly true in New York State where progressive policies and agenda may trump any changes at the federal level. A short sampling of significant issues follows.

It is unclear how LGBTQ policy will fare under the Trump Administration, but federal courts, the EEOC and N.Y.S. Human Rights Division continue to aggressively enforce LGBTQ rights. For example, the Second Circuit recently declined to extend Title VII of the Civil Rights Act of 1964 to sexual orientation, but confirmed that such claims could be litigated under a theory of gender stereotyping. *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195 (2d Cir. 2017). The New York State Human Rights Law and/or regulations cover both sexual orientation as well as transgender classifications. Further, both Buffalo and Rochester ordinances protect against discrimination based on these grounds.

The overtime regulations promulgated by the U.S. Department of Labor in May 2016 were temporarily enjoined and currently are pending appeal before the U.S. Court of Appeals for the Fifth Circuit. Please note that New York State’s generous salary basis test for exempt employees will remain in effect even if the federal regulations are withdrawn or revised. *Minimum Wage Order for Miscellaneous Industries and Occupations*, 12 NYCRR §142-2.14. Employers should analyze whether they should increase employee salaries or re-classify positions based on the New York State salary basis test which increases annually.

It is likely that USCIS will be increasing site visits, interviews and investigations of employers to ensure American workers are not disadvantaged by the H-1B Visa Program. See U.S. Citizenship & Immigration Servs., *Combating Fraud and Abuse in the H-1B Visa Program*, <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/combating-fraud-and-abuse-H-1B-Visa-Program> (last updated Apr. 3, 2017). Similarly, employers should undertake an internal audit of I-9 forms of current employees to confirm authorization to work in the United States. Employers may also wish to consider participation in the E-Verify Program. See U.S. Citizenship & Immigration Servs., *E-Verify*, <https://www.uscis.gov/e-verify>.

The NLRB currently has two openings. After President Trump makes his appointments, and they are confirmed by the Senate, the Board will be comprised of three Republican and two Democrat members. The General Counsel’s term also is set to end in November 2017, and President Trump will then have the opportunity to appoint a replacement. It is therefore anticipated that several recent pro-labor NLRB decisions will be replaced with more employer-friendly decisions on issues, including joint employer standard, use of corporate email by union advocates, collective bargaining impasse standard and use of

replacement workers in the event of a strike. Similarly, it is likely that the NLRB will revise or withdraw labor-friendly rules and guidance that were promulgated in recent years, including the controversial “quickie” election rule and employment handbook restrictions.

In sum, employment and labor law remains in dynamic flux and should be carefully monitored by all human resource professionals.

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