



## Employers Beware: Obama's Lame Duck Presidency and You

by Matt Lynch and Bob Sebris

**Introduction.** No matter what your political persuasion, if you work as an executive or human resources manager in the United States, the next couple of years will be extremely volatile—and not in a good way. Even though there are only about sixteen months remaining in the Obama presidency, the activism of the Federal government's administrative agencies in the employment arena will continue to escalate and major changes will likely occur.

**Expect Increased "Politics" in Labor & Employment Law Decisions.** With a presidential election about a year away in November 2016, the Obama Administration will soon be on its last legs. Such "lame duck" presidencies are often unfocused and ineffectual, and public policy "wins" with Congress through new legislation typically tend to nosedive greatly. Unfortunately, however, the opposite is likely to occur with the federal agencies overseeing U.S. labor and employment laws. The current aggressive enforcement agendas are expected to plow full speed ahead for the key federal employment law agencies: U.S. Department of Labor, Equal Employment Opportunity Commission, and the National Labor Relations Board. The heads of these agencies are activists, and they will continue to push to change the labor and employment law framework.

Indeed, the last year has shown each of these agencies "doubling down" on controversial new labor and employment law policies and strategies. Recent examples include the regulatory changes being pushed through on "administrative employee" exemptions by the DOL and the EEOC assault on "wellness program" incentives. There have also been controversial NLRB regulations and decisions providing for "quickie elections" in union representation cases, expansion of the concept of "joint employer" status, employee rights to use employer e-mail systems to unionize, and limits or outright prohibitions of common and long-established employer workplace policies

**Regulations and Enforcement Actions will Grow.** Through federal policy and enforcement initiatives, the boundaries of American labor and employment law will continue to be stretched. While the Secretary of Labor serves no specific term, the incumbent may remain in power until a new presidential appointee is confirmed by the U.S. Senate—at this point at least a year and a half away. More challenging is the fact that, for the EEOC, a majority of current Commission members (all appointees of President Obama) are serving in staggered, designated terms that will not expire before the summer of 2017. The same is true with current NLRB members.

This does not bode well for stability in labor and employment law rulings in the next few years. Our legal landscape will continue to change dramatically. The proof is the politically charged actions of these federal administrative agencies in the last few years.

The past history forecasts the future. With one year to go in the EEOC "SEP" (Strategic Enforcement Plan: 2012-2016), Regional Offices are still pressing forward on targeted programs. Current emphasis areas include race discrimination and equal pay concerns for women. While Washington State has for years recognized sexual orientation as a protected class, just this summer in a July ruling, the EEOC made this a national protection under Title VII. The DOL's OFCCP issued new rules less than a year ago that require more detailed record retention and audit vulnerability related to expanded, protected class interpretations for federal contractors. In addition to the flurry of social media cases related to concerted activity protections under the NLRA, the NLRB continues to issue major case rulings on subjects that overturn many years—if not decades—of precedents. Most recently, the religious employer exemption has been undermined to favor union organizing in multiple cases around the country, and new "joint employer" theories are being pursued aggressively in separate cases related to franchising relationships and subcontracting situations. (While our Public Employment Relations Commission is not bound by rulings of the NLRB, PERC caselaw is clearly guided by it.) More expansive change is yet to come.

**Words to the Wise.** Knowing that the federal government will continue to vigorously press its agenda in the American workplace, even as the Obama Administration ticks down, now is not a good time for an employer to become a fresh target. Prevention time is cheaper and more effective than litigation time. Extra care should be taken to avoid scrutiny from federal agencies and stay out of the fray with such agencies. Often by working on a deliberate prevention program with counsel, attorney-client privileges can help protect data that uncovers vulnerabilities and corrective action plans.

Possible proactive steps to take with counsel could include a variety of steps or strategies. Just some are:

- Exempt Staff Classification Scrutiny under Wage & Hour Law
- Compensable Time (Meal Periods, Rest Periods & Other "Non-Work" Time) Cross-Check
- Employee Handbook Risk Assessment & Revisions
- Internal Labor & Employment Law Audits
- Strategies on "Supervisors" & Employee-like "Contractors" Under the NLRA
- Labor Union Vulnerability Analysis
- Manager & Supervisor Training in the Basics
- Emphasize "Best Practices" in Labor & Employment Law/Human Resource actions

These and other steps should be considered so that you can in the near term keep your employment setting out of the sights of the federal administrative agencies.

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\*This Employment Law Note is written to inform our clients and friends of developments in labor and employment relations law. It is not intended nor should it be used as a substitute for specific legal advice or opinions since legal counsel may be given only in response to inquiries regarding particular factual situations. For more information on this subject, please call Sebris Busto James at (425) 454-4233.

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