

Post-Election Workplace Challenges for the Employer and Employee

LEGAL PERSPECTIVE FROM SUSAN K. EGGUM

No doubt presidential elections impact employers and employees nationwide. In all presidential administrations, agencies like the National Labor Relations Board, the Equal Employment Opportunity Commission (EEOC) and the Department of Labor, make and enforce policies that affect the rights and obligations of employers and employees alike. Policies of the Trump administration can and will be advanced through key appointments.

There are too many examples of the sweeping change that may be in store for employers, but a few are worth noting. On September 29, 2016, the EEOC announced approval of a revised EEO-1 report that will collect summary pay data from employers, including federal contractors and subcontractors, with 100 or more employees. The wage data would be used to compare pay and identify possible pay discrimination within a job category. To give employers more time to transition, and allow for alignment with the W-2 reporting cycle, the EEO-1 deadline for the 2017 report will be March 31, 2018. Employers will have a total of 18 months — from September 30, 2016 (2016 report deadline) to March 31, 2018 (2017 report deadline) — to make the change. However, the Trump administration has appointed Victoria Lipnic as the new acting chair of the EEOC. It is likely Lipnic will be named chair since she is the sole Republican commissioner. She has signaled that she is not in favor of the revised EEO-1 report requiring the reporting of job category pay data.

This administration may also sign a draft executive order that would allow organizations to claim religious freedom when “providing social services, education or healthcare; earning a living, seeking a job or employing others; receiving government grants or contracts; or otherwise participating in the marketplace, the public square, or interfacing with federal, state or local governments.” The draft executive order expressly and specifically cites certain classes of persons whose conduct or immutable characteristics pose possible conflicts of interest with religious freedom, including persons exercising their right to enter gay marriage, transgendered persons or women who exercise their right to an abortion. Were such an order signed by this administration and found lawful following a legal challenge, the prohibitions of Title VII and other federal statutes intended to protect against discrimination in hiring, discipline and termination would be at risk.

Another example includes the administration’s nomination of Tenth Circuit Court of Appeals Judge Gorsuch to the Supreme Court. If

confirmed, Gorsuch could influence the voting on a number of pending Supreme Court cases, as well as expected additional challenges to workplace rights and obligations affecting health care, ERISA enforcement, and defenses to claims of alleged discrimination against protected classes.

Another topic that impacts employers is the administration’s January 27 executive order temporarily restricting immigration from Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen. That order includes provisions that allow criminal charges to be brought against managers and business owners, and large numbers of unauthorized workers who can be identified and potentially removed during worksite raids. On February 3, at the request of the State of Washington, Judge Robart of the U.S. District Court for the Western District of Washington issued a temporary restraining order suspending enforcement of key parts of the executive order. The U.S. Department of Justice immediately appealed to the Ninth Circuit Court of Appeals requesting a stay of Judge Robart’s order. Six days later, on February 9, the Ninth Circuit unanimously rejected the administration’s arguments, including an argument that President Trump’s decision was unreviewable by a court of law, even if the President’s decision could violate constitutional rights.

While partisan shifts in policy-making and enforcement is nothing new in Washington, DC, what is disturbing for both employers and employees alike are growing reports of post-election acts of harassment and intimidation against racial minorities, immigrants and members of the LGBTQ community. According to the Southern Poverty Law Center, there are presently nine known organized hate groups in Oregon, including white nationalists and neo-Nazi movements based in Portland, Clackamas, Oregon City, Eugene, Ashland and elsewhere in the state. On a nationwide basis, 867 cases of harassment and intimidation were reported in the 10 days following the presidential election with incidents occurring in schools, businesses, public accommodations and workplaces. Experts also report



that incidents involving Muslims are much higher now than incidents occurring post-9/11. Of the 867 incident reports, 33 took place in Oregon, including work sites and places of business. Some of those persons may be your employees, and some of those persons may feel that the post-election environment is a permissive environment where divisive and exclusionary decisions, actions or language will or should be tolerated. A number of Oregon employers, large and small, have taken this as an opportunity to circulate a written statement to all employees that, in light of post-election incidents against certain categories of persons, intolerance, exclusion and marginalization are unacceptable and such conduct will be addressed appropriately.

In short, as the pre-Socratic Greek philosopher Heraclitus of Ephesus said, “The only thing that is constant is change.” Change is on its way in possibly sweeping fashion and, as good citizens of this great state, Oregon employers will meet those challenges with inclusive policies that allow all employees to contribute their value regardless of who they are, where they are from or what personal religious beliefs they hold. ■



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