Vol. 51 | No. 7 | July 2014

education | research | information

benefits

WEB exclusive

MAGAZINE

Stymied by Congress in efforts to pass legislation such as the Fair Minimum Wage and Paycheck Fairness Acts, President Obama has been using his executive powers to impact employment laws. Additional executive action may be on the way.

Obama's "Year of Action" and What It Means for Employers

by Brett E. Coburn and Kristen W. Fox

On May 3, 2014, in a weekly address, President Obama stated: "[I]n this Year of Action, whenever I can act on my own to create jobs and expand opportunity for more Americans, I will." The president's pledge refers to several employment-related executive orders and memoranda issued this year and suggests that more may be on the way.

Presidential memoranda and *executive orders* are directives issued by the president, pursuant to specific statutory or Constitutional authority, which do not require congressional approval. Since January of this year, the president has used executive power to impact employment laws in a number of ways, including raising the minimum wage for federal contractors and instructing the Department of Labor (DOL) to revise the white-collar exemption regulations of the Fair Labor Standards Act (FLSA). The executive actions follow on the heels of the administration's failed efforts to pass more comprehensive legislation, namely the Fair Minimum Wage and Paycheck Fairness Acts, which did not muster enough support to pass in Congress.

What does the president's self-proclaimed Year of Action mean for employers? Most obviously, for employers that contract with the federal government, it means an increase in employee wages, compensation transparency and additional reporting and record-keeping obligations, which we discuss below.

For other employers, the Year of Action reflects the Obama administration's aggressive employment-policy agenda and exemplifies the president's willingness to use his executive powers to advance this agenda without congressional support. The ultimate impact and reach of the president's employment agenda will turn, in large part, on the results of

the midterm elections. In the meantime, employers should familiarize themselves with the president's recent executive actions, the Fair Minimum Wage Act and the Paycheck Fairness Act, because this, to one extent or another, is the direction federal employment laws will take in the next two years.

Raising the Minimum Wage

On February 12, 2014, in Executive Order 13658, Obama increased the minimum wage for workers under new federal contracts from $7.25 to $10.10 an hour for nontipped workers and from $2.13 to $4.90 an hour for tipped workers. In addition, the order provides for annual increases in the minimum wage to account for inflation. For tipped workers, the minimum wage is to increase 85¢ per year until the tipped minimum wage reaches 70% of the regular minimum wage. The new minimum wages will become effective for new contracts, as opposed to existing or renewed contracts, entered into on or after January 1, 2015.

This executive order is almost identical to portions of the Fair Minimum Wage Act, a bill that would raise the minimum wage for the entire workforce, which Democrats have been trying to pass in Congress for nearly two years. While the act has been unsuccessful in Congress, employers should be aware that wage reformation is on its way in the states. Thirty-eight states have considered minimum wage bills this year, and eight of those states so far have enacted increases.[1] Connecticut, Maryland and the District of Columbia each passed some version of the Fair Minimum Wage Act, raising the minimum wage to $10.10 or higher and providing for annual inflation-indexed increases.

Although the president's executive order will have only marginal immediate impact when it goes into effect next year due to its limited application to federal contractors under new contracts only, it is part of the larger movement taking place in the states.

The bottom line for employers: The minimum wage is on the rise.

Updating and Modernizing Overtime Regulations

On March 13, 2014, in a presidential memorandum, Obama directed the Secretary of Labor to propose revisions "to modernize and streamline the existing overtime regulations" under the FLSA. The memorandum specifically referenced the *white-collar* exemptions in FLSA, which exempt certain executive, administrative and professional employees from the FLSA's minimum wage and overtime requirements.

Currently, to qualify for one of the white-collar exemptions, employees must be paid at least $455 per week on a salary basis, and their job must include certain duties, such as managerial or supervisory responsibility and advanced knowledge or independent judgment.[2] Although the president did not elaborate in his memorandum and has not spoken on the issue since, it is anticipated that the called-for "modernization" will include a raise in the salary threshold as well as revisions to the duties requirements that will make it harder to qualify under the white-collar exemptions.

The bad news for employers: Expensive uncertainty. Many employers have audited their workforce within the last few years and will have to go through that same expensive, time-consuming process again when new exemption regulations are adopted. If the salary threshold is increased under new regulations, employers will have to consider paying certain workers more money in order to retain their exempt status. Additionally, if the duties requirements change, employers will be faced with uncertainty and administrative burdens and costs in defending their FLSA classifications under the new regulations.

The good news for employers: You've got time. Any amendments to the existing white-collar exemptions are subject to the normal administrative rule making process, which requires DOL to formally propose a rule, give the public an opportunity to comment, consider making revisions based on those comments, await approval of the rule by the Office of Management and Budget (OMB) and then issue the final rule. At the very least, this process takes six months to a year, and it is likely there will be an additional six months to a year, or longer, before any new rules take effect.

Collecting Compensation Data

On April 8, 2014, in another presidential memorandum, Obama directed the Secretary of Labor to propose a rule that would require federal contractors and subcontractors "to submit to DOL summary data on the compensation paid their employees, including data by sex and race."

The memorandum states that effective enforcement of existing equal pay laws is impeded by a lack of "robust and reliable data" on employee compensation. The directive is part of the administration's equal pay initiative and has been in the works since the beginning of the president's second term. In 2011, the Office of Federal Contract Compliance Programs (OFCCP) gathered input from the public on the development and implementation of a compensation data collection tool, but never issued a proposed rule. The president's memorandum directs the secretary to propose a rule within 120 days. In early May, the OFCCP submitted a proposed rule to the OMB for approval. However, the proposed rule has not yet been made public for review and comment.

The memorandum discusses generally the development of a compensation data collection tool but provides no insight into the parameters of such tool. Until the OFCCP issues the regulations,

the impact is hard to evaluate. One main concern for employers with federal contracts is that the regulations may require federal contractors to present complex compensation data in an oversimplified manner that has the potential to be misleading and, thus, create potential liability.

The bottom line for employers: Keep an eye on the progression of this initiative and the impending proposed rule. The Obama administration may eventually make compensation data collection a requirement for all employers, and this could very well be the pilot program.

Prohibiting Retaliation for Disclosing Compensation Information

Along with the presidential memorandum on compensation data collection, on April 8 the president issued an executive order banning federal contractors from retaliating against employees who discuss their compensation with one another. The executive order provides that federal contractors "will not discharge or in any other manner discriminate against any employee or applicant for employment because such employer or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant."

This order is almost identical to provisions of the Paycheck Fairness Act, a bill that would amend the Equal Pay Act to revise remedies for, enforcement of and exceptions to prohibitions against sex discrimination in the payment of wages. Like the Fair Minimum Wage Act, the bill containing the Paycheck Fairness Act has had several unsuccessful jaunts in Congress and is not expected to pass while Republicans control Congress.

The antiretaliation order expands protections that may already be afforded under the amorphous language of Section 7 of the National Labor Relations Act (NLRA). Section 7 protects employees' rights to engage in concerted activities. The executive order's protections are broader than the NLRA in that the NLRA does not apply to management employees or employees of certain industries such as rail or airline carriers. But the protections are narrower in that the order applies only to employers that contract with the federal government. The Paycheck Fairness Act, however, if eventually successful, would apply nonretaliation prohibitions to the entire workforce.

The bottom line for employers: The main implication of the antiretaliation order is that employers that contract with the federal government can no longer enforce policies mandating the confidentiality of employee compensation information.[3] This is another initiative to watch. Depending on the outcome of the November elections, the Paycheck Fairness Act may be back on the table next spring.

What's Next?

There are still five months left in Obama's Year of Change. Government contractors should expect more use of executive power in areas where the president's employment policy goals have been halted by Congress. The Employment Non-Discrimination Act (ENDA), legislation that would essentially make sexual orientation a protected class under Title VII, has failed to pass in Congress on several occasions but is building momentum in states and municipalities. This may be the administration's next area of focus.

The president's Year of Action address, the executive orders and the presidential memoranda discussed in this article are available at www.whitehouse.gov.

Endnotes

1. National Conference of State Legislatures, State Minimum Wages (May 14, 2014), available at www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx.
2. See 29 C.F.R. Part 541.
3. Note that the order does include an exception for employees whose essential job functions permit them access to other workers' wage information and who disclose the compensation of other employees to individuals who do not otherwise have access to such data.

<< bios

Brett E. Coburn is a partner in the Atlanta, Georgia office of Alston & Bird LLP. His practice focuses on counseling and litigation relating to employment discrimination, wage and hour compliance and other employment-related issues. He also works with federal government contractors on issues relating to affirmative action compliance. Coburn also drafts employment agreements and advises clients on and litigates matters involving restrictive covenant enforcement and related business torts. He earned an A.B. degree from Princeton University and a J.D. degree from the University of Virginia.

Kristen W. Fox is an associate in Alston & Bird's labor and employment group in the Atlanta, Georgia office. Her employment practice includes compliance, counseling and litigation involving discrimination, medical leave, wage and hour, retaliation, noncompetition and breach-of-contract claims. Fox earned a B.A. degree in public policy from Vanderbilt University and a J.D. degree from the University of South Carolina School of Law.