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EMPLOYMENT LIMBO—A LABOR AND EMPLOYMENT LAW PERSPECTIVE ON THE TRANSITION FROM OBAMA TO TRUMP

*Patricia Griffith**

INTRODUCTION

When Donald Trump takes office as the 45th President of the United States, he will have the advantage of a Republican majority in both the U.S. House of Representatives and the Senate. Due to congressional deadlock during most of the Obama administration, many of the changes that impacted employers were implemented through Executive Orders and federal agency rulemaking. This means that Trump may be able to reverse many of the Obama administration's actions even without the assistance of a Republican controlled Congress. In other words, change is coming.

Where and when the change will come is difficult to predict. The most obvious areas to watch are the Affordable Care Act ("ACA") and immigration reform, which Trump addressed repeatedly throughout his campaign. However, other areas also appear just as ripe for change. For instance, the current National Labor Relations Board ("NLRB") has been one of the most activist entities in history. Significantly, two of its five seats are vacant and Trump is expected to fill those with Republican appointees, resulting in a Republican majority and a shift in the balance of power, policies, and enforcement coming from that agency. The Department of Labor ("DOL") has also issued several controversial regulations that Trump's administration will likely reverse or modify.

During the Obama administration, employers felt besieged due to increasing regulations and zealous agency enforcement. The Trump administration has the opportunity to assist employers by changing course and creating a more pro-business environment. However, until he and Congress begin to address specific issues like those discussed in this article, employers will continue to deal with the effects of the Obama administration's policies.

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I. ANALYSIS

A. *Healthcare Reform*

Donald Trump vowed to repeal the ACA (or “Obamacare”) repeatedly during his campaign.¹ Since his election he has maintained that the plan is to “repeal and replace” the ACA.² Whether Congress can actually repeal the ACA is not entirely settled given that the Republicans lack the supermajority necessary to defeat a Democratic filibuster in the Senate.³ Even assuming that the ACA is repealed, how a repeal would affect employers remains unclear.

Recently, Trump has suggested that his “repeal and replace” mantra may not apply wholesale and that he is open to keeping parts of the ACA intact.⁴ He has indicated that he is open to continuing the ACA’s coverage for pre-existing conditions and its provision allowing children up to age 26 to stay on their parents’ coverage.⁵ But he has not yet addressed the major issues employers face under the ACA. For example, will the employer mandate stay intact? What about the prohibition on employer reimbursement arrangements? These are just a few of the outstanding questions making employers anxious.

Given the historic Republican rhetoric towards the ACA, the healthcare arena of employment law will most likely undergo significant changes during the Trump administration. The expectation is that a Trump-GOP healthcare reform plan will be more employer friendly regardless of whether it comes by an amendment, repeal, or replacement to the ACA. However, for the time being the ACA is still the law and employers and their employees simply have little information to help them prepare for the coming changes. Thus, they must continue to ensure compliance with the ACA, but do so knowing that the current ACA may not be the law in the near future. Indeed, Trump has tapped Representative Tom Price of Georgia, an orthopedic surgeon, to become secretary of health and human services. Price has been a leading critic of the ACA and introduced bills offering a replacement plan.

¹ See Amy Goldstein, *Obamacare’s future in critical condition after Trump’s victory*, WASH. POST (Nov. 9, 2016), https://www.washingtonpost.com/national/health-science/acas-future-in-critical-condition-with-trumps-victory/2016/11/09/7c5587e8-a684-11e6-ba59-a7d93165c6d4_story.html.

² See Sarah Ferris, *Trump open to keeping ‘amended’ version of ObamaCare*, THE HILL (Nov. 11, 2016, 3:55 PM), <http://thehill.com/policy/healthcare/305630-trump-willing-to-keep-parts-of-obamacare>.

³ See *supra* note 1.

⁴ See *supra* note 2.

⁵ *Id.*

B. *Immigration Reform*

During his campaign, Trump was also vocal about his intent to reform the country's immigration policies.⁶ Unfortunately, this is another area where it is difficult to predict what specific changes are looming, especially with regard to employment law. Unlike with healthcare, though, employers should not expect Trump's immigrations plans to ease restrictions on businesses.

For example, Trump has proposed establishing a nationwide E-Verify system to electronically screen all new hires for their eligibility to work in the United States.⁷ Such a requirement would add another administrative burden for employers. For small businesses, this could delay getting crucial positions filled in a timely manner.

Trump has also been critical of the H category of visas. During a Republican presidential debate in March 2016, he stated: "I know the H-1B very well . . . it's very bad for our workers and it's unfair for our workers. And we should end it."⁸ This strongly suggests that H-1B reform is likely on the way, and Trump's pick of Alabama Senator Jeffrey Sessions for Attorney General, a vocal opponent of visa programs in general, seems to support that prediction. Notably, though, Trump has also expressed that it is important to maintain a mechanism for highly skilled immigrants to stay in the country.⁹

Trump's policies may also affect the H-2A temporary agricultural visa program. Unlike the H-1B program, Trump has not specifically targeted this area for reform, but his vow of mass deportations of illegal immigrants will undoubtedly affect the agricultural industry. In states such as Idaho more than a quarter of all agricultural workers are undocumented.¹⁰ Demand for H-2A workers has already grown in recent years, which has caused delays in the processing of applications and visa petitions.¹¹ Large-scale deportations would

⁶ See *Transcript of Donald Trump's Immigration Speech*, NY TIMES (Sept. 1, 2016), <http://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html>.

⁷ See Nick Corasaniti, *A Look at Trump's Immigration Plan, Then and Now*, NY TIMES (Aug. 31, 2016), <http://www.nytimes.com/interactive/2016/08/31/us/politics/donald-trump-immigration-changes.html>.

⁸ See Michelle Ye Hee Lee, *Donald Trump flip-flops, then flips and flops more on H-1B visas*, WASH. POST (Mar. 21, 2016), <https://www.washingtonpost.com/news/fact-checker/wp/2016/03/21/donald-trump-flip-flops-then-flips-and-flops-more-on-h-1b-visas/>.

⁹ *Id.*

¹⁰ See Bill Dentzer, *Trump Deportations could hit 1 in 4 Idaho ag workers*, IDAHO STATE JOURNAL (Nov. 19, 2016), http://idahostatejournal.com/news/local/trump-deportations-could-hit-in-idaho-ag-workers/article_53d92476-294f-5592-81b2-156b81cfbd9d.html.

¹¹ See Kristina Johnson, *Anxiety Among Farm Groups As Battle Lines Harden On Immigration Reform*, SUCCESSFUL FARMING MAGAZINE (Nov. 28, 2016), <http://www.agriculture.com/news/business/anxiety->

likely add even more stress to the administration of this visa program. Trump's administration could ease the burden on the agricultural industry by revamping the H-2A program to remove red tape and expedite the review process, but Trump has not yet expressed any specific intention to do so.¹²

Although Trump's official campaign position on immigration did not discuss specific reforms to the H category visas, he did state, "[W]e are going to suspend the issuance of visas to any place where adequate screening cannot occur."¹³ The campaign placed a particular emphasis on limiting Muslim immigration.¹⁴ In 2015, the United States issued over 6,000 H classification visas to citizens of Muslim-majority nations.¹⁵ This is a small percentage of total H visas, but potential regulations could reach beyond those nations to countries such as India, which has a Muslim population of over 170 million and internal issues with Islamic extremism.¹⁶

Depending on how vigorously a Trump administration acts to fulfill his promise to suspend visas, the number of available work visas could be significantly lower than in prior years. Employers that depend on the H visas to obtain laborers are on notice that a Trump administration could dramatically impact their ability to staff their needed workforce. But for now, they simply do not have enough information to effectively prepare for the potential changes.

C. National Labor Relations Board

The current NLRB has been active and decidedly pro-labor, issuing numerous decisions expanding union and worker protections and overruling decades of precedent.¹⁷ As a result, the NLRB has created an atmosphere of

among-farm-groups-as-battle-lines-harden-on-immigration-reform (noting that H-2A workers arrive on average twenty two days after the date they were most needed).

¹² See *Id.*

¹³ See *supra* note 6.

¹⁴ See Ed Pilkington, *Donald Trump: ban all Muslims entering US*, THE GUARDIAN (Dec. 7, 2015, 7:27 PM), <https://www.theguardian.com/us-news/2015/dec/07/donald-trump-ban-all-muslims-entering-us-san-bernardino-shooting>.

¹⁵ See *Table XVII (Part I) Nonimmigrant Visas Issued Fiscal Year 2015*, U.S. DEPT. OF STATE, <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2015AnnualReport/FY15AnnualReport-TableXVII.pdf>

¹⁶ See Conrad Hackett, *By 2050, India to have world's largest populations of Hindus and Muslims*, PEW RESEARCH (Apr. 21, 2015), <http://www.pewresearch.org/fact-tank/2015/04/21/by-2050-india-to-have-worlds-largest-populations-of-hindus-and-muslims/>.

¹⁷ See e.g. *Am. Baptist Homes of the W.*, 362 NLRB No. 139 (June 26, 2015) (overturning 34-year precedent exempting witness statements from employer's obligation to honor union requests for information);

uncertainty, and employers are frequently left a step behind in attempts to comply with the creative interpretations of the National Labor Relations Act (“NLRA”) propounded by the agency. For example, the NLRB has taken extreme positions with regard to employer handbook policies.¹⁸ In *Chipotle Services*, the NLRB found that Chipotle’s social media policy violated the NLRA.¹⁹ Specifically, the NLRB found unlawful the policy’s language prohibiting employees from making “disparaging, false, misleading, harassing or discriminatory statements about or relating to Chipotle, our employees, suppliers, customers, competition, or investors.”²⁰ The agency affirmed the administrative law judge’s conclusion that an employee would reasonably read the policy as a prohibition of lawful activity protected by the NLRA (i.e. discussing terms and conditions of employment).²¹ The NLRB also affirmed the administrative law judge’s decision that employers cannot prohibit mere false or misleading posts, but must show that the employee had a malicious motive.²² Importantly, the NLRB found insufficient the policy’s disclaimer stating, “This code does not restrict any activity that is protected or restricted by the National Labor Relations Act, whistleblower laws, or any other privacy rights.”²³

Another example of the NLRB’s recent controversial positions are the rules it adopted in 2014 that substantially expedite the union election process.²⁴ Under the previous rules, the standard election period was around forty days, but the new rules allow an election to occur in under twenty days.²⁵ The rules were criticized for allowing “ambush elections,” giving employers little time to respond. The rules survived various court challenges and a Congressional

In Re Wkyc-TV, Inc., 359 NLRB No. 30 (Dec. 12, 2012) (overturning 50-year precedent regarding union dues-checkoff provisions).

¹⁸ See e.g. *Chipotle Servs. LLC d/b/a Chipotle Mexican Grill & Pennsylvania Workers Org. Comm., A Project of the Fast Food Workers Comm.*, 364 NLRB No. 72 (Aug. 18, 2016); *Novelis Corp. & United Steel, Paper & Forestry, Rubber Mfg., Energy, Allied Indus. & Serv. Workers, Int’l Union, AFL-CIO Novelis Corp. & United Steel, Paper & Forestry, Rubber Mfg., Energy, Allied Indus. & Serv. Workers, Int’l Union, Afl-Cio*, 364 NLRB No. 101 (Aug. 26, 2016) (finding that a social media policy was unlawful based on the following language: “Anything that an employee posts online that potentially can tarnish the Company’s image ultimately will be the employee’s responsibility . . . taking public positions online that are counter to the Company’s interest might cause conflict and be subject to disciplinary action.”)

¹⁹ *Chipotle Servs.*, 364 NLRB No. 72.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ See 79 Fed. Reg. 74,308.

²⁵ See *id.*; *Median Days from Petition to Election*, NLRB, <http://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election> (last visited Nov. 29, 2016).

resolution,²⁶ and the GOP would have already overturned the rules if not for a presidential veto.

While Trump cannot immediately reverse the decisions of the current NLRB, as mentioned above, he is expected to fill two vacant seats with more business-friendly members. Thus, a number of the recent NLRB rules and interpretations are expected to be reversed or significantly modified. Trump's administration may also jumpstart the Employee Rights Act (the "ERA") which has languished in Congress for over a year.²⁷ Among other things, the ERA would require the use of a secret ballot election in determining whether employees want a union, eliminating the use of card-check elections.²⁸ It would also require unions to win by a majority of all workers, instead of a majority of voters, as is the current practice.²⁹ Additionally, the ERA would require disputes over voter eligibility to be resolved prior to the election instead of after the election. And, the ERA would require a new election if the unionized workforce has turned over by more than 50 percent since the last union election.³⁰ Efforts to pass the ERA, however, may be met with a Democratic filibuster in the Senate.

Whether it is through a shifting of NLRB power or legislative actions, we can expect significant changes for the NLRB.

D. DOL Regulations

The DOL has recently issued two controversial regulations that substantially impact many employers. In March 2016, the DOL finalized a new rule entitled "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act" (the "Persuader Rule").³¹ And in May 2016, the DOL published a final rule updating the regulations regarding the exemptions to the Fair Labor Standards Act's overtime pay requirements.³² Both of these rules have received a high degree of pushback,

²⁶ See e.g. *Associated Builders & Contractors of Texas, Inc. v. Nat'l Labor Relations Bd.*, 826 F.3d 215, 218 (5th Cir. 2016); Gregory Korte, *Obama's fourth veto protects unionization rules*, USA TODAY (Mar. 31, 2015, 12:53 PM), <http://www.usatoday.com/story/news/politics/2015/03/31/obama-nlr-unionization-ambush-election/70718822/>.

²⁷ See Employee Rights Act, S. 1874, 114th Cong. (2015).

²⁸ See *id.*

²⁹ See *id.*

³⁰ See *id.*

³¹ See *Nat'l Fed' of Indep. Bus. v. Perez*, No. 5:16-CV-00066-C, 2016 WL 3766121, at *2 (N.D. Tex. June 27, 2016).

³² See *Nevada v. Dept. of Labor*, E.D. Tex., No. 4:16-cv-00731 (E.D. Tex. Nov. 22, 2016).

and both have been recently enjoined by federal courts.³³ The DOL has also made other recent changes impacting the workplace.

1. *The Persuader Rule*

Section 203 of the Labor Management Reporting and Disclosure Act (“LMRDA”) requires the disclosure of any agreements or arrangements made between employers and labor relations consultants to persuade employees to oppose unionization.³⁴ However, the statute also contains an exemption to the disclosure requirement “where a consultant, including attorneys, provides only advice to the employer.”³⁵ Until the issuance of the new Persuader Rule, the DOL had long interpreted the advice exemption to apply where: (1) the consultant did not communicate directly with bargaining unit employees; and (2) the employer was free to accept or reject the consultant’s advice.³⁶

The Persuader Rule substantially narrows the advice exemption to the LMRDA, and specifically requires reporting where:

(1) A consultant engages in direct contact or communication with any employee with an object to persuade such employee; or

(2) A consultant who has no direct contact with employees undertakes the following activities with an object to persuade employee;

- Plans, directs, or coordinates activities undertaken by supervisors or other employer representatives, including meetings and interactions with employees;
- Provides material or communications to the employer, in oral, written, or electronic form, for dissemination or distribution to employees;
- Conducts a seminar for supervisors or other employer representatives; or
- Develops or implements personnel policies, practices, or actions for the employer.³⁷

This new interpretation of the advice exemption, which arguably encompasses advice from labor lawyers to their clients, received a significant

³³ See *Nat’l Fed’n of Indep. Bus. v. Perez* at *2.

³⁴ See 29 U.S.C. §433(a).

³⁵ See *Nat’l Fed’n of Indep. Bus. v. Perez* at *17; see 29 U.S.C. §433(a).

³⁶ *Id.* at *18; see also LMRDA Interpretative Manual Entry § 265.005 (Jan. 19, 1962).

³⁷ *Id.* at *20.

amount of criticism, including criticism from groups such as the American Bar Association that expressly do not take a position as to the “union-versus-management” dispute.³⁸ The National Federation of Independent Business led a challenge to the regulation in court, and on June 27, 2016, a federal district court temporarily enjoined its enforcement on the grounds that it is inconsistent with the LMRDA and possibly the United States Constitution.³⁹ On November 16, 2016, the district court entered a permanent, nationwide injunction prohibiting enforcement of the Persuader Rule.⁴⁰

With the permanent injunction and the impending Trump presidency, the Persuader Rule is likely dead already. The DOL could appeal the decision, but that process would likely take months and run well into the Trump administration.

2. *New Rule on White Collar Overtime Pay Exemptions*

The FLSA generally requires employers to pay overtime wages to all employees, unless one of the statutory exemptions applies.⁴¹ The DOL’s new overtime regulation substantially narrows the Executive, Administrative, and Professional exemptions (i.e., the “white collar” exemptions) to the FLSA. To qualify for one of the white collar exemptions, the employee must meet a (1) salary basis test, (2) salary level test *and* (3) duties test.⁴² The salary basis and duties tests remained unchanged under the new rule, but the new rule drastically raises the bar for the salary level test. In fact, the new rule more than doubles the minimum salary level threshold.⁴³

Previously, the DOL required an employee to receive a minimum salary of \$455 per week (\$23,660 annually) in order to qualify for a white collar exemption.⁴⁴ Under the new rule, though, an employee must receive a minimum salary of \$913 per week (\$47,476 annually).⁴⁵ The new rule ties the minimum salary level to the 40th percentile of weekly earnings of full time salaried workers in the lowest wage region in the country.⁴⁶

³⁸ *Id.* at *7.

³⁹ *See id.*

⁴⁰ *See Nat’l Fed’n of Independent Bus. v. Perez*, N.D. Tex., No. 16-cv-066 (Nov. 16, 2016).

⁴¹ *See Nevada v. Dept. of Labor*.

⁴² *See id.*

⁴³ *See id.*

⁴⁴ *See id.*

⁴⁵ *See id.*

⁴⁶ *See id.*

The DOL estimates that the new rule will bring over four million employees under the minimum wage and overtime requirements of the FLSA.⁴⁷ This placed a significant burden on employers to ensure compliance with the regulation before it was set to become effective on December 1, 2016. But the time and resources invested by employers to comply with the new overtime rule may have been wasted.

On November 22, 2016, a federal district court issued a preliminary, nationwide injunction temporarily prohibiting enforcement of the overtime rule.⁴⁸ The states and business groups that brought this lawsuit against the DOL argued that the new regulation disregarded the FLSA's white collar exemptions by creating a de facto salary-only test.⁴⁹ United States District Judge Amos Mazzant, an Obama appointee, agreed with the plaintiffs' argument.⁵⁰ Judge Mazzant stated in his decision, "Congress defined the [white collar] exemption with regard to duties, which does not include a minimum salary level . . . The [DOL] exceeds its delegated authority and ignores Congress's intent by raising the minimum salary level such that it supplants the duties test."⁵¹

At this point, then, the DOL's overtime regulation has been put on hold. Importantly though, unlike with the Persuader Rule, the judge has only issued a temporary injunction, not a permanent one.⁵² So, while employers may welcome the fact that the new regulation may not go into effect on December 1, 2016, they must still deal with the reality that enforcement is only delayed until the court makes a final determination on the merits of the case. Based on the court's language, however, it appears likely that the court will strike down the regulation. That decision will likely be appealed. Trump could then choose not to pursue the appeal and thereby kill the regulation without further action. Moreover, even if the new rule were to survive the legal hurdles it now faces, Trump could still overturn or modify the rule's requirements through the rulemaking procedures.

⁴⁷ See Noam Scheiber, *White House Increases Overtime Eligibility by Millions*, NY TIMES (May 17, 2016), <http://www.nytimes.com/2016/05/18/business/white-house-increases-overtime-eligibility-by-millions.html>.

⁴⁸ See *Nevada v. Dept. of Labor*.

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ *Id.*

⁵² See *supra* Section I.D.1.

Regardless, the overtime regulation is a clear example of the problem facing employers during this transition phase. Employers have made great efforts to comply with a regulation that may never even be the law of the land. Obviously, this is a planning and budgeting nightmare for all businesses, regardless of size.

3. OSHA New Retaliation Rule

In May 2016, the DOL announced a new rule regarding employer procedures on reporting violations under the Occupational Safety and Health Act (the “Act”).⁵³ Section 11(c) of the Act prohibits retaliation against an employee for reporting a violation; however, the Occupational Safety and Health Administration (“OSHA”) historically acted under that provision if the employee filed a complaint.⁵⁴ The new rule allows OSHA to cite an employer for violations even where an employee has not filed a complaint.⁵⁵

According to OSHA, “nothing in the final rule prohibits employers from disciplining employees for violating legitimate safety rules, even if the same employee who violated the safety rule also was injured as a result of that violation and reported that injury or illness.”⁵⁶ The emphasis of the rule is that an employer cannot take adverse action against an employee simply because the employee reported a work-related injury or illness. The rule particularly affects employers in two situations: post-incident drug testing and safety incentive programs.

Although the new OSHA rule does not ban drug testing after a workplace incident, it does prohibit the use or threat of drug testing as a form of adverse action against employees who report injuries or illnesses.⁵⁷ OSHA’s policy is that post-incident drug testing should be limited to situations in which the employee’s drug use likely contributed to the incident and the drug test can accurately identify the impairment caused by drug use.⁵⁸ Thus, rather than the automatic, across-the-board policy of post-incident drug testing in place at many work sites, OSHA now requires a “reasonable possibility that drug use

⁵³ See 81 FR § 29623.

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ *Id.*

⁵⁷ See *id.*

⁵⁸ See *id.*

by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing.”⁵⁹

In the new rule, OSHA has also reiterated its previous concern that safety incentive programs may violate the law.⁶⁰ Thus, the new rule makes it a violation for an employer to use an incentive program to take adverse action, including denying a benefit, because an employee reports a work-related injury or illness, such as disqualifying the employee for a monetary bonus or any other action that would discourage or deter a reasonable employee from reporting the work-related injury or illness.⁶¹ Thus, while employers may still have an incentive program that makes a reward contingent upon following legitimate safety rules, the practicalities of creating and implementing such a nuanced program that would pass muster under the currently-constituted agency are not straightforward.⁶²

Trump campaigned on reducing regulations, and the OSHA regulations like this new reporting rule will almost certainly be under review.⁶³ How Trump’s administration handles this regulation could have a significant effect on the whistleblower protections enforced by OSHA.⁶⁴ The new rule has shifted the standard in a way that favors whistleblowers and places a greater burden on employers. It is very possible that a Trump DOL will reverse course.

CONCLUSION

During this Transition period from President Obama to President Trump, employers are stuck in limbo on many issues. Employers must take affirmative steps to comply with laws that may only be enforced for a few months or not at all. This leads to wasted time and resources, and creates uncertainty.

Notably, the uncertainty surrounding the employment laws and regulations does not just affect employers. Beyond any macroeconomic implications, employees must also deal with the negative impacts of the uncertain regulatory environment. Just as employers struggle to plan ahead, employees are wary of

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ *Id.*

⁶² *See id.*

⁶³ *See* Chris Kaufman, *Republican Trump says 70 percent of federal regulations ‘can go’*, REUTERS (Oct. 7, 2016, 6:28 AM), <http://www.reuters.com/article/us-usa-election-trump-regulations-idUSKCN12629R>.

⁶⁴ *See* Sandy Smith, *Transitioning to a Trump Administration: What It Could Mean for the Department of Labor and OSHA*, EHS TODAY (Nov. 10, 2016), <http://ehstoday.com/msha/transitioning-trump-administration-what-it-could-mean-department-labor-and-osa-0>.

how changes in the law may impact them. For example, employees may be concerned about the future of their employer-provided health insurance plan if the employer mandate provision of the ACA is repealed. As another example, employees who had expected a salary increase in order to maintain their exempt status may no longer see that raise. At the very least, employees may experience the same inability to budget and plan as their employers.

In short, while it is premature to state what Trump's priorities will be and whether or how quickly he can implement them, Trump has promised to bring significant changes to the federal government that will undoubtedly affect the landscape of labor and employment law. Employers will likely welcome many of the changes to come. But potential changes of this magnitude come at a cost because they have handicapped everyone's ability to plan ahead with any certainty.