

CFMGMA

*The Next Four Years: What Employers Can
Expect During the Trump Administration*

Presented by: Rachel D. Gebaide

407-418-6258 ●●● rachel.gebaide@lowndes-law.com

www.lowndes-law.com

March 8, 2017

The Next Four Years: What Employers Can Expect During the Trump Administration



Immigration and the Future of the I-9
The DOL Overtime Rule
Shifting Focus at the EEOC
NLRB in the Non-Union Workplace
Best Practices in any Administration

Immigration and the Future of the I-9

In Process During Previous Administration:

New Form I-9: <https://www.uscis.gov/i-9>

- Effective 11/14/16
- Required 1/22/17
- Expires 8/31/19



Employers must use the new Form I-9:

- For all new hires on or after 1/22/17
- For Section 3 reverifications of any employee on or after 1/22/17 even if the initial Form I-9 is an older version.

Existing storage/retention rules for all previously completed Forms I-9 remain in effect.

Immigration and the Future of the I-9

Existing storage/retention rules for all previously completed Forms I-9 remain in effect.

One or more of the following is an acceptable method of storage:

- Paper
- Microfilm or microfiche
- Electronically

Copies of documents are not required to be collected.

- But if you do, keep the copy with the Form I-9

Storage:

- Personnel files not prohibited but may not be best method
- Forms I-9 must be produced for inspection within 3 business days

Retention: Keep each employee's Form I-9 the longer of:

- One year after termination of employment or
- Three years after date of hire.



Immigration and the Future of the I-9

U.S. Citizenship and Immigration Services (USCIS) Suspends Expedited Processing for H-1B Visa Applications

- H-1B for highly skilled foreign workers (i.e., architecture, mathematics, education, theology, law, engineering, physical and social sciences, medicine and health, accounting and other fields requiring specialized knowledge).
- Starting April 3, 2017, USCIS will temporarily **suspend premium processing** for all H-1B petitions *filed on or after April 3, 2017*.
- Suspension may last up to 6 months. USCIS will notify the public before resuming premium processing for H-1B petitions.
- Reasons Given:
 - Process long-pending petitions, which we have currently been unable to process due to the high volume of incoming petitions and the significant surge in premium processing requests over the past few years; and
 - Prioritize adjudication of H-1B extension of status cases that are nearing the 240 day mark.

Immigration and the Future of the I-9

March 6, 2017 Executive Order: Travel Ban Update

Directly affects citizens of the following countries:

- Iran, Syria, Sudan, Libya, Yemen and Somalia.

Exempts:

- Permanent residents a/k/a Green Card Holders
- Current visa holders

No longer includes language offering preferential status to persecuted religious minorities.

Replaced indefinite ban on refugees from Syria with a 120-day freeze that requires review and renewal.

The Fate of the DOL Overtime Rule



The Fate of the DOL Overtime Rule

Common Overtime Exemptions

- Executive
- Administrative
- Professional
- Computer

Required Elements for (Most) Exemptions

- Salary or Fee Basis
- Duties Test

The Fate of the DOL's Overtime Rule

The Salary Basis for Overtime Exemptions: A History of (Attempted) Change

Prior to August 23, 2004

- \$155/week (\$8,060 annually)

August 23, 2004

- \$455/week (\$23,660 annually)

December 1, 2016

- \$913/week (\$47,476 annually)
- Adjusted every three (3) years on 150 days' notice
 - January 1, 2020, 2023, 2026, etc.

The Fate of the DOL's Overtime Rule

What Was Not Going to Change Under New Rule?

- \$27.63/hour option for computer professionals
- Salary basis does not apply to doctors, lawyers, teachers, or outside sales employees
- 7(i) exemption formula for inside sales employees

Most significantly:

- ***The duties tests for all exemptions was not--and has not--changed!***

The Fate of the DOL's Overtime Rule

November 8, 2016



The Fate of the DOL's Overtime Rule

November 22, 2016

December 1, 2016

- \$913/week (\$47,476 annually)
- Adjusted every three (3) years on 150 days' notice
 - January 1, 2020, 2023, 2026, etc

**Injunction Entered November 22, 2016
Blocks New Rule**

The Fate of the DOL's Overtime Rule

January 20, 2017



The Fate of the DOL's Overtime Rule

What Now?

- President Expected to Roll Back Highly Regulated Landscape
- Secretary of DOL Nominee Andrew Puzder (Withdrawn)
- New Nominee: Alex Acosta (Awaiting Approval)
- Appeal of Injunction is Fully Briefed, BUT:
 - Will DOL Withdraw Appeal?
 - Will DOL Issue New, Less “Onerous” Regulations?
- DOL was granted an extension until May 1, 2017, to file its briefs in support of the new overtime rules.
 - At first, the DOL asked for an expedited appeal, hoping to get a quick decision on the fate of the rule.
 - But now, under the new administration, two requests for extensions have been filed and granted.
 - DOL: Additional time is “necessary to allow incoming leadership personnel adequate time to consider the issues.”
- Stay Tuned!

Shifting Focus at the EEOC

Victoria Lipnic – Acting Chair

- An acting chair appointment is not necessarily for the long term, but Lipnic may be confirmed.
- She is described by an attorney at a national employment law firm as “very thoughtful, smart and balanced. She cares deeply about the laws and employees' rights under them” but also “understands business realities.”



Shifting Focus at the EEOC

- Shifting Resources
 - Increased scrutiny of, and reduction to, budget
 - Similar to previous Republican administrations
- Shifting Focus Away from Priorities of Previous Administration
 - Equal pay
 - Lilly Ledbetter Fair Pay Act
 - EEO-1: Requires most federal contractors and large employers (100+) to provide data on pay ranges and hours worked in relation to demographic information (Starting March 31, 2018).
 - VP Pence has publicly opposed new pay equity legislation

Shifting Focus at the EEOC

- Shifting Focus Away from Priorities of Previous Administration
 - Expanded scope of Title VII
 - Sexual orientation and gender identity
 - Gender nonconformity/transgender rights
 - EEOC lost case at trial
 - EEOC appealing decision
 - Concern that EEOC would withdraw after Inauguration Day (did not happen)
- Shifting Procedures
 - Possible restrictions on autonomy of EEOC District Offices in decisions to settle or litigate.
 - Increased accountability/transparency regarding conciliation and litigation.
 - Possible requirement for EEOC to make good faith efforts to resolve “cause” findings by bona fide conciliation.
 - Focus on backlog of unresolved cases.

NLRB in the Non-Union Workplace

Philip A. Miscimarra – Acting Chair

- An acting chair appointment is not necessarily for the long term, but Miscimarra may be confirmed.
- “I remain committed to the task that Congress has assigned to the Board, which is to foster stability and to apply the National Labor Relations Act in an *even-handed manner* that serves the interests of employees, *employers* and unions throughout the country.”
(emphasis added)



NLRB in the Non-Union Workplace

The NLRA guarantees the right of (almost all) non-management employees:

- To **organize and bargain collectively** with their employers, and
- To engage in other **protected concerted activity**.

Protected concerted activity includes, but is not limited to:

- **Discuss terms and conditions of employment** or union organizing **with co-workers** or a union.
- Take action with one or more co-workers to improve working conditions by, among other means, **raising work-related complaints directly with employer** or with a government agency, and seeking help from a union.

NLRB in the Non-Union Workplace

Policies and Practices Under NLRB Scrutiny

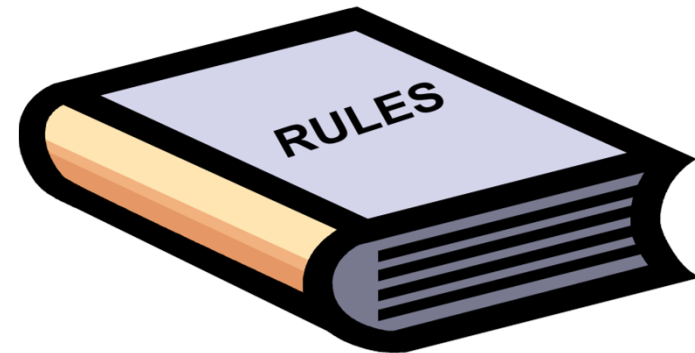
Employee Handbook Acknowledgments

Statements of “At Will” Employment

Non-Disparagement Policies

Social Media Policies

Confidentiality Policies



What is the Problem???

Concern is that the documents contain language that could reasonably be construed to “chill” an employee’s exercise of their right to engage in “protected concerted activity.”

NLRB in the Non-Union Workplace

Employee Handbook Acknowledgements

Statements of “At Will” Employment

Nothing contained in this Handbook is intended to nor does it create a contract of employment for any specific duration. I understand and agree that my employment can be terminated with or without cause and with or without notice at any time at the option of either me or the practice. I understand that no employee of ABC Medical Group has the authority to enter into any agreement for employment for any specified period of time or to make any agreement contrary to the foregoing **and that any such agreement for employment for any specific duration must be in writing and signed by me and the President of ABC Medical Group.**

Language in bold is considered an unfair labor practice: interference with Section 7 right to bargain collectively, among other rights.

NLRB in the Non-Union Workplace

Confidentiality Rules: What is Not Allowed?

The following rules have been declared “Unfair Labor Practices” by the NLRB:

Rule: Do not discuss "customer or employee information" outside of work, including "phone numbers [and] addresses."

Rule: You must not disclose proprietary or confidential information about [the Employer, or] other associates (if the proprietary or confidential information relating to [the Employer's] associates was obtained in violation of law or lawful Company policy).

Rule: Never publish or disclose [the Employer's] or another's confidential or other proprietary information. Never publish or report on conversations that are meant to be private or internal to [the Employer].

NLRB in the Non-Union Workplace

Confidentiality Rules: What is Allowed?

The following rules have been declared acceptable (not an unfair labor practice) by the NLRB because they do not reference information regarding employees or employee terms and conditions of employment; the term “confidential” is not defined in an overbroad manner:

Rule: No unauthorized disclosure of "business 'secrets' or other confidential information.

Rule: Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside [Employer] is cause for disciplinary action, including termination.

Rule: Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers.

NLRB in the Non-Union Workplace

Solicitation Rules:

Rule: Employees may not solicit for any purpose during business hours.

NLRB: Unfair Labor Practice

The rule impermissibly interferes with an employee's right to solicit coworkers during breaks or other non-working time to join a union.

Rule: Employees may not solicit for any purpose during working time.

NLRB: Permissible, provided that the rule is enforced in a non-discriminatory manner. This means that employees may not sell Girl Scout cookies or chocolate for their child's band by leaving a sign-up sheet or box of chocolate at their desk if a sign up sheet to attend a union organizing meeting would be prohibited.

NLRB in the Non-Union Workplace

Social Media Policy:

- Adopt a **friendly tone** when engaging online. **Don't pick fights**. Social media is about conversations.
- When engaging with others online, adopt a warm and friendly tone that will encourage others to respond to your postings and join your conversation.
- Remember to communicate in a professional tone. . . . This includes not only the obvious (no ethnic slurs, personal insults, obscenity, etc.) but also proper consideration of privacy and **topics that may be considered objectionable or inflammatory—such as politics and religion**.
- Don't make any comments about [Employer's] customers, suppliers or competitors that might be considered defamatory.

Interference with right to engage in protected concerted activity!

NLRB in the Non-Union Workplace

Board Appointments:

- The President must act quickly and with success or the NLRB will be unable to take certain actions.
- The NLRB must have a three-member quorum to decide and take final action in unfair labor practice proceedings and union election cases.
- Without replacement board members, the board would be unable to act, but the acting or new general counsel and regional directors would still be able to pursue actions.

Shifting Focus:

- Possibly abandon efforts to increase joint employer liability
- Possibly scale back efforts to regulate alleged interference with Section 7 rights to engage in protected concerted activity.
- The NLRA/NLRB may not be a Trump Administration priority.

Best Practices for Your Practice (In Any Administration)

I-9 Audit

- Completed Forms
- Correct Storage

FLSA: Audit Wage/Hour Practices

- Correct Classification
- Correct Pay

Employee Handbook and Other Personnel Policies

- Are policies enforced as written?
- Do policies, as written, constitute an unfair labor practice?
- All applicable notices included and/or posted?

Evaluate HR Decisions Based on Facts and Circumstances

- Document, Document, Document!”

WHAT'S ON YOUR MIND?

QUESTIONS?

Thank You!

www.theemployerlawyers.com