

What Can Be Done with Employment Regulation Under the Trump Administration

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PRACTICE AREAS

Employment and Labor

Now that President Trump's first 100 days in office has begun and his administration turns to policy and legal decisions. President Trump has stated that he plans to cut "regulations by 75 percent," which leaves many wondering what will happen to the labor and employment regulations issued under the Obama Administration. Although it is impossible to predict with certainty, a federal law known as the Administrative Procedure Act (the "APA") provides some guidance.

As an initial matter, although Congress passes legislation (i.e. statutes), regulations are made and promulgated by agencies empowered by Congress to do so. Most regulations are issued by one or more federal agencies through a process known as "notice and comment rulemaking" pursuant to which the issuing agency must provide the public with notice of what it intends to do and the opportunity to comment on the proposed action before the action may be finalized and given the force and effect of law. Examples of recent notice and comment regulations include the Department of Labor's (the "DOL") revised overtime regulations and the Occupational Safety and Health Administration's ("OSHA") final rule regarding tracking of workplace injuries and illnesses (please see our previous NewsFlashes for more information on both final rules).

Hypothetically, what would be required for the Trump Administration to repeal or rescind a regulation? In order for the Trump Administration, acting through an "agency" (i.e. OSHA or the DOL), to repeal a regulation promulgated

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pursuant to notice and comment rulemaking, the APA requires the following steps:

First, the agency would have to notify the public that it intends to repeal the current regulation. Then, the agency must give the public the opportunity to comment on the rescission of the regulation. These comments typically involve interested groups or organizations submitting data, views, or arguments for or against the proposed action. After the period of comments closes, the agency must respond to the significant comments received during the public comment period.

Additionally, when an agency rescinds a regulation it is “obligated to supply a reasoned analysis for the change”¹ At times, this explanation may be as simple as the agency, under a new President, has a different view of the appropriate role of government. However, if in rescinding the regulation, the agency is disregarding the factual findings that supported the prior regulation, or industries and stakeholders have developed a serious reliance on the prior regulation, the agency would be required to provide a more detailed justification for the rescission.

So, what does this mean for employers? At the most basic level, it means that regulations issued pursuant to the notice and comment process cannot be repealed by the stroke of a pen, but rather only through another round of notice and comment rulemaking, a process that takes time. At a minimum, regulations issued under the Obama Administration will survive until a new round of notice and comment rulemaking has been completed. Based on the amount of time notice and comment rulemaking usually takes, it is unlikely that any significant regulations will be rescinded or changed until late 2017 or early 2018. In the end, employers should be prepared to live with a number of the labor and employment regulations issued under the Obama Administration (at least in the short-term), notwithstanding the change in the White House.

We will continue to monitor these issues and include updates in future NewsFlashes. If you have any questions about these or other issues, please feel free to contact a member of Koley Jessen’s Employment, Labor and Benefits Practice Group.

¹ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983).