

Employment Law Update December 2012

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The Impact of Obama's Re-election on Employers

By: Jennifer Craighead Carey

Now that the November Presidential election is behind us, many employers are asking: What impact will President Obama's re-election have on employers? Obama's first term brought an increased focus on enforcement over conciliation by agencies enforcing federal employment laws. It is likely this focus will continue. Here are a few key areas that will continue to receive heightened attention during Obama's second term.

OFCCP During Obama's first term, the Office of Federal Contract Compliance Programs (OFCCP) proposed regulations that would impact government contractors. Among these were proposals to increase pressure on contractors to hire Veterans and the disabled, including setting utilization goals for such groups, such as a target hiring goal of 7% of each job group for individuals with disabilities. While these proposals have set off a firestorm of controversy among the contractor community, it is likely that some final form of regulations will be forthcoming. In addition, the OFCCP has made compensation its primary audit focus and while its recovery in this arena has been disproportionately small relative to its budget expenditures, it is likely the OFCCP will continue to make compensation a priority. Government contractors should watch for final regulations on Veterans and the disabled down the road. In addition, contractors would be wise to consult with legal counsel about their compensation requirements.

NLRB During Obama's first term, the National Labor Relations Board (NLRB) has taken an expansive position on Section 7 rights under the National Labor Relations Act (NLRA). Section 7 guarantees the right of all employees, including non-unionized workers, to engage in group activity to advance the terms and conditions of their employment, including discussing wages, hours, and working conditions. Under Obama, the NLRB has invalidated employer social media policies that appear to limit what employees can say over social media, and certain employer rules that prohibit employees from discussing ongoing internal investigations with coworkers. It is likely the NLRB will continue to aggressively pursue employer policies and

practices which it perceives as having a chilling effect on employees' Section 7 rights. Employers should consider reviewing their employee handbooks in consultation with legal counsel to mitigate the risk of unfair labor practice charges.

EEOC Under the Obama administration, the EEOC has aggressively pursued its systemic discrimination initiative, in many cases using a charge by a single employee as the launching pad to conduct facility-wide investigations. Some believe Obama's re-election will embolden the EEOC further. Additionally, prior to Obama's re-election, the EEOC announced in September of 2012 a proposed Strategic Enforcement Plan (SEP). The SEP targeted, among other issues, eliminating systemic barriers to hiring and recruitment, LGBT (lesbian, gay, bi-sexual, and transgender) coverage under Title VII's existing sex discrimination provisions, and employers who fail to accommodate pregnant females with work restrictions through forced leaves of absence. Employers should review their policies and practices on hiring, disability accommodation, pregnancy, and harassment to avoid potential class action lawsuits.

Immigration It is likely President Obama will push for comprehensive federal immigration reform, capitalizing on the support he received from the Latino community during the election. The format of that reform remains to be seen. Employers should continue to monitor changes in the law which may impact, both favorably and unfavorably, their business operations.

Healthcare President Obama will continue to implement the Patient Protection and Affordable Care Act (PPACA) that he signed into law on March 23, 2010. There are a host of provisions in the law that will take effect in the next two years. Employers should be mindful of the compliance deadlines and consult legal counsel to ensure they meet the PPACA's requirements.

These represent a cross section of the key areas where Obama's re-election is likely to impact employers. It is also likely that enforcement will continue to be a key priority of government agencies in the coming four years. Employers must be vigilant ensuring that their employment practices comply with federal regulatory requirements. For compliance assistance in any or all of the above areas, please contact a member of our employment law group.

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New Legislation Could Equal Big \$\$ for Big Employers

By: Dara C. Bachman

On October 25, 2012, Governor Corbett signed the Promoting Employment Across Pennsylvania Act (PEP) in an effort to attract employers to-and create jobs in-the Commonwealth. The PEP allows eligible employers to retain 95% of the withholding taxes paid by its new employees (up to \$5 million per year) over the course of up to ten years. To be eligible, a company must:

- Be a for-profit entity;
- Agree to create at least 250 new jobs in Pennsylvania within five years of the date an agreement is reached with the Department of Community and Economic Development (DCED), 100 of which must be hired within the first two years;

- Offer health insurance coverage to its full-time employees and pay at least half the premium; and
- Not be delinquent on any taxes to the Federal government, the Commonwealth, or any political subdivision.

Companies that meet these criteria should apply to the DCED, which will determine within 30 days whether the company is eligible to participate. If the company is eligible, the DCED and the company will enter into an agreement outlining the required terms for the company to retain its employees' withholding taxes. DCED will then have an ongoing responsibility to report the company's continuing eligibility to the Department of Revenue each taxable year. The company will have a quarterly responsibility to report their compliance to the Department of Revenue. In addition, the company must clearly disclose its participation in the PEP to any employee whose withholding taxes will be retained.

The amount of time a company will be permitted to retain its new employees' withholding depends upon the wages paid to the new employees in comparison to the average annual wage paid to employees in the county, as reported by the Center for Workforce Information and Analysis. If new employees' wages meet or exceed the county average wage, the company may retain the withholding taxes during a seven to ten year period, depending upon how much the new employee is paid.

But if the company fails to comply with the PEP's requirements, the agreement with DCED will terminate, and the company will be required to pay back all the withholding taxes retained as of the termination date. Similarly, if the company moves outside the Commonwealth (other than for a reason beyond its control) at any time during the five-year period immediately following expiration of the agreement, the company will be required to pay back a percentage of the retained withholding taxes.

New employees should not notice a change in their paycheck, even though 95% of their withholding tax won't go to the Commonwealth. But the retention of state withholding taxes could be a substantial financial incentive for employers to move operations to, or increase the amount of business they do, in Pennsylvania.

Employer in the following industries, however, are excluded from receiving the PEP's tax benefits: gambling; religious organizations; retail and trade; educational services; public administration; utilities; food services; and drinking places.

If you are interested in learning more about the PEP or think the PEP could potentially benefit your company, now is the time to start discussions with your attorney or accountant. The PEP is scheduled to expire on January 1, 2018. The earlier companies get into the program, the more they reap its benefits.

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Immigration Policy as a Political Tool: Where is Immigration Law Heading in 2013?

By: Silas M. Ruiz-Steele

As predicted, immigration was a hot button topic in the 2012 presidential and congressional elections. Meanwhile, the economy's growing need for professional workers to supplement the declining U.S. workforce remained hostage to the politics surrounding whether or not to legalize the nearly 13 million undocumented persons who currently reside in the country.

Looking forward, 2013 is expected to be a significant year in terms of immigration policy. Congress has already extended the following four immigration programs for three years, to September 30, 2015: the EB-5 regional center program; the E-Verify program; the Special Immigrant Religious Worker Program; and the Conrad State 30 J-1 visa waiver program for certain foreign doctors working in medically underserved areas. Additionally, with President Obama's re-election, the Department of Homeland Security's Deferred Action for Childhood Arrivals ("DACA") will likely remain in place.

In addition, on November 27, 2012, Senators Kyl (R-AZ) and Hutchison (R-TX) co-introduced the ACHIEVE Act. If enacted, the ACHIEVE Act would allow individuals who meet certain established criteria to obtain a series of conditional nonimmigrant visas designated as W-1, W-2, and W-3. Although similar to the DREAM Act (which has never passed Congress), the ACHIEVE Act does not provide a green card to beneficiaries, but instead grants a "permanent nonimmigration status." Likewise, the ACHIEVE Act restricts eligibility to a narrower class of individuals than the DREAM Act.

Most recently, on November 30, 2012, the U.S. House of Representatives approved the STEM Jobs Act (H.R. 6429) by a vote of 245-139. That bill would eliminate the diversity visa program and reallocate up to 55,000 new green cards to the most highly qualified foreign graduates of American universities with advanced degrees in science, technology, engineering, and math (STEM) fields. The bill also contains a provision to put families first, allowing the spouses and minor children of legal permanent residents to come to the U.S. after waiting one year for their green cards. The STEM Jobs Act now goes to the Senate, where it faces stiff opposition. And even if it were to pass the Senate, President Obama has indicated that he favors more comprehensive reform.

These and other proposals sure to come seek to reach accommodation between the demographic pressures of increased demand for more foreign workers in the U.S. economy and the ongoing problem of illegal immigration. The best approach for business managers who face these demands is to ensure their companies are in compliance with U.S. immigration and hiring laws, and, where appropriate, to make their Congressional representatives aware of their ongoing issues finding adequate numbers of qualified workers under current U.S. economic realities and immigration restrictions.

Although it is difficult to predict which, if any, of these proposals will become law, we anticipate that 2013 will be a year of significant change for immigration law. Barley Snyder's Immigration Group will continue to update you as changes occur. For additional information or questions regarding how current policy may affect your business, please contact Attorney [Silas Ruiz-Steele](#), Chair of Barley Snyder's [Immigration Law](#) Group, at 610-898-7153 or sruizsteele@barley.com.

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2013 IRS and Social Security Cost-of-Living Adjustments Announced

By: Mark A. Smith

The IRS and Social Security Administration have announced the 2013 cost-of-living adjustments. These new limits, including those mandated by the Economic Growth and Tax Relief Reconciliation Act of 2001, are

summarized in the IRS News Release IR-2012-77.

Following are some of the more significant limitations affecting employee benefit plans:

- The maximum amount that may be deferred under a 401(k) plan, not including Catch-up Deferrals (i.e. 402(g) limit) will increase from \$17,000 to \$17,500. For tax-sheltered annuities (Section 403(b) plans) and Section 457 plans, the maximum salary reduction contribution is also \$17,500.
- The IRC section 415 maximum annual benefit under a defined benefit plan will increase by \$5,000 to \$205,000.
- The IRC section 415 maximum annual additions under a defined contribution plan will increase by \$1,000 to \$51,000, subject to the overall limitation of 100% of compensation.
- The highly compensated employee threshold dollar limit will remain unchanged at \$115,000.
- The maximum amount of compensation that may be taken into account for benefit purposes under a qualified plan will increase from the current limit of \$250,000 to \$255,000.
- The Catch-up Deferrals to 401(k), 403(b), and 457 plans also will remain unchanged at \$5,500. Please note that the Catch-up Deferrals are only available for plan participants who turn 50 at any time during the plan year and who may no longer make deferrals because of plan or regulatory limitations.
- The Social Security taxable wage base will increase by \$3,600 to \$113,700.

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