Keep an Eye on Executive Orders and Presidential Memoranda for Key Employment Initiatives in 2015

With Republicans in control of both the Senate and the House of Representatives, the showdown between President Obama and Congress on the labor and employment front promises to continue into 2015. Expect to see the President's continued reliance on legislating unilaterally by executive orders and presidential memoranda where Congress is unwilling to advance his legislative agenda. "My job over the next couple of years is to do some practical, concrete things as much as possible with Congress," noted the President, adding "If it's not possible with Congress, then on my own."

Both executive orders and presidential memoranda do not require action by Congress. Through their use, President Obama has taken executive action more frequently than any president since President Carter. Many of these executive orders and presidential memoranda become effective or will result in new regulations in 2015.

Foremost is the President's March 2014 presidential memorandum directing the U.S. Department of Labor (DOL) to "modernize and streamline" the Fair Labor Standards Act (FLSA) "white collar" overtime exemptions for executive, administrative and professional employees. DOL Secretary Perez set a February 2015 deadline to release these new regulations for comment, which intend to expand overtime pay to millions of lower and middle wage earners. We will likely see proposals to increase the minimum weekly salary threshold from $455 to $500 or $600, and to increase the required amount of time spent in exempt duties to above 50 percent, resulting in overtime pay to millions of middle managers and administrators. *Note that Pennsylvania already requires 80 percent of time spent in exempt duties for several of its white collar exemptions.* Finally, we may see clarity around (i.e. a narrowing of) qualifying exempt administrative duties, the most misapplied of the white collar exemptions.

In April 2014, the President issued a presidential memorandum directing the DOL to collect salary data from federal contractors with more than 100 employees to monitor whether they are paying women and minorities fairly. As with many federal affirmative action requirements, the Office of Federal Contracts Compliance Programs (OFCCP) considers banks and financial institutions to be covered federal contractors. Other executive orders addressing federal contractors of which banks and financial institutions should be aware:

- Final rule prohibiting discrimination against sexual orientation and gender identity for federal contractors subject to Executive Order 11246.
- Executive Order 13665, prohibiting federal contractors from discharging or discriminating against employees and job applicants for discussing, disclosing, or inquiring about compensation of themselves or others.
- Proposed rule implementing the Executive Order on Fair Pay and Safe Workplaces, requiring companies bidding for contracts in excess of $500,000 to disclose labor law violations; to make certain

continued on page 42

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disclosures to employees regarding hours and pay; and restricting pre-dispute arbitration agreements for contracts in excess of $1 million.

An exception is the $10.10 per hour minimum wage for federal contractors in Executive Order 13658. Initially, it was unclear whether this rule applied to banks and financial institutions. In November, however, the DOL clarified that the requirement is limited to the Davis-Bacon Act construction contracts; supply, service and concession contracts; and certain contracts in connection with federal property or lands; which typically do not involve banks and financial institutions.

Also watch the DOL, which has been criticized for issuing broad administrative interpretations and using amicus briefs in federal cases to circumvent the rulemaking process. Prominent in 2015 will be the U. S. Supreme Court's decision on mortgage loan officers – specifically, the validity of the DOL's 2010 "administrative interpretation" that mortgage loan officers are not exempt from the FLSA overtime requirements, which completely reversed its 2006 interpretation. The financial industry relied for years on this 2006 interpretation, and the DOL's about-face left banks and the mortgage loan industry scrambling to change pay practices in the face of class action lawsuits. While we might not see a definitive ruling on whether mortgage loan officers are exempt, the Supreme Court will address DOL's practices. The outcome may be a directive to the DOL that such a substantive change in interpretation must follow the notice and comment requirements in the rule making process.

At the state level, the Pennsylvania legislature has been relatively inactive in advancing wage and hour laws. As a result, there are and will continue to be inconsistencies between Pennsylvania law and the federal FLSA, creating traps for employers, including banks and financial institutions. One example is the rejection of the FLSA fluctuating work week method of overtime pay by Pennsylvania federal courts. Another is Pennsylvania's lack of a computer professional white collar exemption. In addition, Pennsylvania does not follow the FLSA "highly compensated" overtime exemption – currently $100,000. Thus, while mortgage loan officers could fall under this exemption in states that follow the FLSA, banks and the financial industry in Pennsylvania have been subject to expensive state class action litigation by mortgage loan officers. Given the Republic-controlled General Assembly in Pennsylvania and a newly elected Democratic governor, we may not see legislative solutions to these inconsistencies in 2015.