Ten Employment and Employee Benefits Areas to Watch in Trump's Second Term

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The election of Donald J. Trump as the 47th president is expected to bring significant changes to employment, labor, and employee benefits law and regulation. While no reforms have been officially announced, we can make some informed predictions based on Mr. Trump's past administration and campaign statements. Below are ten key areas to monitor, with insights into how potential changes may impact employers.

Noncompetes

Employers are likely to see the withdrawal of the noncompete ban issued by the Federal Trade Commission (the "FTC") in April 2024, which was recently set aside by a federal district court in Texas. Enforcement of the FTC's ban has been held up by adverse rulings in federal courts in Texas and Florida. Since then, the FTC has appealed both rulings to federal circuit courts.

The withdrawal of the noncompete ban is likely to come sooner than any outcome in the courts. Commissioner Lina Khan's term expired on September 26, 2024, though she will remain acting chair until she steps down (thereby leaving the Commission evenly split between Democrats and Republicans) or until Mr. Trump nominates a new commissioner to that position. Given that the Republican Party holds both the House and the Senate, his nominee will likely be confirmed. Mr. Trump will also likely elevate a Republican to be FTC chair, who can then shape the Commission's priorities. The current Republican FTC commissioners issued a 45-page dissent to the FTC's promulgation of the noncompete rule, arguing that it was unlawful.

As a result, should the Trump administration want to rescind the rule, the FTC under the administration is likely to comply. The rule would be withdrawn, the cases on appeal would be moot, and the noncompete ban would not go into effect. In the absence of a federal noncompete rule, however, we can expect more legislative and judicial activity restricting the use of noncompetes at the state level, especially in "blue" states.

Artificial Intelligence ("AI")

Developers and users of AI will likely see the roll-back of some Biden-era AI guidance and an AI agenda in line with other goals of the Trump administration. As the industry has rapidly expanded in the last few years, the Biden administration has issued very little by way of binding regulation related to AI and instead has advanced its AI policy agenda through (largely nonbinding) agency- and sector-specific actions and interpretive guidance. The Blueprint for an AI Bill of Rights from October 2022 set out principles related to privacy, fairness and user rights, while his AI Executive Order from October 2023 addressed everything from AI's use in healthcare to risks of IP theft. The Department of Labor (the "DOL"), responding to President Biden's executive order, recently released a guide to the use of artificial intelligence in the workplace, with a heavy emphasis on protecting workers' rights under antidiscrimination law and collective bargaining rules. Also, the Equal Employment Opportunity Commission (the "EEOC") recently indicated in its Strategic Enforcement Plan for 2024-2028 that artificial intelligence will be an area of priority, including its use in targeting job advertisements, recruiting applicants and making or assisting in hiring or other employment decisions, practices or policies.

At a rally in Cedar Rapids, Iowa, last December, Mr. Trump vowed to "cancel Biden's artificial intelligence executive order and ban the use of AI to censor the speech of American citizens on day one." Mr. Trump has not yet said what might replace President Biden's executive order. During his last presidential term, Mr. Trump did not have an entirely hands-off policy: he signed executive orders founding national AI research institutes, directing federal agencies to prioritize AI research and development and mandating that agencies "protect civil liberties, privacy and American values" in using AI, help workers gain AI-relevant skills and promote "trustworthy" technologies. We expect the AI agenda of his second administration to align with its other goals, including dismantling policy achievements of the Biden administration, supporting national security and international competition objectives (including through workforce development and AI technology investment) and responding to perceived threats to conservative speech (e.g., on media, in search engine results and in DEI initiatives).

Independent Contractors

Employers can likely expect more employer-friendly rules around worker status under the Fair Labor Standards Act (the "FLSA"). Just before Mr. Trump previously left office, his DOL finalized a regulation for determining whether a worker is an employee or an independent contractor under the FLSA that emphasized two factors: "the nature and

degree of the worker's control over the work" and "the worker's opportunity for profit or loss based on initiative and/or investment." The move was widely seen as a boon to employers, who often prefer independent contractors to employees for greater flexibility in staffing and lower costs due to not having to provide employee benefits or withhold or pay employment taxes. The Biden administration never implemented the rule, though; instead, it endorsed the common law five-factor test, which also weighs the length or permanence of the relationship, the worker's special skills and the work's integration into general operations. Thus, the change never went into effect. But Mr. Trump's DOL may reinstate the proposed rule, making it easier for employers to classify workers as independent contractors.

Additionally, if Mr. Trump recomposes the National Labor Relations Board (the "NLRB") (which is discussed more below), a new Board could return to the independent contractor test set forth in its 2019 decision in *SuperShuttle DFW, Inc.,* 367 NLRB No. 75 (2019). That test focused on a worker's "entrepreneurial opportunity" rather than equally evaluating all of the common law factors. (Under President Biden, the equal weighting of the common law test has made it very difficult for employers to contest employee status).

National Labor Relations Board

Change is also likely coming to both the prosecutorial priorities and decision-making process at the NLRB. Since President Biden replaced Board General Counsel ("GC") Peter Robb with GC Jennifer Abruzzo, the NLRB has dramatically changed its prosecutorial priorities. Mr. Trump will likely appoint a new NLRB GC, who may rescind several currently active memoranda taking an expansive view of worker protections under the FLSA and National Labor Relations Act (the "NLRA"). To take a few: GC Memo 25-01 provided that certain "stay-or-pay" provisions and noncompetes (a position previously taken in GC Memo 23-08) are unlawful under the NLRA; GC Memo 24-04 expanded the scope of consequential damages regional offices should seek in unfair labor practice proceedings; GC Memo 21-07 instructed regional offices to settle cases for no less than 100% of the backpay and benefits owed and, in cases where a discharged employee waives reinstatement, to require front pay as part of any settlement; and finally, GC Memo 23-02 significantly tightened regulations around employer use of surveillance practices that could potentially impede employees from engaging in activity protected under Section 7 of the NLRA.

And while the Board currently has a 2-1 Democratic majority, the Trump administration will also likely change the Board's composition to a Republican majority. Board Chair Lauren McFerrance, whose term expires December 15, 2024, is currently

awaiting a confirmation vote to a third term, as is President Biden's nomination of Joseph L. Ditelberg to fill the Board's vacant Republican seat. The Senate has not yet acted on these nominations, and while it is possible McFerran could be confirmed (giving the Board a Democratic majority until at least August 2025, when Democratic Member David Prouty's term expires), it is unlikely the Senate will confirm these nominees prior to Mr. Trump's inauguration. If the Senate does not do so, these vacancies will likely be filled by Trump appointees more likely to have pro-employer views.

A Republican-majority Board could also overturn several consequential Biden-era decisions. For example, *Amazon.com Services LLC*, 373 NLRB No. 136 (Nov 13, 2024) held that an employer violates the NLRA by holding "captive audience meetings" in which the employer expresses its view on unionization. Also, *Cemex Const. Materials Pac. LLC*, 372 NLRB No. 310 (2023) allowed unions to achieve recognition as the certified bargaining representative of employees without a formal NLRB secret-ballot election. *McLaren Macomb*, 372 NLRB No. 58 (2023) held that employers violate the NLRA by offering departing employees severance agreements that include overly broad confidentiality and non-disparagement provisions. And *Stericycle Inc.*, 372 NLRB No. 113 (2023) created a standard under which an employer work rule is presumptively unlawful if it has a reasonable tendency to chill employees from exercising their rights when viewed from the perspective of a reasonable employee, even if the contrary interpretation is equally reasonable. Decisions of the NLRB can be appealed to federal appeals courts, and if Mr. Trump is able to continue appointing federal judges, it is likely more employee-friendly decisions will be reversed and employer-friendly decisions will be upheld.

U.S. Equal Employment Opportunity Commission

Employers should also stay abreast of changes at the EEOC. While the EEOC has a Democratic majority until 2026, future Trump-appointed commissioners could take different interpretations of civil rights and anti-discrimination laws, ones likely to be upheld by a more conservative Supreme Court.

For example, a Trump EEOC could seek to limit protections under the Pregnant Workers Fairness Act (the "PWFA"). The PWFA requires eligible employers to provide qualified employees or applicants with accommodations for known limitations related to pregnancy, childbirth or related medical conditions. Andrea Lucas, currently the sole Republican appointee, has voiced criticism of the EEOC's interpretation of the PWFA to include accommodations for abortion, menopause and infertility. Following the Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.*, she initiated charges

against companies offering abortion travel benefits on the theory that this practice constitutes discrimination against pregnant workers who choose to carry their pregnancies to term.

The Trump EEOC may also roll back Biden-era protections for LGBTQ+ workers. In April of this year, the EEOC issued its first updated enforcement guidance on workplace harassment in 25 years, broadening the definition of sex-based discrimination to encompass actions such as misgendering or denying an individual access to a bathroom consistent with their gender identity. Commissioner Lucas publicly opposed that guidance, arguing that it could infringe on employees' rights to religious freedom and expression.

Diversity, Equity and Inclusion ("DEI")

The second Trump presidency could bring major challenges to DEI initiatives, with potential action by the EEOC, DOL and DOJ.

"Reverse discrimination" may become a focal point of the second Trump administration. America First Legal has filed numerous complaints with the EEOC challenging corporate DEI practices under Title VII. While these complaints have not had any traction with the EEOC's Democratic majority, a newly composed EEOC may be more receptive to them.

The same day as the Supreme Court's decision in *Students for Fair Admissions v. Harvard*, 600 U.S. 181 (2023), which starkly limited affirmative action in higher education, EEOC Commissioner Lucas published an article arguing that many DEI initiatives in corporate America run afoul of federal employment law by considering race and sex in decision-making. If the Supreme Court were to take up the EEOC and DOJ's broad view of what constitutes an "adverse action" in the workplace under Title VII, she argued, a slew of DEI practices would be at legal risk, such as providing race-restricted access to mentoring, sponsorship or training programs, selecting interviewees partially due to diverse candidate slate policies, offering race-restricted diversity internship programs or accelerated interview programs or tying executive or employee compensation to achieving demographic targets. In *Muldrow v. City of St. Louis*, 601 U.S. --- (2024), the Supreme Court indeed held that an employee seeking to bring a discrimination claim must allege only that he or she suffered "some" harm, not "significant harm," making it potentially easier to challenge Commissioner Lucas's list of potential targets.

Such concerns will likely be raised by other parts of the Trump administration, of which America First founder Stephen Miller has been named deputy chief of staff for policy.

During his first term, Mr. Trump issued an executive order prohibiting government contractors from offering certain types of "divisive" diversity training. Shortly thereafter, his Department of Labor's Office of Federal Contract Compliance investigated whether Microsoft and Wells Fargo violated civil rights law by pledging to double their ranks of black leaders. And just this summer, Vice President-elect and Senator J.D. Vance introduced Senate Bill 4516 (the "Dismantle DEI Act of 2024"), which, if passed, would revoke a slew of President Biden's executive orders relating to DEI, prohibit government departments from requiring employees to attend DEI training and require the Office of Personnel Management to revise all policies and procedures to ensure compliance with the Act, including by closing its DEI offices and the Chief Diversity Officers Executive Council. Two weeks ago, the bill passed out of the House Oversight Committee, and, regardless of whether it is passed, signals a policy priority of the incoming Vice President.

Securities and Exchange Commission ("SEC") Whistleblower Program

The second Trump presidency will likely lead to major changes at the SEC, including a new chair, a narrower enforcement agenda and lower penalties. The SEC's Whistleblower Program, which offers confidentiality, anti-retaliation provisions and monetary awards for information leading to a successful enforcement, has received bipartisan support and will likely remain a strong driver of enforcement. But the SEC may well take a different approach to calculating awards.

The current Republican SEC commissioners have criticized large awards with limited transparency. And while only Congress can adjust the statutory mandate to award eligible whistleblowers 10% to 30% of amounts collected, a newly composed Commission might apply more scrutiny to how the appropriate percentage is determined. For example, it could use its rulemaking authority to adopt rules adjusting the percentage based on the dollar amount of the award. Former Chair Jay Clayton did so under Mr. Trump's first term, though the rule was subject to litigation and ultimately unwound by Biden-era Chair Gary Gensler.

As we have discussed in prior client alerts, the Biden-era SEC has taken a very expansive view of Rule 21F-17(a), which prohibits any person from taking any actions to impede individuals from contacting the SEC to report a possible securities law violation, including by enforcing or threatening to enforce a confidentiality agreement. The SEC has taken the position that language in employee agreements, company policies and other material could be interpreted as having a chilling effect on whistleblowers and therefore violate the rule. The SEC under the new administration could reel in this interpretation. That said, cases could remain in the settlement queue and trickle out

over the coming months, and to the extent the SEC identifies less controversial alleged violations (*e.g.*, agreements without any savings clause whatsoever or agreements that allow whistleblowing but prohibit whistleblowers from receiving an award from the SEC), we expect continued enforcement action.

We suggest clients continue to include Rule 21F-17(a) clauses in employment-related agreements and policies. Regardless of what the Trump administration brings, the SEC typically operates on a look-back basis, and employers should continue to be prepared for if and when enforcement priorities change.

Investment Advice Fiduciary Rule

The Biden administration DOL published its final rule in April 2024 updating the definition of an investment advice fiduciary under the Employee Retirement Income Security Act ("ERISA"). The new definition expanded the situations in which financial service providers who provide investment advice to retirement plan participants and individual retirement account owners will be considered fiduciaries under ERISA, including where those providers make one-time recommendations to roll over assets from an employer-sponsored plan into an individual retirement account managed by the provider.

The rule was set to go into effect in September 2024 but was stayed by a federal judge this past summer. The DOL has appealed the stay, and the matter is currently before the Fifth Circuit, but it is expected that the incoming Trump administration will withdraw that appeal. We can look to the previous Trump administration for how this may play out—specifically, the Obama administration attempted a similar change to the investment advice fiduciary definition. Early during his first term, Mr. Trump issued a presidential memorandum ordering the DOL to reexamine the rule, which led to a delay of its implementation. Ultimately, the rule was struck down by the Fifth Circuit in 2018, and the first Trump administration made no effort to save it. We expect a similar outcome now.

Environmental, Social and Governance ("ESG") Rule for ERISA Fiduciaries

In late 2022, the Biden administration DOL finalized a rule, officially titled the "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights," which created a structure expressly permitting ERISA fiduciaries to consider environmental, social or governance issues when making investment decisions in the context of evaluating the risks and returns of an investment by an ERISA-covered

retirement plan. This rule has faced challenges in the courtroom (including a suit against the DOL by 26 states and other interested parties) and in Congress, which passed a bill to overturn the rule in 2023. President Biden vetoed Congress' bill, the first veto of his presidency, but Congress has remained interested in passing anti-ESG legislation. While legal challenges have been unsuccessful thus far, challenges to the DOL's ESG rule seem more likely to prevail following the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo* (even if the Trump administration does not withdraw the DOL's defense of the rule).

In any event, the rule is unlikely to survive in the second Trump administration. The Biden administration ESG rule runs contrary to a DOL rule from the first Trump administration that required plan fiduciaries to solely consider pecuniary factors when making investment decisions, and in a 2023 campaign video, Mr. Trump committed to repealing the rule. ERISA fiduciaries should be prepared for another round of whiplash on this issue in the new Trump administration.

Affordable Care Act (the "ACA")

The ACA, which was enacted in 2010, expanded access to affordable health insurance, as well as the Medicaid program. It did so in part by requiring employers with 50 or more full-time employees to offer affordable health insurance to full-time employees. President Biden's administration extended the individual health premium tax credit and expanded its eligibility criteria with the American Rescue Plan Act of 2021 and the Inflation Reduction Act of 2022. However, this credit, which was initially set to expire in 2022, now does so in 2025, during the second Trump administration.

Overall, the ACA has been in the crosshairs of Republican legislators since its passage. Now that the Republican Party holds the White House, the Senate and a small majority in the House of Representatives, some form of repeal of the employer mandate is possible. The first Trump administration acted quickly in its attempt to repeal the ACA in part in July 2017, targeting both the individual and employer mandate and associated penalties. Ultimately, it was unsuccessful due to "no" votes from three Republican senators, including late Senator John McCain. Eventually, the Tax Cuts and Jobs Act of 2017 successfully repealed the individual mandate penalties. It is possible that Mr. Trump's return to the White House will lead to renewed efforts to repeal the ACA or at least the employer mandate. House Speaker Mike Johnson promised massive reform of health law during the campaign.

A number of other changes around healthcare benefits may also be in store. It is likely that the health premium tax credit will be allowed to expire in 2025. Vice President-elect

J.D. Vance has also suggested allowing insurance companies to place people into different risk pools. Additionally, Mr. Trump's previous administration lengthened the maximum period for short-term insurance plans—which offer bridge, temporary and unrenewable coverage—from three months to 36 months. President Biden's administration lowered the maximum to four months. The maximum length could again be increased significantly with Mr. Trump returning to office. Overall, employers should stay aware that significant change could be ahead regarding healthcare coverage requirements.

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Please do not hesitate to reach out if you have any questions or for assistance in adapting to a new regulatory landscape.

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