What Has the “Nuclear Option” Wrought?

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With the Obama administration unable to get labor and employment law changes through a gridlocked Congress, one of its significant accomplishments and lasting legacies may be its remarkable record of reshaping federal regulatory agencies and the federal judiciary.

Senate Confirmations of Nominees to Federal Agencies

Except for the independent regulatory agencies where political appointments are established for set statutory term lengths—such as five years for members of the National Labor Relations Board (NLRB) and four years for commissioners of the U.S. Equal Employment Opportunity Commission (EEOC)—the leaders of executive branch agencies, such as the U.S. Department of Labor, depart with the end of the administration that appointed them. In other words, at the end of 2016, with the change of administrations in the White House, there will be a new U.S. Secretary of Labor and senior staff at the Labor Department, whichever political party prevails.

Among the independent agencies, however, the familiar transfer of executive agency leadership that accompanies the end of an administration’s “tenure” is less certain. This may turn out to be especially troubling at the NLRB where, for example, new pro-union members appointed by the current administration and confirmed by the U.S. Senate for full five-year terms will be able to serve well into the next administration. And if one does not like the decisions issued by the NLRB now, one should not expect relief anytime soon with the Senate unable to slow down confirmation of administration nominees. Confirmation of the administration’s nominees now requires only a simple 51-vote majority following the Senate’s adoption in 2013 of the “nuclear option,” which eliminated filibusters of executive branch and federal judicial nominations, except for those nominated to the Supreme Court of the United States. Formerly, Senate rules required a super-majority of 60 votes to end debate (“invoke cloture”) on all judicial and Executive Branch nominations.

The next NLRB vacancy will occur on December 16, 2014, with the expiration of Board Member Nancy J. Schiffer’s term. However, to prevent the Board from being reduced to a two-on-two political and philosophical deadlock between Chairman Mark Gaston Pearce and Member Kent Y. Hirozawa on one side, and Members Philip A. Miscimarra and Harry L. Johnson, III on the other, the White House has announced the nomination of former recess appointee Sharon Block as Schiffer’s replacement. Block’s five-year term will carry over well into the next administration and virtually assure a pro-union majority.

Nominations to Federal Appellate Courts
As for judicial appointments, the administration has not changed the philosophical makeup of the Supreme Court of the United States, though the same cannot be said for the second-most important appeals court in the nation—the U.S. Court of Appeals for the District of Columbia Circuit—and most of the other federal circuit courts. For example, when President Obama took office in January of 2009, the D.C. Circuit was dominated by judges appointed by Republican presidents. Today, thanks in large part to the Senate’s “nuclear option,” which has eased the confirmation passage for judicial branch nominees, the D.C. Circuit has four Republicans and seven Democrats, four of whom were nominated by President Obama and confirmed by the Senate under the “nuclear option.”

The overwhelming majority of circuit courts—9 of the 13 federal courts of appeals—are controlled by judges appointed by Democratic presidents. Eight of those courts changed majorities recently with the confirmation of the administration’s nominees. The only four remaining circuit courts with Republican majorities are the Fifth Circuit Court of Appeals (based in New Orleans), the Sixth Circuit (based in Cincinnati), and the Seventh Circuit (based in Chicago) and Eighth Circuit (based in St. Louis).

Currently, there are only 7 vacancies in the 13 federal appellate courts across the nation—the lowest number in more than two decades. There are 34 federal district court nominations pending at various stages in the Senate confirmation process, with 16 of those nominations having already been passed out of the Senate Judiciary Committee.

Nominations to the Supreme Court of the United States

Currently, there are no vacancies on the Supreme Court bench, and unless illness forces their hand, Supreme Court justices largely choose to “retire strategically” when an ideological ally occupies the White House and can choose their successor, rather than when the Senate’s composition presents a favorable setting for confirmation. Senate confirmations of Supreme Court nominations, of course, are not subject to the “nuclear option” rules. Given the importance of the Supreme Court as the coequal third branch of government and given the fact of lifetime appointments, Supreme Court nominations often engender heated Senate confirmation battles.

Justice Should Be Blind

Of course, party affiliation does not always determine a judge’s judicial philosophy or how a judge will rule in a particular case—in fact, party affiliation should not make any difference since federal judges are expected to be competent, nonpartisan and swayed only by the federal Constitution and the laws as written by Congress. Further, there is nothing inherently wrong with a president nominating members of his or her political party or those who share his or her philosophy. After all, elections have consequences.

But the point is, regulatory decisions by the U.S. Department of Labor and federal agencies such as the NLRB and EEOC will most likely be reviewed by circuits dominated by recently-confirmed judges who were rushed through a confirmation process under the Senate’s “nuclear option” rules. These judges, at least when nominated, likely shared the administration’s philosophy with respect to regulatory policy and administrative rulemaking. Thus, it is less likely that federal agencies’
regulatory decisions will be reviewed by the dwindling number of federal district and
circuit courts of appeals that do not have majorities appointed by the current
administration.

To Appeal or Not To Appeal?

Legal challenges to federal regulatory actions and administrative decisions are still
the best and, in some cases, the only option for relief from objectionable agency
rules. Employers are still well advised to weigh the importance of each regulatory
charge, complaint, or policy before an expected adverse ruling is issued by a
regulatory agency, and determine whether it is sufficiently important to litigate the
issue rather than settle it. The worst option for an employer is to lose a case before a
federal agency, such as the NLRB, and to not appeal the decision, thus leaving
adverse Board precedent in place for all future employers. If an employer deems that
it is not inclined to appeal a potential adverse ruling, the employer would be better
off settling the case prior to the anticipated administrative decision. Of course, the
NLRB is now making it more difficult to settle cases by demanding the inclusion of
"default" language in agreements that permits the reopening of settlements and
imposes original remedies upon future related violations. If one cannot persuade the
Board's Regional Offices to agree to remove the "default" language from settlement
agreements, the employer should not settle, but should instead take the default issue
back to an administrative law judge for relief.

As for federal labor policies, such as the NLRB's "ambush election" rules for union
representation, depending on what the final rules provide, there will likely be little
option but to litigate. The only other option is to hope that perhaps a future
Congress will block funding to enforce the rule through the congressional
appropriations process.

Conclusion

In the final analysis, employers should always consider challenging adverse
administrative rulings in court. Just be aware that the best options for where to bring
those challenges are narrowing—thanks, in part, to the Senate's "nuclear option."
Research the law in various circuits and, if you have an option, be prepared to select
your choice of venue rather than waiting for the government or opposing party to
select it for you in a setting more favorable to them.