

Beltway Buzz, November 13, 2020

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By [James J. Plunkett](#)

The Beltway Buzz is a weekly update summarizing labor and employment news from inside the Beltway and clarifying how what's happening in Washington, D.C. could impact your business.



Biden Agency Review Teams Announced. President-elect Joe Biden has announced his “[agency review teams](#)” to begin evaluating agency operations in anticipation of the shift in executive power in January 2021. The labor review team (overseeing the U.S. Department of Labor (DOL), the National Labor Relations Board, and the U.S. Equal Employment Opportunity Commission (EEOC), among other agencies) looks like a yearbook photo from the final year of President Barack Obama’s administration. Individuals such as Jenny Yang (former EEOC chair), Seth Harris (former DOL deputy secretary and acting secretary), and Patricia Smith (former DOL solicitor) will join others from organized labor, academia, and progressive think tanks in beginning the initial overhaul of the DOL.

EEOC Update. Three important updates regarding policies coming out of the EEOC are as follows:

- *Conciliation Comments.* November 9, 2020, was the deadline for stakeholders to submit comments on the Commission's proposed rule to provide "greater clarity to the conciliation process [by] enhanc[ing] the effectiveness of the process and ensur[ing] that the Commission meets its statutory obligations."
- *Religious Guidelines.* This week, the Commission voted to send an updated draft of its Compliance Manual Section on Religious Discrimination to the Office of Information and Regulatory Affairs (OIRA) for review prior to public comment. According to a press release, the changes reflect the changing landscape of federal jurisprudence on this matter and "include important updates to the discussion of protections for employees from religious discrimination in the context of reasonable accommodations and harassment[,]" as well as an expanded "discussion of defenses that may be available to religious employers."
- *Wellness.* This week, the EEOC also sent proposed rules addressing employer sponsored wellness plans under the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act to OIRA.

OFCCP Final Rule on Discrimination Procedures. On November 10, 2020, the Office of Federal Contract Compliance Programs (OFCCP) published a final rule entitled, "[Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures to Resolve Potential Employment Discrimination](#)." The rule codifies changes made in previous OFCCP directives and is intended to increase the "transparency of OFCCP's operations so that contractors and OFCCP can resolve potential violations through a clear, mutual understanding of the issues." In part, the rule sets forth the different types of evidence that OFCCP uses to support the issuance of a Predetermination Notice (PDN) or Notice of Violation (NOV). The rule becomes effective December 10, 2020.

NLRB Rules on Mail Ballots. This week the National Labor Relations Board (NLRB) issued a [decision](#) establishing the standards for mail and manual elections during the COVID-19 pandemic. Board policy traditionally favors in-person elections, but since March, it has conducted 90 percent of elections via mail due to the safety concerns raised by the pandemic. The Board's decision establishes six situations, each one of which is normally sufficient to favor mail ballots in lieu of in-person voting. The situations are:

"The Agency office tasked with conducting the election is operating under 'mandatory telework' status."

"Either the 14-day trend in the number of new confirmed cases of Covid-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher."

"The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size."

"The employer fails or refuses to commit to abide by GC Memo 20-10 [Suggested Manual Election Protocols] protocols."

"There is a current Covid-19 outbreak at the facility or the employer refuses to disclose and certify its current status."

"Other similarly compelling considerations."

DOL Appeals Joint-Employer Ruling. Late last week, the DOL filed its appeal of a decision by the U.S. District Court for the Southern District of New York in *State of New York v. Scalia* that [struck down the DOL's joint-employer rule](#) under the Fair Labor Standards Act. Because the wheels of justice turn slowly, it is very likely that this appeal will be inherited by the next administration, which will likely not be interested in defending the rule. Accordingly, the next administration will probably seek to pause the litigation while it reviews the rule and promulgates its own joint-employer rule and then will ask the court to dismiss the case as moot. However, business groups have been permitted to intervene in the case, and they will undoubtedly have a say in how it proceeds.

First Dogs. Dogs (and pets, in general) will be returning to the White House in January 2021 after a four-year hiatus under President Donald Trump. President-elect Biden has two pooches, Champ and Major, the latter of which will be the first shelter dog to live in the White House. According to the Presidential Pet Museum, prior to President Trump, the last president not to have a pet was Andrew Johnson (unless you count the family of [white mice](#) he allegedly cared for during his impeachment hearings). James Polk was the only other president without any known pets. On the other side of the spectrum, the president with the most pets was Theodore Roosevelt, who tallied up about 48 different pets over the years, including a flying squirrel, two kangaroo rats, a snake named [Emily Spinach](#), and a badger named [Josiah](#).

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