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Will the New Composition of Federal Agencies Effect Change?

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Nine months into President Trump's term, the pace of nominations and appointments to fill critical position within his administration is accelerating. Action on the nominations to the National Labor Relations Board (NLRB), Equal Employment Opportunity Commission (EEOC) and Department of Labor (DOL) signals that widely expected changes in workplace policy are indeed forthcoming.

Agency Nominations

On September 25, 2017, the Senate confirmed Bill Emanuel to fill the remaining vacant seat on the National Labor Relations Board (NLRB). The confirmation of the former Littler Shareholder puts Republican members in control of the NLRB for the first time in almost 10 years. With all five seats on the Board now filled, Republicans have a 3-2 edge, setting the stage for a long-anticipated change in direction and potential reversal of Obama-era policy.

Republican control of the Board is assured only through the December expiration of current Chair Philip Miscimarra's term. Until his replacement is nominated and confirmed, the Board will effectively be deadlocked with two Republican and two Democratic members. In

addition, the all-important position of NLRB General Counsel will not switch hands until after the expiration of Richard Griffin's term next month. On September 15, the president announced the nomination of management-side labor and employment attorney Peter Robb to fill this critical position.

On October 4, the Senate Health, Education, Labor and Pensions (HELP) Committee held a [hearing](#) on Robb's nomination. During his testimony at the hearing, Robb spoke of gaining extensive knowledge in negotiation and the resolution of labor disputes. Explaining his reasoning for wanting to be NLRB General Counsel, Robb said:

I've always believed in the core values expressed in the National Labor Relations Act, which can be paraphrased as protecting the rights of employees to engage in union or other protected, concerted activity with respect to wages, hours and working conditions, as well as the rights of employees to refrain from such activities.

During the same Senate hearing, the HELP Committee also evaluated the nomination of another important labor and employment policy position, that of administrator of the DOL's Wage and Hour Division.

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Cheryl Stanton, the president's pick for the position, has served as executive director for the South Carolina Department of Employment and Workforce. She previously worked as a labor and employment attorney and in the White House Counsel's office under President George W. Bush. Upon confirmation, Stanton will face a full plate of issues at the DOL, including the fate of the overtime regulation. The DOL has sought public comment through a Request for Information on the salary threshold and other issues related to updating the white collar overtime exemption regulations.

On October 18, the Senate HELP Committee approved Stanton's nomination by a vote of 12-11. During the same session, the Committee also approved Robb's nomination by a similar margin. The nomination of Patrick Pizzella to be Deputy Secretary of Labor also advanced, as did the nominations of Janet Dhillon to be a Member of the Equal Employment Opportunity Commission (EEOC), and upon confirmation, designated Chair, and Daniel M. Gade to be a Member of the EEOC.

The Committee action on these key labor and employment positions was a significant step toward instigating changes at the DOL, NLRB and EEOC. Their nominations now move to the full Senate for consideration, where they face an already crowded Senate floor schedule.

Joint Employment and the Sharing Economy

Even in the absence of a confirmed Wage and Hour Administrator, the DOL has taken action to reverse positions taken by the prior administrator. On June 7, the DOL [announced](#) that it was withdrawing guidance on independent contractor status and joint employment under the Fair Labor Standards Act (FLSA).

Although the expansive and controversial Administrator's Interpretations were withdrawn, additional guidance by the Wage and Hour Division on these topics by the new administration will likely have to wait until the new administration is in place. Meanwhile, lawmakers in the House are taking steps to roll back the prior administration's broad interpretation of joint employment. On September 13, the House Education and Workforce Committee held a hearing on the Save Local Businesses Act, H.R. 3441. The legislation, introduced by Rep. Bradley Byrne (R-AL), Chairman of the Subcommittee on Workforce Protections, will reaffirm that two or more employers must have "actual, direct, and immediate" control over employees to be considered joint employers

under the National Labor Relations Act and FLSA. The Save Local Business Act amends the NLRA and FLSA by defining joint employer relationships as follows:

A person may be considered a joint employer in relation to an employee only if such person directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over essential terms and conditions of employment, such as hiring employees, discharging employees, determining individual employee rates of pay and benefits, day-to-day supervision of employees, assigning individual work schedules, positions, and tasks, or administering employee discipline.

On October 4, the Committee [approved](#) the legislation by a vote of 23-17. Upon the Committee's passage of the bill, Rep. Byrne stated: "the Save Local Business Act is all about eliminating uncertainty for workers and protecting small businesses throughout the United States. Over the coming weeks, I will continue working with my colleagues to build even stronger support for this commonsense, bipartisan legislation." Littler's Workplace Policy Institute will provide updates on the status of this legislation.

Another workplace policy issue the House Education and Workforce Committee is examining is the so-called "sharing economy." In her [opening statement](#) for the hearing, entitled "The Sharing Economy: Creating Opportunities for Innovation and Flexibility," Chairwoman Virginia Foxx (R-NC) stated:

As the sharing economy continues to grow, we need to make sure outdated federal policies don't stand in the way. The self-employed individuals who rely on the sharing economy for work don't fit neatly into obsolete job categories defined in another era. So, there are important questions over how we can modernize policies to meet the needs of the future.

The hearing evidences the Committee's interest in the topic and could signal further action ahead.

Health Care

After months of speculation, the shape of the White House and congressional action on the future of the Affordable Care Act (ACA) seems to be taking shape. In the wake of failed efforts by Republicans to "repeal and replace" the ACA through the legislative process, the White House turned to Executive Branch action to try to reform the nation's healthcare system. On October 12, President Trump [signed](#) an executive order (EO):

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“Promoting Healthcare Choice and Competition across the United States.”

The EO describes that it is the policy of the executive branch, “to the extent consistent with law, to facilitate the purchase of insurance across State lines and the development and operation of a healthcare system that provides high-quality care at affordable prices for the American people.” The Order outlines three proposals to further this policy: (1) expanding access to Association Health Plans (AHPs); (2) expanding availability of short-term, limited duration health insurance; and (3) expanding the availability and permitted uses of Health Reimbursement Accounts (HRAs). These three proposals are, in essence, designed to expand alternatives to health insurance purchased through the ACA exchanges.

The AHP proposal, for example, envisions allowing small businesses to group together to self-insure or purchase large group health insurance. The Secretary of Labor is charged with issuing proposed regulations on AHPs within 60 days.

The Secretary of Labor, together with the Secretaries of Health and Human Services and Treasury, are directed to issue proposed regulations within 120 days that would allow HRAs to be used for the purchase of health insurance in the individual market, a reversal of current policy. The Secretaries are also directed to consider issuing regulations or guidance lengthening the time period for short-term, limited duration health insurance from the current three-month limit.

The same day President Trump issued the EO, the White House announced the administration would discontinue funding the ACA’s cost-sharing reduction (CSR) payments to insurers. The ACA requires insurers to reduce cost-sharing for low-income individuals who purchase

“silver-level” plans through the ACA exchanges. The move prompted a number of states to sue to compel the administration to make the payments pending ultimate resolution of their lawsuit. Cost-sharing reductions totaled \$7 billion in 2017. The White House decision on the CSRs and the upcoming open enrollment period for the ACA exchanges renewed bipartisan efforts in the Senate to shore up the individual health insurance market. Indeed, on October 19, a group of 24 senators—12 Republicans and 12 Democrats led by Senate Health Committee Chairman Lamar Alexander (R-TN) and Ranking Member Patty Murray (D-WA)—released short-term [bipartisan legislation](#) to stabilize premiums and access to insurance in individual health insurance markets.

The bill appropriates CSRs for 2017 through 2019 and provides \$106 million for outreach to spur enrollment in ACA exchanges. The bill also amends the ACA’s Section 1332 State Innovation Waivers to allow for more state flexibility and a streamlined approval process. In addition, the bill allows all individuals, not just those under 30, to purchase a lower-premium “Copper” plan in the individual market.

The bill’s fate is uncertain. Although its bipartisan nature increases its prospect for passage in the Senate, House passage may have to wait for inclusion in must-pass year-end spending bills. On September 14, the House passed its combined bill funding federal agencies for FY 2018. On September 27, the Senate Appropriations Committee approved the FY 2018 Labor-HHS bill, which includes funding for the DOL. Timing of Senate Floor consideration of the funding bills, as well as an agreement on a final version of this funding package, remains uncertain. . It is likely that a funding bill—and the fate of any labor-related policy riders and the bipartisan ACA legislation—will not be known until year-end.

ABOUT LITTLER’S WORKPLACE POLICY INSTITUTE®

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