What to Expect in 2027

Legal Changes Potentially Impacting Employers



Charles B. Baldwin



Ellen Pactor

President Trump's administration has brought many changes this year, including for labor and employment policies. Below are a few changes that could affect employers in 2027 and beyond.

National Labor Relations Board (NLRB). On September 11, NLRB General Counsel (GC) Crystal Carey filed a brief in NLRB litigation regarding employers' workplace rules. Under the current standard governing workplace rules, which was implemented in 2023, the GC must show that a workplace rule has a "reasonable tendency to chill employees from exercising their" rights under Section 7 of the National Labor Relations Act (NLRA). If the GC can make that showing, the workplace rule is considered presumptively unlawful. The employer must then prove its rule advances a legitimate and substantial business interest and no more narrowly tailored rule could serve the same interest.

According to the GC, the existing standard "presumed unlawful interference whenever employer policies potentially interacted with even the most excessively broad interpretations of Section 7." The GC urges a return to a prior framework that dates back to the first Trump administration and that uses reasonable-employee and balancing elements. The GC would not, however, use the prior framework's three-category system, where certain rules were considered always lawful, others received individual scrutiny, and others still were always unlawful.

Instead, the GC proposes a two-step test to evaluate workplace rules. In this proposed test, the GC first would have to prove a facially neutral rule would be interpreted by an "objectively reasonable employee" to potentially interfere with Section 7 rights. If the GC met that burden, the NLRB then would balance the employer's legitimate business reasons for its workplace rule against the extent to which the rule interferes with an employee's Section 7 rights. Under this proposed framework, a rule would not be found unlawful merely because it "could hypothetically be interpreted" to limit Section 7 activity or because the employer "failed to eliminate all ambiguities from the rule."

The GC is likely to continue to take issue with rules that could be interpreted as preventing concerted activity, and the NLRB is likely to shift back to prior NLRB rules and policy that could be considered more employer friendly.

H-1B Employment. On September 30, the Northern District of California vacated guidance documents issued by United States Citizenship and Immigration Services (USCIS), the State Department and Customs and Border Protection (CBP) that implemented President Trump's Proclamation 10973, which requires employers to include a $100,000 fee with each H-1B petition filed.

The Northern District of California is the second court to block implementation of the proclamation (the District of Massachusetts was the first) while a third court – D.C.'s district court – upheld the proclamation as a valid exercise of presidential authority. The two prior decisions are under appeal.

For employers, the practical impact is straightforward: the proclamation-based $100,000 H-1B payment is not currently being enforced. Employers filing H-1B petitions, including cases requiring consular processing or admission from abroad, are therefore not currently required to pay the $100,000 amount.

Employers sponsoring H-1B workers should continue monitoring the litigation. As of the time of this writing, USCIS's website advises that, if the applicable court order is later lifted, it intends to collect the payment. Additional court rulings or agency actions could alter the requirements applicable to H-1B petitions and admission.

The court order does not affect the Department of Homeland Security's (DHS) separately proposed $103,265 fee for H-1B cap-subject petitions, which remains in the rulemaking process and is not currently in effect.

Reductions in Force. On September 18, President Trump issued an executive order directing the DHS, Department of Labor (DOL), and State Department to coordinate more closely on H-1B program administration. When adjudicating H-1B-related filings, the DOL, DHS and State Department must consider whether an employer conducted layoffs within the prior year or plans to conduct layoffs affecting similarly situated U.S. workers.

The executive order may lead to closer agency review of H-1B filings when a sponsoring employer has recently conducted or is planning a reduction in force involving positions similar to sponsored H-1B roles. Employers may need to address the relationship between workforce reductions and sponsored positions across the relevant filing record.

The executive order leaves implementation details to forthcoming agency guidance, which will determine how the DHS, DOL and the State Department incorporate layoff-related information into H-1B adjudications. The forthcoming guidance will provide essential information on how the executive order will apply in practice.

New Labor Secretary. On September 30, the Senate confirmed Keith Sonderling as secretary of labor. Sonderling will play a key role in driving the DOL's regulatory agenda, particularly as the agency seeks to finalize key regulations in the remaining two years of the Trump administration. Key regulatory developments may include the finalization of rules addressing joint-employer and independent-contractor tests under the Fair Labor Standards Act and heat injury and illness prevention.

Looking Ahead. In our current political moment, employers must be ready to quickly adapt to changes, update their policies and training, and manage their human resources prospectively.

AUTHORS: Charles B. Baldwin is a shareholder, and Ellen Pactor is a counsel attorney for the Indianapolis office of Ogletree Deakins. They can be contacted at (317) 916-1300 or www.ogletreedeakins.com.