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A DIVIDED CONGRESS: IMPLICATIONS FOR EMPLOYERS

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With Democrats taking the Senate and Republicans the House, what should employers expect through January 2025? Without a single party controlling both houses of the legislature, it's very unlikely that any new legislation substantially increasing or decreasing employer compliance obligations will pass in the upcoming term. This doesn't mean that things won't change in the next two years, however. Employers should prepare themselves for aggressive enforcement and attempts to expand existing law by federal regulatory agencies like DOL, OSHA, and especially the EEOC and the NLRB.

The EEOC has been rudderless due to the failure of Biden's nominee for the tiebreaking fifth Commissioner spot, Kalpana Kotagal, to get out of committee proceedings. Former EEOC Chair, Janet Dhillon, whose term ended in July and whom Biden displaced as Chair, continued to serve on the Commission in that spot, but has tendered her resignation, effective November 18. Thus, the EEOC will remain in a stalemate with 2 Republicans and 2 Democrats until the new Senate term begins and the majority Democratic (or tied, with VP Harris as tiebreaker) Senate should push through the nominations of Kotalgal and the nominated EEOC General Counsel, Jessica Looman. Once Kotalgal and Looman are confirmed, expect the EEOC to become far more aggressive on the enforcement front by filing more lawsuits and by resuming some form of compensation data collection as part of the EEO-1 reporting process.

The NLRB and its General Counsel will continue changing the rules of engagement to try to increase union membership and make non-union employees aware of their Section 7 rights under the National Labor Relations Act. OSHA will become more aggressive. We expect the Department of Labor to focus on exemptions and independent contractor status, raising the exemption salary thresholds, and changing the duties tests. Agencies will continue to coordinate with each other, such as the EEOC, NLRB and DOL focusing on shared investigations, particularly concerning retaliation claims.

Agencies not usually focused on the employment relationship are also becoming involved. Expect the Federal Trade Commission to increase its focus on non-compete agreements and to prosecute employers who enter formal or informal no-poaching or wage-fixing agreements. The Consumer Financial Protection Bureau plans to investigate employer practices where employees owe the employer money—wage confiscation—such as for training reimbursement, relocation reimbursement, and advanced leave. So, although there may be legislative gridlock in Washington, watch out for the agencies. As a pilot sometimes tells passengers, "Buckle up; there's turbulence ahead."