



Podcast: 2016 Election Has High Stakes for Employers

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David Weisenfeld: I’m David Weisenfeld for XpertHR.com, published by Reed Business Information and proudly partnered with LexisNexis.

On this podcast, the countdown to the 2016 election is well underway. So we’ll talk with Mike Aitken, Vice President for Government Affairs at the Society for Human Resource Management. Mike joins me here in Washington D.C. at the SHRM 2016 Annual Convention. Mike, welcome.

Mike Aitken: Thank you David for having me today.

David Weisenfeld: Well it’s our pleasure and I want to start with something that you said during a presentation you gave, which I thought was a great quote. You mentioned, referring to Donald Trump, “It’s fun to date the bad boy, but you really don’t want to walk with him down the aisle.” What do you think would be the implications of some of Mr Trump’s positions in terms of SHRM going forward? [0:001:05.0]

Mike Aitken: Yeah, well in fairness about what I was saying about Mr Trump was I think a lot of the establishment saw a candidate that wasn’t going to be able to capture the nomination, said some extraordinary sometimes outlandish things, and people thought he was going to fade. But they didn’t realize he was tapping into a great deal of concern and despair and anger that’s out there in the American public. And I think what Mr Trump has been able to do is to tap into that.

It’s fascinating to me from kind of a political science perspective is to watch some of the overlap of the issues between what Mr Trump has tapped into and even what Senator Sanders was tapping into. So issues around trade, issues around income inequality, economic disparity, concerns about high-skilled immigration, which is certainly something that impacts the workplace as well as the economic disparity issues.

And I think from a Trump perspective, I think you will see, if Mr Trump was elected President, you’ll see certainly a focus on those two issues. And both of those are workplace issues.

David Weisenfeld: You mentioned the high-skilled workers and obviously immigration has been a touchstone during this whole primary season with some of the rhetoric. What do you think is going to happen going forward with that? Because there has been a bit of a shortage. [0:02:25.5]

Mike Aitken: Yeah, great question David. So I think there are two things, and I think both candidates – both Secretary Clinton and Mr Trump – will try and focus on immigration during their first term. They'll take a different perspective obviously when it comes to either what we would call comprehensive immigration or legalized immigration, whereas Mr Trump would probably have a more fair restrictionist view from his perspective – or categorized as a restrictionist view – with Secretary Clinton probably being more open.

Both of them would obviously look at stepped-up enforcement within the worksite, so probably a mandatory electronic verification system – maybe it's E-Verify or some version of it – and when it comes to employment-based immigration, I think both Mr Trump and Mrs Clinton will probably take a much tighter view around that. There is certainly a shortage. Our members have experienced it, particularly around the H1B visa area and the like, and the needed access to high-skilled employees, wherever they come from. Certainly something has to be done about the green card system, which is broken, and the way that numbers are allocated, which leads to some of the reliance upon the H1B program.

So more of a comprehensive approach as opposed to a scatter-gun approach is what's needed in employment-based immigration. I'm not sure that that'll be the environment that we'll be in after the elections, but that's certainly something that we'll be working toward.

David Weisenfeld: Now you mentioned E-Verify and a few years ago that was really a hot button issue. We saw a lot of southern states adopt mandatory E-Verify laws. It seems to have slowed down a bit the last couple of years. I know at the end of the fiscal year the E-Verify program has to be extended...

Mike Aitken: Has to be extended again.

David Weisenfeld: Right. So where do you see that playing out? [0:04:13.6]

Mike Aitken: Well E-Verify, there's both an appropriations and an authorizations process. The thing that will need to be extended will be both the authorization and the appropriation but often the appropriation gets extended before the authorization. So we don't anticipate E-Verify not being extended, and certainly will become the launch-pad for any type of employment verification proposal going forward in 2017.

SHRM's always been very supportive of having an entirely electronic federal – as opposed to a state-by-state – verification system and it's got to do three things from our perspective:

- 1) It's got to work;
- 2) It's got to be easy to use; and
- 3) It's got to hold the employer not liable for the decisions the employer makes based on the information from the system.

One of the challenges with E-Verify, while it does and has improved upon verifying that the name and number, or the number associated with the name, are within the database systems of the federal government, it can't tell you whether or not the person that's presenting the name and number actually is the same person. So there's an identity theft component that has to be addressed in order for E-Verify to truly live up to its full promise. And that's one of the things we will be working on in the next Congress.

David Weisenfeld:

So would SHRM not necessarily be in favor of those mandatory systems? 'Cause I know Alabama and Arizona, for instance, had some pretty draconian penalties for employers. [0:05:43.4]

Mike Aitken:

Part of the problem with the state-by-state approach is that some of the state laws conflict with not only each other but they conflict with the federal government's E-Verify program itself, and certainly one of the challenges that employers have in the employment law area has to do with conflicting federal and state law. So we like to have one law that they have to worry about, not multiple laws.

Secondly, SHRM's been on record that we would support a mandatory verification system, but right now E-Verify is one piece of the verification puzzle. You still, as an employer, have to do the I9 *and* E-Verify and to us, both of those should be electronic and integrated so the employer is doing one system, not two. So that's what we would be supporting moving forward.

David Weisenfeld:

What do you think is the issue, Mike, that would be mostly likely to blindside HR, looking ahead to 2017, if you had to pick one? [0:06:37.3]

Mike Aitken:

If I had to only pick one issue that's most likely to blindside, well they're never going to be blindsided if they're members of SHRM, or following your publication, because they're going to be up to speed on what's ever happening but I think there are a lot of issues if you're listening closely on the campaign that are workplace issues. Certainly you've heard the candidates talk obviously about immigration reform, healthcare reform, whether there'll be sweeping changes to the Affordable Care Act or more technical pieces. Paid leave is another one that has been discussed, both paid sick leave and paid maternity leave.

I think one that is interesting that's coming up and is starting to get a little bit of attention, which you've had Senator Mark Warner from Virginia talk about Employment 2.0, do we need to look at our employment and labor law protections for the gig economy, for example? And that is certainly going to have some implications for the workplace in terms of the kind of relationship that organizations will have with their employees or in some cases with their independent contractors. So I think that's one issue that's kind of looming out there that may not be as at the forefront as some of the others.

David Weisenfeld:

Again, I'm speaking with SHRM's Vice President for Government Affairs, Mike Aitken. Mike, shifting gears just a little bit, I wanted to talk a bit about background checks. Ban the Box has been a huge trend not only at the state level but the municipal level. What's SHRM's reaction to some of the legislation out there? [0:08:03.3]

Mike Aitken:

Sure David, that's a great question. When we think about efforts around background checks and we think about them wider, our biggest issue is that employers have to have the ability to conduct a background check, whether it's something such as a check on an application form or being able to either themselves or use a thirdparty entity, be able to conduct a check that looks at everything from their criminal record, their credit history, to verifying employment, verifying educational requirements because the threat to, or the danger of, a bad hire can be so significant.

We've had several incidents and one unfortunately we hear too often is where the employer may not have done as thorough a background check, and somebody commits a violent act against either the customers of the organization or the employees themselves, coworkers and the like, in the worksite. So we need to be very careful and have that ability.

SHRM's perspective overall is right now with efforts for example like Ban the Box, that's been pretty clear even with some of the EOC guidance that was re-stated back in 2012, saying that employers shouldn't have just a blank app on their application, just a blank form, that that in itself can run a potential foul under the Civil Rights Act and other things, but they need to look carefully at their background check process and what they have on their job apps.

But we've been very clear that employers still need to have the ability to be able to conduct a background check throughout that process and that public policy proposals, whether they're at the federal, state or municipal level that curtail that curtail that at a risk of an employer making an informed hiring decision.

David Weisenfeld:

One other area I wanted to address with you involves sick leave.

Mike Aitken:

Sure.

David Weisenfeld:

It's about twenty years ago or so that we saw the Family Medical Leave Act come to fruition. Depending on the outcome of the election, potentially we could have another President Clinton, although we still have some time. Could we see possibly paid sick leave on the federal level if that happens? [0:10:15.6]

Mike Aitken:

Well you've already to a certain extent, already have with federal contractors under the executive order being required to provide up to 56 hours of paid sick leave to employees that are working on federal contracts, an hour of sick leave for every 30 hours they work. And Secretary Clinton has indicated that she is supportive of a paid sick leave proposal, as well as a paid maternity leave or paternity leave proposal.

The challenge that comes with all of these and from our perspective, SHRM thinks it's a great idea for employers to provide both paid sick

leave and paid paternity leave, but we believe it should be done on a voluntary basis. The challenge becomes when you mandate stuff is that our data demonstrates and history shows that employers cut back to whatever that mandated requirement is. And it cuts down a lot of the flexibility that might be within the workplace that allows the employer and the employee to deal with whatever the situation is. After I did a presentation recently here and had a member come up to me that was a federal contractor, and they offer a very generous PTO plan, And so one of the question they asked me is, "We're going to come under this executive order. What happens if the employee exhausts his or her PTO leave and then gets sick?" And I said, "Well that's a great question. You might still be required to provide seven days of paid sick leave under the proposal from the executive office."

And so I think what their response would be is they would carve out seven days of paid leave out of their PTO plan. They wouldn't do 20 days of PTO *plus* seven days of paid sick leave. And that's unfortunate because it takes away some choice from an employee in their ability to deal with whatever situations they want or how they want to use that leave.

SHRM's on the verge of—I've been having a lot of conversations with public policy decision-makers, conservative and liberal, Republicans and Democrats, on an alternative federal opt-in proposal where employers who provide a certain amount of paid sick leave, coupled with flexibility, would be held subject to *that* approach as opposed to these individual state and local mandates. We think it's incentivizing employers to be more generous in this area than any type of state law approach would propose, and we think it's a way that allows an employer to offer a very generous benefits package to its employees and allow the employee to choose how he or she wants to use that leave.

David Weisenfeld:

So basically would that just wrap everything into one pot of PTO time? [0:12:57.3]

Mike Aitken:

It could very well wrap it into one pot of PTO time, but if I'm an employer that's a federal contractor. Well let's say I'm just an employer, and I have operations in California, I not only have to comply with the California paid leave requirement, I might have to comply with the San Francisco, the Los Angeles and the San Diego leave ordinance as well, and we think that's not an administratively wise approach. Nor is it an easy one for an employer to try and be compliant with, and we think instead if you had this type of an approach, you'd only have to worry about one type of proposal, which would be this federal opt-in approach as opposed to four.

David Weisenfeld:

And final question Mike because you got to meet with a lot of people here at the convention and have your ear to the ground. What's the number one concern that you hear from employers or members of your organization in terms of what's going on politically? [0:13:53.8]

Mike Aitken:

Well I think there are probably two top concerns. Kind of at the macro level I think there's a lot of unease about the election and what it's going to yield. I think there's a lot of concern about whether we as a

country are doing the things we need to do to try and address the very serious problems that are in front of us. But I think from a HR public policy workplace perspective, the issue that's been first and foremost in everybody's minds are the final changes to the overtime rules, and really particularly for some sectors – non-profit, state, local governments – how they're going to handle these changes and to be able to comply with them and meet those obligations.

David Weisenfeld:

Okay, well we'll let that be the last word. Our guest has been Mike Aitken, Vice President of Government Affairs at SHRM. Mike, thanks so much for joining us.

Mike Aitken:

David, thank you for having me. Very much enjoyed it.

David Weisenfeld:

I'm David Weisenfeld. We hope you've enjoyed this XpertHR.com podcast. Thanks again for listening. Continue checking our website regularly for more podcasts on key employment topics affecting the world of HR. Recent programs include an in-depth look at the Department of Labor's new overtime rules that Mike just alluded to, plus active shooter planning.

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