

By David Tobenkin

POST-ELECTION

FEDERAL FORECAST

SEVERE THREATS AHEAD!

Advocates Brace for Assaults

OMINOUS CLOUDS ARE GATHERING for the federal civilian workforce. As tough as the last decade has been for federal employees and retirees, the next two to four years likely will be far more challenging, following the results of the 2016 federal elections, knowledgeable observers say.

Federal employees, retirees and their advocates will be seen as successful if they can limit adverse executive branch and congressional measures targeting federal employment size, compensation and benefits, as they have managed to do over the past several years, these experts say.

At worst, and a real possibility, are legislative and executive actions that would significantly diminish federal employee and retiree benefits, reduce the size of the federal workforce, curtail civil service protections and generally make federal service a less attractive career option for many.

ALERTS RAISED

“We can’t sugarcoat it,” says U.S. Rep. Gerald E. Connolly, D-VA, a vigorous supporter of the federal community who represents a district with many federal employees and retirees. “A unified Republican government that controls both the legislative branch and the White House poses a serious threat to our federal workforce.”

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A member of the House Oversight and Government Reform Committee, Connolly says that during the 114th Congress – in both the Committee and on the House floor – federal advocates had to “repeatedly fight back efforts to weaken federal employee protections, attempts to change federal employee compensation and benefits, not to mention proposed draconian cuts to federal agencies.

“Thankfully, we had the Senate and the White House to thwart the worst of these efforts,” he says. “Moving forward next Congress, it is going to be a challenge. President-elect Trump has already signaled that he wants to cap federal employment and implement a hiring freeze. If past is prologue, those of us who consider ourselves advocates for the federal worker must be prepared for attacks on pay, benefits and workforce protections.”

Robert Tobias, director of the Institute for the Study of Public Policy Implementation at American University, shares that view. “I expect a broadscale attack on civil service protections once Donald Trump is president,” says Tobias, a professor of public sector leadership. “I expect that he will join with [Speaker of the U.S. House of Representatives] Paul Ryan and other legislators who believe the solution to the country’s problems is to downsize the federal workforce.”

Federal employee advocates say that if ever there was a time for federal employees and retirees to stand up and be counted through grass-roots efforts to defend their interests, it is now, as their actions may help prevent worst-case outcomes.

“It’s incumbent upon federal employees and retirees, particularly those outside of Washington, DC, to emphasize what federal employees do for the country,” says NARFE Legislative Director Jessica Klement. “Congresspeople want productivity and employment in their districts, and many have considerable numbers of federal employees who live there. NARFE members need to sensitize them to what getting rid of these jobs would mean for a district’s or state’s economy. NARFE members need to be more vocal about the work they do and how it matters

to the country through every medium possible. We must be prepared to take on any fight with which we are faced.”

Klement says retired federal employees, in particular, should take note that some of their benefits, as well as those of active employees, are likely to be targeted through legislation that will have an increased chance of congressional passage and, in a Trump presidency, a greatly reduced chance of a presidential veto.

THE PRESIDENT’S PLAN FOR THE FEDERAL WORKFORCE

Federal workforce and regulatory issues were featured prominently in candidate Donald J. Trump’s “Contract with the American Voter,” a 100-day action plan promising “to make America great again.”

The Contract promised to institute a federal hiring freeze – with exceptions for military, public safety and public health functions – a promise that is easy to accomplish through a presidential executive order that could be signed on Trump’s first day in office. In fact, Presidents Ronald Reagan and Jimmy Carter both instituted hiring freezes, which were later rescinded. While Trump already has backed away from some campaign pledges, many sources interviewed in November and December expected this promise to be kept.

On the other hand, Klement notes that the areas exempted from the hiring freeze, including defense, public health and public safety, comprise a large percentage of the federal workforce. Federal unions also point out that workforce levels at some large agencies already have been frozen or have been in decline for years. “We continue to push hard for additional staffing for the IRS,” says National Treasury Employees Union (NTEU) National President Tony Rendon. “IRS has lost more than 20,000 employees since 2010 due to budget cuts. [Customs and Border Protection] is also experiencing significant staffing shortages around the country.”

Trump’s Contract also proposed that for every new federal regulation, two existing regulations must be eliminated, something that was

mentioned in about half of his election speeches, according to *The New York Times*, and that is within his presidential authority to mandate.

Trump’s statements to date include promises to increase spending on defense, infrastructure and border control, but they also express a need for greater fiscal control, which many say would be difficult to achieve simultaneously. That has led to concern that the Trump White House could propose to cut employee benefits and resources at agencies that are not related to his priority areas.

Trump the candidate appeared to have federal agency policy favorites and to be prepared to intervene in picking winners and losers among agencies. If the Department of Defense is a favorite, the Department of Education and the Environmental Protection Agency appear to be the opposite, with Trump calling for their abolition on the campaign trail.

Still, many of Trump’s positions, such as those on the pay and benefits of the federal workforce, have been, and remain, unclear. Notably, Trump did not submit a candidate statement to NARFE, unlike Hillary Clinton.

Critics suggest that Trump simply does not have strong opinions on many federal employment issues and may not make the key calls in his administration on federal worker issues. “Donald Trump doesn’t think about how government works – his statements don’t even comport with the Constitution,” says David Cay Johnston, a professor of regulatory law at Syracuse University and the Pulitzer Prize-winning author of *The Making of Donald Trump*. “Donald has said he will assign out the work of being president to someone else, and it’s pretty clear that that’s going to be Mike Pence.”

Vice President-elect Pence, a former member of the U.S. House of Representatives and governor of Indiana, has a track record in the latter position of opposing public employee unions and supporting compensation reforms such as pay for performance, which was tried and abandoned at the Department of Defense. In his 12 years in the House, he had a 0 percent NARFE lifetime voting record.

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CIVIL SERVICE REFORMS ON THE FRONT BURNER

An initial hope for federal employee advocates was that with the multitude of significant policy changes Trump proposed in his candidacy, attention to federal workforce issues might be deferred until later in his four-year term. That might allow federal employment advocates time to mitigate them or offer counterproposals.

Many federal advocates concede that aspects of the civil service could use reform. The Partnership for Public Service, a body generally supportive of the federal workforce and its mission, and Booz Allen Hamilton, a major management consulting firm, jointly released a report in 2014 that called for overhauling the entire civil service system, including pay, performance management, hiring, job classification, accountability and workplace justice. However, efforts thus far have gone nowhere in the face of general legislative gridlock.

But hopes to defer civil service issues have been steadily reduced by statements of Trump advisers and appointees, suggesting that major federal workforce changes could be targeted for early in his term, taking advantage of the two-year period in which the Republicans are guaranteed to control both Houses of Congress, and when they could follow the policy recommendations of Trump advisers who are zealous critics of the federal bureaucracy.

Newt Gingrich, former House speaker and a member of Trump’s transition team, has in the past urged reducing the federal workforce and curtailing civil service protections. In a late November interview with *The Washington Post*, Gingrich emphasized the importance of civil service reform and predicted that Stephen Ban-

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non, former Breitbart News chief, would lead efforts to reform the federal workforce. The *Post* story noted that Breitbart stories have criticized the federal workforce as too large and overpaid.

Many being offered senior positions in the Trump administration have no experience managing federal workers or have made statements in the past critical of the federal workforce, suggesting employees at those agencies could face a challenging work environment, says William Dougan, until recently president of the National Federation of Federal Employees (NFFE), a union.

In late November, news organizations said Paul Conway would head up the “landing team” at the Office of Personnel Management (OPM) to assist with transition efforts at the agency. While Conway was chief of staff at OPM during the George W. Bush administration, he also has worked for the Heritage Foundation, a conservative Washington, DC, think tank, and led a group called Generation Opportunity, a libertarian-leaning group aimed at millennials.

The Heritage Foundation and Generation Opportunity have been harshly critical of the size of the federal government. The Heritage Founda-

tion, for example, in July issued a report proposing cuts of \$333 billion to federal employee pay and benefits over a decade, mostly through reductions in Federal Employees Retirement System (FERS) benefits, as well as cuts in pay, in paid leave, in Federal Employees Health Benefits Program (FEHBP) payments by the government and in retiree health care. It proposed that new federal workers – those with fewer than five years’ experience – should be shifted to a defined contribution plan exclusively, which would eliminate the FERS basic annuity.

RENEWED CONGRESSIONAL PUSH ON WORKFORCE ISSUES

Independent of President Trump’s actions relating to federal workforce issues, congressional Republicans are expected to push for legislation that many employee advocates view as adverse to the federal workforce.

Jason Chaffetz, R-UT, also interviewed for the late November *Washington Post* story, said he would seek to make it easier to fire employees who are incompetent or who break the rules, and also said he planned to push for converting from the current pension-based system for federal employees to a defined contribution, 401(k)-type set of benefits.

Such positions are consistent with recent GOP budgets and party platforms. In March 2015, for example, House Republicans, through a budget resolution, introduced a variety of proposals opposed by federal employee advocates, including: cutting non-national security employees by 10 percent through attrition by filling only one out of every three vacancies; requiring federal employees to contribute an equal amount to their pensions as do agencies, an effective pay cut of roughly 6 percent; phasing out the pension component of the employee retirement package altogether, as well as eliminating the FERS annuity supplement, which substitutes for Social Security benefits for young retirees; reducing the return on the government securities in the Thrift Savings Plan (TSP) G Fund; and basing the government’s share of FEHBP premiums for retirees on inflation, rather than the average cost of the plan.

The Republican Platform 2016 also called for easier disciplining and dismissals of problematic federal employees and for an end to union activities on federal time. It also criticized employee pay and benefits as excessive compared to the private sector and urged Congress to bring federal compensation and benefits “in line with the standards of most American employees.” Many individual pieces of legislation relating to these themes and proposals have been introduced in the House in recent years but failed to be passed by Congress in



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the face of opposition in the Senate and a likely veto by President Obama. Many expect similar legislation to be introduced in 2017, when the bills will not face a potential veto by the Obama administration.

Some major incremental, though piecemeal, reforms to the civil service already have taken place or are underway, including legislation that greatly reduced the civil service protections of Department of Veterans Affairs (VA) managers following scandals relating to waits for medical care at the agency's hospitals. That legislation passed with bipartisan support, including that of President Obama. Obama subsequently suspended enforcement of the so-called 2014 Choice Act, and a lawsuit by a dismissed VA executive challenging the constitutionality of the legislation is before a federal appellate court.

FEDERAL ADVOCATE REACTIONS

Federal employee advocates have a mixed response to these developments. They emphasize professionalism in executing the policy choices of their congressional and executive branch bosses, some in hopes that communication and education can dissuade budget hawks from taking extreme policy actions that would impair federal government functions and services.

Some point out, for example, that hiring freezes at the Internal Revenue Service (IRS) and the Social Security Administration (SSA) have harmed customer service at both agencies. The Government Accountability Office (GAO), an independent watchdog, has noted in a variety of reports the importance of maintaining a robust federal workforce to meet the nation's challenges. A 1982 GAO audit, for example, found that the Reagan and Carter federal hiring freezes did not save the government money. And many note that curbing civil service protections could reintroduce the kind of politicized and unprofessional "spoils system" workforce that led to the adoption of civil service protections in the first place.

"The problems that federal agencies are called upon to address are often critical and

complex," says NTEU's Reardon. "We need a workforce that is talented, well-trained and [that has] the tools and resources necessary to be as effective as possible. NTEU will fight to ensure that policies to enhance recruiting, retaining and rewarding such talented employees will be supported by Congress and the administration. And we will oppose any efforts to harm the federal workforce."

Federal employee advocates also will seek to marshal the best numbers they can to demonstrate federal employee compensation is reasonable compared to equivalent private-sector compensation, adding to what is already a raging debate with competing studies on that subject.

And there are some factors that are potentially favorable for the federal community.

For example, an influencing factor on a legislator's positions, regardless of party, is how many federal employees and retirees live in their district or, in the case of senators, state. Some Republican legislators defected to oppose some of the more extreme legislative measures directed at the federal workforce in the past several years. On the other hand, some Democrats supported, and the president signed into law, bills that eased the termination of VA leaders and that increased employee contributions to the FERS retirement plan for newer employees.

The House is generally viewed as less friendly to federal employees and retirees than the Senate, a body whose more powerful members with their longer terms more frequently vote their beliefs, rather than the party line. A narrowed Republican majority in that body after the 2016 elections, now 52 Republicans to 48 Democrats (including two Independents who caucus with the Democrats), means that for legislation that splits along partisan lines, a smaller number of Republican defectors could block legislation that would otherwise pass. "I think there is hope that the Senate can block the worst of the legislation," Dougan says.

In addition, a Senate filibuster may prove to be the hope to prevent such action. Filibusters

occur when a party refuses to yield the floor and allow a matter to come up to a vote.

And there also is tradition: The federal civil service has survived for 133 years, including past periods of single-party dominance of federal government.

Still, a note of caution is in order. Reforms to previously politically untouchable benefits programs appear to be on the table, from what appears to be an assertive Republican policy-change agenda. House Speaker Ryan, for example, has proposed reforming Medicare into a private system and has hinted that the Social Security benefit structure could be re-examined.

If legislation on such reforms proceeds, federal employees and retirees could find themselves fighting with much larger constituencies for scarce activism and policy agenda space among their legislative supporters, NARFE's Klement notes. There are, for example, roughly five million federal employees and annuitants and their spouses and survivors, compared to 55 million Medicare beneficiaries in 2015, according to the U.S. Centers for Medicare & Medicaid Services.

A last resort may be the courts. "I expect an uptick in the number of proposed removals and other adverse actions against federal employees," says John Mahoney, an attorney who has represented federal employees in a range of actions and is a former administrative law judge. "The narrative that has been sold to the electorate is that there is a lot of dead weight and bad performers in federal government who should be made to go away. I am concerned that there will be a major push to get rid of as many federal employees as possible, though I hope my fears don't come to fruition."

Under current federal law, federal employees are entitled to protections that include written notice of a proposed removal, 7-14 days to reply in writing, and a written decision effective date 30 days after the proposal. Employees also enjoy statutory appeals rights. Mahoney says he is concerned that if civil service protections are statutorily repealed, the process for adverse

actions could default to the minimal standard that the Supreme Court said in its 1985 decision, *Cleveland Board of Education v. Loudermill*, constitutes due process: advance written notice and an opportunity to respond. In practice, he says, this would be little better than at-will employment. Federal employee advocates and their attorneys will need to resort to the courts to seek to challenge unconstitutional legislative actions by the federal government, wherever possible, he says.

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NEXT SHOES TO DROP

Developments in the next few months will likely start to define the scope of the challenge for federal employees, retirees and their advocates. The continuing resolution, the short-term funding measure that is keeping the government operating in fiscal year (FY) 2017, will expire in late April. And the Trump administration's first federal budget, for FY 2018, will be due early this year. Funding proposals for different agencies will speak volumes as to the administration's plans for the federal bureaucracy, American University's Tobias notes.

Other developments include continuing picks by Trump for Cabinet and agency positions, including the Office of Management and Budget and OPM, which exert a strong hand over federal workforce policy.

Federal employee advocates also hope the next two years will be free of major, high-profile civil service controversies, as crises or scandals, or the appearance thereof, have been a catalyst for civil service change in recent years. ■

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