Insights

Trump Administration Makes Changes to Appointment of Federal Administrative Law Judges

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On July 10, 2018, President Trump signed an Executive Order ("EO") that altered the manner in which Federal Administrative Law Judges ("ALJ") are selected for service from competitive examination and competitive service selection procedures to agency appointments. The changes in the EO were effective July 10, 2018, while grandfathering ALJs already serving prior to the effective date.

ALJs act in a judicial-like capacity in hearing and ruling on disputes with government agencies. In fact, State and Federal laws often require agency disputes to first proceed through the administrative appeal process before filing a suit in a court of law. In such cases, the legal grounds for challenging an agency decision are often narrow and deferential to the agency and typically limited to the record produced during the administrative appeal process. To a certain extent, the administrative appeals process is akin to a mini-trial, and the ALJs are similar to trial court judges who review and rule on various procedural motions, admit evidence, and issue orders. Given the cost and expense of an administrative appeal, and the practical implications of an agency decision, especially if it involves the licensing or certification of a regulated person or entity, the ALJ's order is often the final word.

Federal ALJs were previously selected through competitive exam and competitive service selection procedures. The EO cites a recent United States Supreme Court case[1] as demonstrating that ALJs are "Officers of the United States" subject to the Appointments Clause. The EO attempts to clarify this ambiguity by removing ALJs from the competitive exam and service requirements and subjecting them to agency appointments. According to the EO, "This action will also give agencies greater ability and discretion to assess critical qualities in ALJ candidates, such as work ethic, judgment, and ability to meet the particular needs of the agency."

Like trial court judges, ALJs are intended to be fair and impartial when overseeing all disputes, but unlike trial court judges, they often work for the administrative agency whose decisions are being challenged. A potential consequence of the EO is that agency heads may more easily remove ALJs without cause. As such, critics argue that the new appointment policy will undermine the judicial independence of ALJs and result in ALJs being picked for political or policy preferences or to advance a particular administration's agenda, as opposed to their skills, knowledge, skills and expertise in the complex and heavily regulated areas over which they are presiding. The EO applies to all Federal ALJs, and as such, its effects will be felt by health care providers throughout the industry seeking to challenge adverse Federal agency actions. The EO does not apply to ALJs working for the State of Indiana. A link to the Executive Order is available at https://www.whitehouse.gov/presidential-actions/executive-order-excepting-administrative-law-judges-competitive-service/

The administrative appeals process is a complex and challenging endeavor. Krieg DeVault has experienced attorneys ready and able to assist in such matters. Please contact Libby Yin Goodknight at lgoodknight@kdlegal.com or Brandon W. Shirley at bshirley@kdlegal.com for assistance with actual or pending administrative appeals.

[1] See Lucia v. Securities and Exchange Commission, 138 S.Ct. 2044 (2018).