



A Post-Election Report | November 2016

## WITH THE ELECTION (MERCIFULLY) BEHIND US, WHAT WILL A TRUMP ADMINISTRATION MEAN FOR EMPLOYERS?

The 2016 Presidential election was arguably the most contentious, unpredictable, and politically polarizing race in this nation's history. The contours of the electoral map changed by the hour in the days leading up to November 8th, confounding even the most seasoned political observers. Although the House of Representatives was expected to remain in Republican hands, which party would control the Senate and of course the White House was decidedly less certain. In the end, Donald Trump will be sworn in as the 45th President on January 20, 2017, with a Republican majority in both Houses of Congress. What will this mean for employers?

Trump's unexpected win was a reflection of voter dissatisfaction with current policy. The overarching expectation of a Trump presidency is that he will reverse the workplace policy course President Obama set with his "middle-class economics" agenda over the past eight years. He will likely accomplish this aim by rescinding several employment-related Executive

Orders, re-issuing former President Bush-Era Orders, and appointing agency officials who will stem perceived regulatory overreach.

President-elect Trump may be particularly emboldened by the composition of the 115th Congress. Throughout this horserace of an election, the Senate's chances of flipping to a Democratic majority appeared to be a real possibility, and many Republicans feared double-digit losses in the House. As election night wore on, however, it became clear that Republicans will retain control of the upper chamber, albeit by a slimmer margin. In the House, Republicans lost only a handful of seats, so their majority remains solid. Therefore, President-elect Trump's Cabinet, agency and judicial appointments

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will not likely receive insurmountable opposition in the Senate. Legislation advanced by Republican lawmakers will also likely be signed into law. However, absent further changes to the Senate filibuster rules, Senate Democrats may be the only remaining block on GOP legislative proposals.

Now that hopes of a progressive policy agenda are all but gone at the federal level, it is expected that legislation pushing for paid leave, minimum wage increases, and other worker-friendly measures will fall to the states and localities. This trend of local-level legislation, which is creating a constantly evolving patchwork of employer obligations nationwide, will likely continue over the next four years, at least in traditionally Democratic states.

In this article, we examine the workplace policy agenda that President-elect Trump promised to pursue once in office. While we cannot predict the future, we identify a variety of topics that may affect employers in the new Trump Era. On the whole, this surprise election outcome calls for renewed vigilance among employers to anticipate trends, identify opportunities, understand changes as they arise, and exert influence whenever possible.

## Judicial and Regulatory Appointments

After taking the oath of office, one of President-elect Trump's highest priorities will be filling judicial vacancies and key regulatory positions within his administration.

First and foremost, we can assume that he will move swiftly to nominate a successor to take the late Justice Antonin Scalia's seat on the Supreme Court. Based on comments from the campaign trail, President-elect Trump intends to choose a jurist "based on constitutional principles, with input from respected conservative leaders."<sup>1</sup> To date, Trump has named 21 potential nominees, any of whom—if confirmed—would secure the conservative tilt to the 9-member bench.<sup>2</sup> Unlike Hillary Clinton's predicted nominees, all of President-elect Trump's would likely

uphold the Court's decision in *Citizens United v. Federal Election Commission*<sup>3</sup> if given the chance.

Notably, among his list of potential candidates is Timothy Tymkovich, the justice who wrote the Tenth Circuit's opinion in *Burwell v. Sebelius*,<sup>4</sup> the case



addressing whether closely-held pro-profit corporations have to comply with the Affordable Care Act's contraceptive mandate if doing so runs contrary to their religious beliefs. President-elect Trump has repeatedly called for the ACA's repeal, and is a proponent of allowing businesses to assert objections based on religious principles.<sup>5</sup> Another top contender is Justice Joan Larsen, a member of the Michigan Supreme Court and a former clerk for the late Justice Scalia.

In selecting a Supreme Court candidate, President-elect Trump undoubtedly will bear in mind that the Senate must approve any nomination. Under current filibuster rules, Supreme Court nominees remain subject to a 60-vote threshold, which Senate Republicans will fall short of in the next Congress.

Nonetheless, given the outcome of the election, and the pressure he may feel from the more conservative factions of the party, he is quite likely to choose a candidate ideologically similar to the late Justice Scalia.

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Assuming the Court returns to its full complement in early 2017, the appointment of a ninth justice will immediately affect the Supreme Court, which has been evenly split on several issues since Justice Scalia's death. The Court deadlocked on a few key decisions earlier this year and appears to be delaying the scheduling of certain oral arguments until a ninth justice is seated. Meanwhile, there are several significant labor and employment cases pending before the Court this term, most notably:



- *Ernst & Young LLP v. Morris* (16-300), *Epic Systems Corporation v. Lewis* (16-285), *National Labor Relations Board v. Murphy Oil USA, Inc.* (16-307), and *Patterson v. Raymours Furniture Company, Inc.* (16-388). The Supreme Court is currently considering the cert petitions filed in these four cases.<sup>6</sup> The common question presented is the enforceability of class action waivers contained in mandatory arbitration provisions under the Federal Arbitration Act and the National Labor Relations Act. In the underlying actions, the Ninth and Seventh Circuits found that mandatory class action waivers violated the NLRA, while the Fifth, Eighth and Second Circuits upheld them as lawful.<sup>7</sup>
- *National Labor Relations Board v. SW General, Inc.* (15-1251). This case represents another opportunity for the Court to address the scope of presidential authority to make appointments. The D.C. Circuit<sup>8</sup> concluded that former Acting General Counsel of the National Labor Relations Board (NLRB or “Board”), Lafe Solomon, had served in violation of the Federal Vacancies Reform Act because he continued in that role after being nominated to a full term in the same position. The court agreed with the employer that, as a result, Solomon was ineligible to continue service as Acting General Counsel, thus arguably invalidating actions taken at the pertinent time. The Supreme Court heard oral arguments in this case on November 7, 2016.

- *McLane Company v. Equal Employment Opportunity Commission* (15-1248). Here, the Supreme Court is slated to resolve a circuit split concerning the standard of review applied to district court decisions to either quash or enforce subpoenas issued by the Equal Employment Opportunity Commission (EEOC). The Ninth Circuit<sup>9</sup> applied a de novo review in the underlying case, while eight other circuits review orders on these subpoenas deferentially.
- *Serna v. Transport Workers Union of America* (16-484). The employer in this case filed a petition to challenge the collection of compulsory fees from employees who are subject to the Railway Labor Act. The district court and Fifth Circuit<sup>10</sup> affirmed the union's right under its agreement to require represented employees to share in costs, even if they are not members of the union. If the Supreme Court agrees to consider this matter, the case could provide an opportunity for the Court to revisit its split decision in *Friedrichs v. California Teachers Association*,<sup>11</sup> which also involved a union fees dispute.

Beyond the critically important Supreme Court seat, President-elect Trump will need to fill numerous vacancies in the lower courts. Shortly before the election, there were nearly 100 empty seats on the district and appellate benches, with more than



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50 nominations left pending. These vacancies include more than a dozen at the appellate level, with at least one open seat in most of the circuits. President-elect Trump will be highly motivated to place as many judges as he can across the country.

In evaluating nominees at all levels, he will presumably select candidates who will be inclined to challenge the Obama Administration's agency rulemaking and exercise of executive authority. In essence, he will likely aim to ensure, to the best of his ability, that challenges to the Obama Administration's executive and administrative branch actions will be undone by legal challenges before the judicial branch.

In addition to addressing the many judicial vacancies, the Trump Administration will prioritize filling in Cabinet and key regulatory appointments.



The Secretary of Labor will represent one of his most important appointments. The current, influential Secretary, Thomas Perez, has advanced one of the most progressive agendas in history. President-elect Trump is expected to nominate someone who will rein in the agency's extensive rulemaking, and be more receptive to employer concerns. In fact, in his 100-day action plan, President-elect Trump promised to require "that for every new federal regulation, two existing regulations must be eliminated."<sup>12</sup>

Relatedly, he presumably will choose conservative-leaning candidates for the Administrator of the

Wage and Hour Division, the Occupational Health and Safety Administration (OSHA), and the Office of Federal Contract Compliance Programs (OFCCP). They, in turn, are expected to use their rulemaking authority sparingly, and limit the use of sub-regulatory guidance.

Over the course of his term, President-elect Trump also will make crucial decisions concerning the composition of the EEOC and the National Labor Relations Board (NLRB or Board). The party controlling the White House holds a majority of the five members, in each of these two agencies. Within the next two years, President-elect Trump is scheduled to fill two vacancies, and replace two outgoing members, of the Board, each of whom will serve a five-year term. He will also nominate a successor for NLRB General Counsel, Richard Griffin, Jr., whose term concludes in November 2017. As for the EEOC, all five current members (including the Chair) will turn over before the end of 2020. It is uncertain whether President-elect Trump would re-appoint any particular member. For his part, David Lopez, EEOC General Counsel since 2010, announced that he is leaving next month. President Obama looked to the NLRB and EEOC to help define and enforce his employment policy, and we can expect President-elect Trump to do the same.

While the Senate Judiciary Committee will shepherd judicial nominations, the Senate Committee on Health, Education, Labor and Pensions (HELP) will handle nominations for the NLRB, the Secretary of Labor, and EEOC members. Most commentators predict that Senator Lamar Alexander (R-TN), the current Chairman of the HELP Committee, will remain in his position. It is expected that congressional Republicans will be receptive to President-elect Trump's nominees.

## Labor Law

President-elect Trump is expected to bring with his Administration a dramatic shift in labor policy. Throughout the campaign, he has signaled his

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disapproval with certain labor issues. For example, in his infrastructure improvement plan, he advocates the use of “incentive-based contracting to ensure projects are on time and on budget.”<sup>13</sup> It is therefore anticipated he will rescind President Obama’s Executive Order 13502<sup>14</sup> promoting project labor agreements (PLAs), otherwise known as “pre-hire” collective bargaining agreements, and re-issue the Bush-Era Executive Order 13202,<sup>15</sup> which required contract neutrality. In other words, Executive Order 13202 banned requiring or prohibiting contracting bidders to enter into or adhere to agreements with one or more labor organizations.

A Trump Administration is also expected to strongly support right-to-work laws, a position that was included in the 2016 Republican Party Platform. And although President-elect Trump did not attack the NLRB directly during his campaign, many Republicans in Congress have taken issue with a number of Board actions in recent years.

For example, last year the NLRB implemented the so-called “quickie election” rule.<sup>16</sup> Among other things, the rule shortens the time between a union’s filing of a representation petition and the holding of an election. The quickie election rule is widely perceived as a pro-union measure, as it makes it harder for employers to oppose representation in the condensed timeframe. While employers have challenged the rule in court, it has survived thus far and does not appear to be going anywhere.<sup>17</sup> Under a Trump Administration, however, the rule would be more vulnerable to attack.

While there is not much the Trump Administration would be able to do to revoke the election rule outright, it could restrict the NLRB’s funding regarding enforcement of the rule’s provisions. Alternatively, the NLRB could revise the rule to temper some of its more cumbersome or contentious provisions. In a similar vein, a Republican majority in Congress could reintroduce legislation to protect employees’ right to secret ballot union representation elections.<sup>18</sup>

Both the NLRB and DOL have handed down a multitude of expansive rules and decisions impacting labor law, beyond the quickie election rule.<sup>19</sup> The employer community has pushed back on several of these labor developments, resulting in ongoing litigation. In particular, employers (and their amicus) contend that the Board or DOL have overstepped on these key issues:

- *Class action waivers.* Known most commonly as the “*D.R. Horton/Murphy Oil*” issue, employers contest the NLRB’s insistence that class action waivers contained in arbitration agreements violate the NLRA.<sup>20</sup> As discussed above, petitions have been filed in four cases seeking Supreme Court review of this issue. The Board’s minority party members have raised vigorous dissents in the class action waiver cases, and these dissents likely will become the majority position.
- *Joint employer analysis.* In its *Browning-Ferris Industries of California, Inc.* decision last year, the Board revised the standard for determining whether two or more entities are joint employers of a single workforce.<sup>21</sup> Under this broader standard, the NLRB considers whether an entity has “indirect control” over the employees in question.<sup>22</sup> Demonstrating an entity’s indirect control of, or even its “unexercised potential to control” another entity’s employees, could establish joint employment before the Board. This approach plainly carries wide-sweeping implications for many types of arrangements, such as franchiser-franchisee relationships. The employer in *Browning-Ferris* has appealed the Board’s interpretation to the D.C. Circuit, where briefing is underway.<sup>23</sup>
- *Persuader rule.* The DOL’s final “persuader rule,” issued on March 24, 2016, requires employers to file public reports with the DOL when they use consultants (including lawyers) to provide labor relations advice and services that have the purpose of persuading employees regarding union organizing or collective bargaining.<sup>24</sup>

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In the past, such disclosure was required only if a consultant providing advice had direct contact with employees. No less than three lawsuits have been filed to block the rule.<sup>25</sup> On June 27, 2016, a district court in Texas entered a nationwide preliminary injunction, preventing the DOL from implementing the rule. The DOL has filed an interlocutory appeal with the Fifth Circuit, which is pending.

While these issues percolate through the court system, the NLRB continues to articulate new positions in an effort to further expand employee



rights under the NLRA—including in nonunion workplaces. (The NLRA applies to both unionized and non-unionized non-supervisory employees working in the private sector.) For example, in 2015, the NLRB's General Counsel issued a report evaluating the legality of common employer rules. The memo explained that handbook policies that could be construed as dissuading employees from engaging in conduct protected by Section 7 violate the NLRA. Thus, according to the NLRB, a blanket rule that forbids employees from fighting on the internet, or from insulting other employees, could be deemed overly broad, because concerted activity can involve passionate debate that should not be curbed.<sup>26</sup> The General Counsel also asked the Board to clarify and widen the protection afforded employees who engage in intermittent

and partial strikes.<sup>27</sup> In an effort to set the stage for Board input, the General Counsel distributed a model brief to be used by counsel if that issue arises in a pending matter.

With an opportunity to re-shape the NLRB, President-elect Trump could stem the expansion of Section 7 coverage. A reconstituted Board could queue up positions for the Board to address. Any ensuing litigation to contest Board interpretations will require both time and resources, leaving questions unresolved for perhaps years.

For his part, President-elect Trump is expected to support and vigorously defend actions taken by the Board that seek to restore long-standing labor law positions. For example, he would presumably sign into law any congressional effort to legislate the reversal of a controversial Board decision—such as the *Browning-Ferris* joint employer case—that does not align with his policies. If a Board interpretation is challenged in court, President-elect Trump's judicial nominations become that much more important.

President-elect Trump could also take a page out of President Obama's playbook and use his executive power to restore prior labor law policy. For example, it is anticipated President-elect Trump will re-issue Executive Order 13201, signed by President George W. Bush on February 21, 2001, which required federal contractors to post a notice in the workplace informing employees of their rights under *Communication Workers of America v. Beck*.<sup>28</sup> In *Beck*, the Supreme Court held that unions could not use member dues for purposes unrelated to collective bargaining or contract administration without the members' consent. In January 2009, President Obama issued Executive Order 13496—*Notification of Employee Rights Under Federal Labor Laws*—which rescinded the Beck rights Executive Order, and instead required contractors to inform their employees of their rights to unionize or refrain from unionizing under the National Labor Relations Act. It is likely this Executive Order will be rescinded.

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Overall, the business community can expect a more employer-friendly Board, or at least one less inclined to stretch Section 7 coverage to unworkable limits.

## Equal Employment Opportunity Law

While his opponent made equal pay and women's rights cornerstones of her campaign, President-elect Trump did not squarely address Equal Employment Opportunity (EEO) laws on the campaign trail. It is expected, however, that recent EEOC efforts will be in the new Administration's crosshairs. Notably, the President-elect is not likely to view favorably the EEOC's revised EEO-1 reporting requirements, which will obligate employers to disclose pay data



information. This change takes effect with the 2017 EEO-1 reports, due March 2018, and applies to private employers with 100 or more employees.

This move to promote pay equity, although admirable, has been widely criticized in the employer community as expensive, cumbersome, and structured in a way that will not likely achieve its desired end. Before the final EEO-1 Report was released, a trio of Republican Senators sent a letter to the White House Office of Management and Budget (OMB) expressing their "serious concerns" with the EEOC's EEO-1 proposal.<sup>29</sup> In addition, various Republican lawmakers introduced legislation to prevent implementation of the revised report.<sup>30</sup> Although this measure was not expected to advance under President Obama's watch, President-elect

Trump would likely sign it into law should a similar measure land on his desk.

During President Obama's term, the EEOC, like the NLRB and DOL, advanced an ambitious agenda. The Commission recently released its Strategic Enforcement Plan (SEP) for the 2017-2021 fiscal years, setting out priorities and strategies for the near term, which coincides with the duration of the new Presidential term.<sup>31</sup> The SEP continues the push for equal pay, promising to address disparities that persist on all grounds, including sex, race, ethnicity, and disability. Along with equal pay, the EEOC identified several additional substantive priorities. Of particular interest, the EEOC will hone in on "issues related to complex employment relationships and structures in the 21st century workplace, focusing specifically on temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy." With this change, the SEP acknowledges the continuing evolution of the workforce brought about by the "gig economy," as more and more people work in alternative or contingent arrangements, including on-demand jobs. The EEOC plainly intends to take a much closer look at these types of relationships, including staffing agencies and independent contractors, than it has in the past.

Republican lawmakers, however, have criticized the Commission for activity unrelated to processing the significant backlog of discrimination claims filed with the EEOC, and advanced legislation to force the EEOC to "prioritize its staffing and resources towards reducing the number of current and outstanding unresolved private sector pending charges and public sector hearings," and to solicit public input before taking any potential action on proposed guidance.<sup>32</sup> Therefore, the EEOC under the Trump Administration would likely be re-directed to address existing discrimination claims instead of continuing to pursue bigger-picture efforts.



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Another area where the EEOC's position might clash with the future Trump Administration's involves the rights of the LGBT community. Over the years, the EEOC has taken a firm stand on LGBT claims. Beginning with its 2012 enforcement plan, the EEOC identified protecting the rights of LGBT employees as a top priority.<sup>33</sup> According to the EEOC, Title VII's prohibition on sex discrimination also forbids discrimination on the basis of either gender identity or sexual orientation. Thus, for example, the EEOC considers sex discrimination to include: failing to hire an applicant because of their transgender status or gender transition, denying an employee access to a restroom corresponding to the individual's gender



identity, and denying available spousal health insurance benefits to same-sex spouses.

Courts are starting to agree with this interpretation. A federal court in Pennsylvania recently denied an employer's motion to dismiss an employee's constructive discharge claim, finding that his allegations that he was harassed due to his sexual orientation "is a subset of sexual stereotyping and thus covered by Title VII's prohibitions on discrimination 'because of sex.'"<sup>34</sup> Two federal circuit courts of appeal are also poised to consider this issue in the coming months.<sup>35</sup>

As previously noted, however, President-elect Trump has adhered to the GOP Platform when it comes to LGBT issues. Although the EEOC takes the position that discrimination on the basis of sexual

orientation and/or gender identity is actionable sex discrimination under Title VII, there is no federal law codifying that stance. The Employment Non-Discrimination Act (ENDA), which would prohibit employment discrimination on the basis of sexual orientation or gender identity, has been introduced over the years, and even cleared the Senate in 2013.<sup>36</sup> Even if ENDA were to be reintroduced during the Trump Administration, however, its chances of passage are slim.

In sum, the EEOC's ambitious SEP might be scaled back under a Trump Presidency, and the agency might be pressured to temper its enforcement agenda and focus instead on its discrimination charge backlog.

Lastly, the EEOC's final rules on wellness programs under the American with Disabilities Act and Genetic Information Nondiscrimination Act could be on the chopping block or subject to significant revisions. Even as the EEOC faces a lawsuit from the AARP alleging the rules were too permissive and violated these statutes, many employers feel conversely that the EEOC rules were too restrictive.

## Occupational Health and Safety Law

Although President-Elect Trump will not preside over a typical Republican Administration, it is expected that with his business-oriented views, his treatment of health and safety issues will be very different from that of the last eight years. President-elect Trump has been vocal in his opposition to regulations that burden business. During the presidential debates and on his website, President-elect Trump promised to "[a]sk all Department heads to submit a list of every wasteful and unnecessary regulation which kills jobs, and which does not improve public safety, and eliminate them."<sup>37</sup>

OSHA has seen a flurry of regulatory activity over the past eight years. Indeed, OSHA's current regulatory agenda calls for the release of final rules on walking-working surfaces, continuing obligations for updating injury and illness records, and access



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to employee medical records, along with procedural rules for retaliation complaints under the Dodd-Frank and MAP 21 laws. In addition, the agency has stated it will propose new rules addressing guidelines for the control of infectious diseases in the healthcare industry and the standards improvement project change to 18 different OSHA standards. Whether or not OSHA continues with these rulemaking actions in the lame duck period before the inauguration remains to be seen. There is certainly precedent for that with OSHA issuing several rules in the last days of former President Clinton's Administration in January 2001.

If OSHA attempts to push through rulemaking in the final days of the current Administration, the new Trump Administration will be able to administratively suspend and change or eliminate those provisions through its own rulemakings. Indeed, during the Administration of George W. Bush, OSHA simply cancelled more than two dozen pending rulemaking efforts, some of which involved years of agency work.<sup>38</sup>

Because there are broad policy issues at play, once he takes office, Trump is expected to repeal or significantly pare down the existing OSHA rules, and rescind any proposed measures. For items that are simply agency policy, the new Administration can change the policies by promulgating a new version of the policy. For example, the agency is expected to withdraw its February 21, 2013 Letter of Interpretation (LOI) that allows union agents and community organizers to accompany safety inspectors into non-union worksites.<sup>39</sup> Employers have long argued that this LOI contradicts the plain language of the Occupational Safety and Health (OSH) Act and the NLRA, and violates the Administrative Procedure Act (APA). For decades, OSHA has permitted a safety inspector to be accompanied by a labor union only where such a union has been certified or recognized as representing the employees of the employer under procedures established by the NLRB. Under

the new policy, an unspecified (non-majority) number of employees in the non-union workplace may designate an outside union or community organization as their representative for safety inspection purposes, even though a majority of



the workers have failed to authorize the union as their representative for any purpose. This change marked the first time non-union employers could be compelled to invite outside members into their workplaces absent a showing that the individual represents a majority of the employees. The interpretation has been challenged in a newly filed lawsuit and thus will be a priority issue for consideration.

For existing rules that are already in effect, substantive changes to the rules would be more difficult. For example, pursuant to 2015 legislation—and for the first time in 25 years—OSHA penalties increased effective August 2, 2016. OSHA citations are now subject to a 78.1568% increase in potential penalties. This dramatic increase, a “catch-up adjustment” to account for inflation since 1990, suggests a real possibility that even a single citation could cost an employer over \$10,000. Because this change was mandated by legislation, the new administration cannot change it without action from Congress.

OSHA also promulgated a new final rule affecting employers' injury and illness recording and reporting obligations. This rule requires some employers to

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electronically report injury and illness data, which will then be made available to the public online. Enforcement of this reporting provision will begin on January 1, 2017. Employers have expressed concern over this electronic reporting element, characterizing it as an attempt to enforce the law by “shaming.”<sup>40</sup>

A separate element of the rule concerning retaliation has drawn even more ire. That provision clarifies the rights of workers to report work-related injuries and illnesses, and purports to expressly prohibit retaliation for such reporting through drug-testing or safety incentive programs. Industry employers (represented by Littler Mendelson) filed a lawsuit to block the rule, arguing in part that the anti-retaliation provision hinders safety incentive programs and thwarts routine post-accident drug testing policies.<sup>41</sup> The anti-retaliation rule was scheduled to take effect on August 10, 2016, but OSHA has agreed to move the deadline twice, now back to December 1, 2016, to give the court more time to consider the pending motion for preliminary injunction. Regardless of the outcome of the litigation, the Trump Administration could engage in further rulemaking to change the provisions.

Any other efforts to expand the scope of OSHA enforcement are also expected to be reined in. For example, in 2015, OSHA updated its 1996 and 2004 guidelines for protecting healthcare and social service workers from workplace violence.<sup>42</sup>

Such actions might be considered administrative overreach, and scaled back.

## **Wage and Hour Law**

Although the country is facing a patchwork of minimum wage laws, any federal bill to raise the rate beyond the current \$7.25-per-hour floor is not expected to be signed into law during the Trump presidency.

Moreover, the recently-finalized DOL rule revising the “white collar” overtime exemption under the Fair Labor Standards Act (FLSA) is now more vulnerable to attack. Although it is not expected to be repealed at this point, the rule—which raises the salary threshold for the white collar exemption from \$23,660 to \$47,476 per year (or \$913 per week), with automatic adjustments every three years<sup>43</sup> — could be undermined through legislation, regulation, and/or litigation. Lawmakers could renew efforts to overturn the rule under the Congressional Review Act (CRA), or attempt to restructure the substance or timing of the threshold increase.

At this point, two lawsuits have been filed in the Eastern District of Texas, seeking to enjoin the new rule in whole or in part. A group of 21 states filed one lawsuit, disputing the rule’s applicability to state employees. A coalition of business groups, including the U.S. Chamber of Commerce, filed the second action, arguing that the DOL exceeded its authority with the regulation.<sup>44</sup> Pending a ruling, employers should continue to prepare to comply with the new overtime rule, which is slated to take effect on December 1, 2016, in all respects. However, employers have reason to be slightly more optimistic about their overtime compliance burdens. It is possible, if the rule is not enjoined, that the incoming Administration would engage in further rulemaking and roll back the automatic increases and evaluate other changes to the White Collar regulations that would favor employers.

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Beyond the overtime rule, in January 2016, the DOL's Wage and Hour Division issued an administrator's interpretation (AI), establishing significantly more generous standards for determining joint employment under the FLSA and under the Migrant and Seasonal Agricultural Worker Protection Act.<sup>45</sup> This AI was significant because it was another step the agency has taken pursuant to the so-called "fissured workplace" theory. WHD Administrator David Weil has long argued that business models such as franchising and the use of independent contractors and temporary workers leads to greater instances of misclassification and wage and hour law violations. Efforts to expand the scope of who is a joint employer with the offending entity have led to more charges filed against businesses for wage and hour violations.



In July 2015, the Wage and Hour Division also issued a controversial administrator's interpretation regarding independent contractors. This AI was part of a larger effort to take an expansive view of employment and further the Wage and Hour Division's Misclassification Initiatives including partnerships with state and local agencies.

The WHD under the Trump Administration, however, will not likely be as focused on misclassification efforts, and all sub-regulatory guidance issued, including the January 2016 and July 2015 AIs, will probably be withdrawn.

This may be welcome news to employers in the burgeoning on-demand or gig economy. Millions of Americans now work in gig arrangements in support of the service economy. Some employers label and treat these on-demand workers as independent contractors, rather than as employees within the meaning of the FLSA and other laws. The DOL recently turned a spotlight on this issue when it announced its plans to revive the Contingent Worker Supplement (CWS) to the Current Population Survey, scheduled for May 2017. The DOL hopes to gather reliable statistics about the number and characteristics of contingent workers through the CWS, including how they obtain their customers and whether gig work represents their primary source of income. This data could be used to support future legislative and/or regulatory actions under the new Administration.<sup>46</sup> Under a Trump Administration, however, any actions that seek to wholesale classify on-demand workers as employees would face a cool reception.

## Benefits Law

In light of recent regulatory actions and campaign discussion, numerous benefits-related changes may be in store for employers. We begin with the ACA, the repeal of which was a cornerstone of the Trump campaign, particularly in the weeks leading up to the election. Trump has expressed in no uncertain terms his distaste for President Obama's landmark healthcare law. He has pledged to repeal and replace the ACA.<sup>47</sup>

With Republicans in control of both the White House and Congress, repeal of the ACA becomes more than just a campaign pledge or message vote. The task will now fall to Republicans to put forth a proposal to not just to repeal the landmark law, but to replace it as well. With popular provisions of the ACA in place, and millions of Americans currently covered by ACA marketplace plans, this task will no doubt be challenging. Yet it will remain at the



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top of President-elect Trump's and congressional Republican's legislative priorities.

President-elect Trump is also likely to take steps to counteract several recent DOL actions concerning retirement plans. In April 2016, for example, the DOL issued a final rule redefining and broadening who is deemed a "fiduciary" of an employee benefit plan under the Employee Retirement Income Security Act (ERISA) by providing investment advice to a plan or its participants or beneficiaries.<sup>48</sup> The rule sought to eliminate conflicts of interest in advising. A handful of lawsuits have been filed by trade groups challenging the fiduciary rule on multiple legal grounds, including First Amendment, due process, and unauthorized rulemaking theories.<sup>49</sup> The Republican Party platform strongly opposed the rule, so a Trump Administration is not expected to defend it, both in and out of court.

The DOL relatedly unveiled a final rule and a proposed rule, both aiming to offer safe harbor for states looking to create their own retirement savings programs. The final rule, effective October 31, 2016,

explains how states can structure state-sponsored mandatory or voluntary retirement savings plans so that private employers with participating employees do not unintentionally sponsor ERISA plans or take on fiduciary duties. The proposed rule seeks to expand that safe harbor provision to certain state political subdivisions, primarily larger cities and counties. For his part, President-elect Trump is expected to be less inclined to support any program that would transfer retirement plan administration from the private sector to the government, placing the proposed rule in endangered status.

## **Paid Leave**

Paid family and sick leave became a central issue this election cycle, with both major party candidates supporting some form of paid leave. President-elect Trump's plan is less expansive than that offered by his opponent, advocating for six weeks of paid maternity leave.<sup>50</sup> The details of this proposal have not been fleshed out, so it is unclear whether it would apply to both mothers and fathers, or to adoptive parents. He has also called for providing incentives to employers to provide childcare at the workplace.

Because paid leave has become such a campaign talking point, it is possible even a Republican Congress could entertain a more modest type of leave proposal. In the interim, employers can expect to see additional states and municipalities wading into the paid leave waters. The flavor of legislation will turn on the composition of the state government. For example, Republican-led states may pass legislation preventing localities from enacting leave laws that are more generous than federal law. To date, at least 15 states have done so, including Alabama, Arizona, Georgia, Indiana, Kansas, Louisiana, Michigan, Mississippi, Missouri, North Carolina, and Tennessee. On the other hand, Democratic-led states may press on to pass, or at least permit, more progressive leave laws, such as those enacted in California, New Jersey,

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Rhode Island, New York, Oregon, and Vermont. In any event, paid leave obligations for employers around the country will presumably become more numerous and complex.

## Federal Contractors

As widely noted, and in light of congressional gridlock, President Obama relied on executive action, including executive orders, to accomplish much of his agenda in his second term. As previously discussed, President-elect Trump is expected to rescind many of these executive orders, and re-issue orders that seek to restore the pre-Obama Administration status quo.

Perhaps no group has been, or will be, affected more by this continued exercise of executive authority than employers that contract with the federal government. While many employers await



resolution of the ongoing paid leave debate, for example, federal contractors are already subject to such a requirement.<sup>51</sup> Pursuant to Executive Order 13706, and the resultant DOL final rule, employers with certain types of federal government contracts must provide employees with up to 7 days (56 hours) of paid sick leave per year, including leave to care for family members as well as for absences related to domestic violence, sexual assault, and stalking. This order also applies to subcontractors. It takes effect for all new contracts, and replacements for prior contracts, stemming from government solicitations on or after January 1, 2017.

The minimum wage for all workers on federal construction and service contracts has also been established by executive order. Pursuant to Executive Order 13658, all contractors must pay covered workers, including subcontractors, at least \$10.20 per hour, beginning January 1, 2017—roughly \$3 per hour above the current federal minimum wage.<sup>52</sup> Relatedly, Executive Order 13665 (also known as the “pay transparency” or “pay secrecy” order) prohibits federal contractors and subcontractors from retaliating or discriminating against an employee or applicant for inquiring about, discussing, or disclosing his or his own compensation, or the compensation of any other employee or applicant.<sup>53</sup> Meanwhile, Executive Order 13672 prohibits federal contractors from discriminating against employees on the basis of sexual orientation or gender identity, in addition to previously-recognized protected characteristics.<sup>54</sup>

Possibly the most controversial order applicable to federal contractors, however, is Executive Order 13673, the Fair Pay and Safe Workplaces Executive Order, signed by President Obama on July 31, 2014. This so-called “blacklisting” Executive Order has been the source of much employer consternation since it was issued two years ago.<sup>55</sup> On August 25, 2016, the Department of Defense, General Services Administration, the National Aeronautics and Space Administration (FAR Council) and the DOL released the final rule and guidance, respectively, implementing the order. Boiled down, the rule requires contractors and subcontractors to report any “administrative merits determination, arbitral award or decision, or civil judgment” rendered against the contractor in the preceding three years. It thus forces contractors to disclose potential violations of numerous laws, including the FLSA, OSHA, NLRA, FMLA, and anti-discrimination statutes. The contracting office must consider any such violations when awarding or extending significant contracts, in conjunction with any remedial measures and mitigating factors. In

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addition, the executive order penalizes contractors that implement or attempt to enforce arbitration agreements covering Title VII and certain tort claims.

Employer stakeholders sued to enjoin the “blacklisting rule,” which was scheduled to take effect October 25, 2016. Plaintiffs seek to set aside Executive Order 13673 and the associated regulations for several reasons, including the breadth of the definition of “administrative merits determination.” On October 24, 2016, a Texas district court granted a preliminary injunction blocking implementation of the rule’s disclosure requirements and its ban on pre-dispute arbitration agreements.<sup>56</sup> The paycheck fairness provisions of the executive order, which require contractors to include information regarding overtime pay and exempt status with each paycheck and to provide certain notices to independent contractors, have not been enjoined and are still scheduled to go into effect in connection with solicitations or contract amendments made on or after January 1, 2017.

Although the legal validity of this rule could take years to resolve if the government were to continue to seek its enforcement, the issue could become moot if, as expected, President-elect Trump rescinds this and other orders.

Some earlier executive orders President Obama issued impacting federal contractors that President-elect Trump is also expected to rescind include:

- EO 13495 - *Nondisplacement of Qualified Workers Under Service Contracts*, which creates hiring rights of first refusal for employees of federal contractors when a contract changes hands; and
- EO 13494 - *Economy in Government Contracting*, which prevents the government from reimbursing contractors for costs associated with persuading employees whether to organize and bargain collectively.

Aside from executive orders, regulatory action by the OFCCP has also altered the landscape for

government contractors. In 2014, for example, the OFCCP issued regulations to strengthen affirmative action requirements to promote recruitment and retention of veterans. The OFCCP also published a new regulation in 2014 that similarly established hiring benchmarks for individuals with disabilities, pursuant to Section 503 of the Rehabilitation Act. Just this summer, moreover, the OFCCP published a final rule detailing the obligations of federal contractors to ensure nondiscrimination on the basis of sex and to take affirmative action to treat all applicants and employees equally without regard to sex.<sup>57</sup>

These developments are inconsistent with President-elect Trump’s positions, so it is possible that new rules will revise some of the regulations’ more onerous provisions.

## Immigration Law

Perhaps one of the most divisive issues of the 2016 Presidential campaign was immigration reform. President-elect’s promise to “build a wall” aside, he advocated significant changes to U.S. immigration policy, some of which could impact employers.

Because President-elect Trump has taken such a hard line on deporting undocumented immigrants (he has said that within the ICE, he would create a special deportation task force), employers can expect the Department of Homeland Security’s Immigration and Customs Enforcement (ICE) to ramp up enforcement of employment verification documentation.

According to a speech on immigration he made in August, President-elect Trump will focus on individuals who overstay their visas. During the same August speech, the President-elect said he would “ensure that E-verify is used to the fullest extent possible under existing law,” and would “work with Congress to strengthen and expand its use across the country.”<sup>58</sup>



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Legal immigration, for which President Trump has expressed support, is also subject to review. President-elect Trump has worked closely with Sen. Jeff Sessions (R-AL) in formulating his immigration proposal. Sessions is the Chair of the Immigration Subcommittee of the Senate Judiciary Committee, and a vocal proponent of restricting legal immigration. This covers the visas categories most commonly used by U.S. employers. Among potential reforms are changes to the H visa category and restrictions on “green card” processing. Reforms to the former would include elevating current prevailing wage (PW) requirements on visa categories from the current minimum payment of full PW to “PW plus.” As for green card processing, there could be a stop to all employer-sponsored green card issuance.

While we wait for immigration reform proposals to solidify, employers can expect the Department of Homeland Security (DHS), the DOL, and the Department of Justice to maintain focus on increasing compliance with existing immigration laws, particularly I-9, and E-Verify, which the President-elect wants to make mandatory for all employers. It is historically proven that increased enforcement action, irrespective of the party in power, is politically the doorway to more comprehensive immigration reform initiatives. To that end, these agencies recently raised the civil fines applicable to employers that commit immigration-related offenses. Indeed, the fines for I-9 paperwork violations increased by 96% in 2016, from \$110 to \$1,100 per violation up to \$216 to \$2,156 per violation.<sup>59</sup> Furthermore fines for employers that knowingly hire unauthorized workers increased from a range of \$375 to \$3,200 per violation to \$589 to \$4,313 per violation.

Finally, President-elect Trump has not supported the Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans (DAPA), two initiatives issued by the DHS that seek to protect certain types of aliens from deportation

and to permit them to work lawfully in the country. Numerous states challenged DAPA and DACA, and a Texas court has preliminarily enjoined their implementation while that lawsuit plays out.<sup>60</sup> President-elect Trump is not expected to defend either action.

## **What This All Means for Employers**

So now that the political chips have fallen, what can the employer community expect over the next four years? President-elect Trump will not necessarily be handed a blank check by Congress with Senate Democrats still capable of mounting a filibuster of legislation under current Senate rules. The political logistics of passing significant labor- and employment-related legislation remains tricky, as Republicans do not have a filibuster-proof majority in the Senate. However, he will certainly be able to undo many of President Obama’s policy initiatives through executive action, and institute some of his own. Employers will be presented with an opportunity to seek changes to labor and employment laws to more accurately reflect the realities of the modern workforce. These new employment policies will take shape over the next few months.

To this end, Littler’s WPI will help employers navigate the new terrain and adapt to life under the Trump Administration. With forethought, counseling, and planning, employers will be ready to comply and succeed no matter what changes arise in the Trump Era.

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- 4 723 F.3d 1114 (10th Cir. 1013) (en banc).
- 5 The 2016 Republican Party Platform opposes laws that would sanction businesses or entities that “decline to sell items or services to individuals for activities that go against their religious views about such activities.” 2016 Republican Party Platform, p. 32, *available at* <https://www.gop.com/the-2016-republican-party-platform/>. Moreover, Vice President-Elect Mike Pence, while the Governor of Indiana, signed into law a bill that would essentially permit businesses to deny service to gay people for religious reasons.
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- 15 Executive Order 13202, *Preservation of Open Competition and Government Neutrality Towards Government Contractors’ Labor Relations on Federal and Federally Funded Construction Projects*, 66 Fed. Reg. 11225-11226 (Feb. 22, 2001).
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