

EMPLOYMENT LAW COMMENTARY

Volume 28, Issue 11

December 2016

San Francisco

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YOU'RE FIRED? POTENTIAL WORKPLACE RAMIFICATIONS OF THE TRUMP PRESIDENCY

By [Neil Tyler](#)

Last month, Donald Trump was elected the 45th president of the United States. The surprising and historic outcome has left everyone asking: Will Trump actually follow through on his campaign promises and rhetoric beginning January 20, 2017? While Trump's polarizing and volatile campaign for president provided a high-level view of his goals regarding issues such as immigration, trade, tax reform, and health care, the absence of specific policy proposals from him has led to significant uncertainty throughout the private and public sectors.

For employers and employees, the situation is no different. Not only does Trump lack a record in public office that businesses and individuals can review in order to predict what types of policies he will pursue in regards to

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workers, but Trump has also infrequently discussed labor or employment policies during his campaign. This is in contrast to Hillary Clinton, who, had she been elected president, was expected to pursue a progressive worker agenda by focusing on raising the minimum wage, improving working conditions, providing greater benefits to workers, improving workplace fairness and equality, and broadening overtime eligibility.

Nevertheless, Trump's broad campaign principles, the evolving composition of his administration, and the statements that have been made by him and his transition team in the weeks after the election have offered some initial insight into the president-elect's labor and employment plans over the next four years. In general, it is expected that the Trump administration will pursue a pro-business labor and employment platform over the next four years. It is almost guaranteed that, with the backing of the Republican-controlled House and Senate, the Trump administration will seek to lower corporate taxes and diminish the number of regulations governing employers in a variety of industries. On the other hand, the conventional wisdom is that Trump owes his election to working-class whites in the Rust Belt who are expecting their incomes to rise over the next four years, which could lead to some less business-friendly initiatives from the Trump administration. Accordingly, the path the Trump administration will pursue in regard to employment laws is rather foggy.

While far from an all-encompassing review of potential employment policies under President-elect Trump, this Commentary will provide employers and employees with some insight into what can be expected during the President-elect's first hundred days, and beyond.

MINIMUM WAGE

Increasing the federal minimum wage is not likely to be a central focus of the Trump administration, despite the fact that it remains at \$7.25 per hour.

On the campaign trail, Trump provided several conflicting statements regarding the minimum wage. He made some statements supporting a \$10 minimum wage, at other times opposed any wage increases at all, and has even called for states to set the minimum wage for themselves. Yet, even though Trump's campaign resonated with blue-collar workers throughout the country, many of whom would benefit from an increase in the federal minimum wage, it is unlikely that any

federal wage increase will occur over the next four years. Trump's history of running highly labor-intensive businesses would suggest that he supports keeping labor costs low. The nomination of Andrew Puzder, the chief executive of the company that operates Hardee's and Carl's Jr., for labor secretary suggests the same, as Puzder has expressed his opposition to raising minimum wages. Further, in recent years, Congress has made little progress on increasing the federal minimum wage, and the incoming GOP-controlled Congress is not expected to pursue such increases—at least initially.

As a result, it is likely that, for the next several years, states will be left to govern their own minimum wage standards. Recently, California and New York enacted legislation requiring employers to gradually increase the minimum wage to \$15 per hour.¹ New York's law also provided workers in the state the ability to take 12 weeks of paid family leave. Oregon also recently enacted a three-tier system increasing the state's minimum wage based on the employer's location within the state.² And last month, four states voted heavily in favor of ballot measures calling for gradual increases in the state minimum wage: Arizona, Colorado, Maine, and Washington. The Arizona and Washington measures also contained provisions that allow workers to accrue paid sick leave.

If the incoming Congress and President Trump do not move to increase the federal minimum wage in the near future, additional states and municipalities are likely to pursue similar ballot measures over the next few years. It therefore will be important for employers to stay apprised of proposed changes to the minimum wage and worker benefits in the various states in which they operate, and ensure that they are able to comply with these varying requirements, both financially and operationally.

PAID FAMILY LEAVE AND CHILD CARE POLICIES

On the campaign trail, one of the most concrete statements made by the Trump team regarding employment law was not actually made by Trump himself, but rather his daughter Ivanka. During the 2016 Republican National Convention, Ivanka claimed that “[her] father will change the labor laws that were put into place at a time when women were not a significant portion of the workplace.” Ivanka further vowed that the president-elect would make child care more affordable for and accessible to families in the United States.

While his statements have been short on details, Trump does seem to support expansion of workers' benefits when it comes to maternity and paternity issues. Following the Republican Convention, Trump called for revisions of the tax laws to allow working parents to deduct caregiving expenses for up to four children and elderly dependents, to make low-income families eligible for child care rebates, and to establish tax-free dependent-care savings accounts. In addition, Trump has supported offering six weeks of paid maternity leave to mothers who work for employers that do not already offer paid leave, claiming that his maternity leave plan will be self-financing through employers' unemployment insurance contributions. Trump has also stated that he wishes to incentivize employers to offer child care services for their workers within the workplace by expanding existing tax credits for the cost of providing on-site child care.

Based on Ivanka's promises, and the subsequent statements made by the president-elect during his campaign, it is widely expected that proposals to expand family leave and other child care benefits and offerings will be pursued in some manner under the Trump administration. Many of Trump's proposed changes are likely to garner bipartisan support. The real question is how quickly and in exactly what form we will see these changes implemented, and whether some of them will in fact be self-financing as Trump has promised.

OVERTIME

On November 22, 2016, a Texas federal judge issued a nationwide injunction blocking the U.S. Department of Labor (DOL) from implementing its new overtime rule, which was set to take effect December 1, 2016.³ The DOL's regulation was set to among other changes, double the minimum salary threshold required to qualify for the Fair Labor Standard Act's (FLSA) white-collar exemption to \$47,476 per year, which would have made approximately 4 million workers newly eligible for overtime pay, and provided for future increases.⁴ For a more detailed discussion of the DOL's now-enjoined Final Rule regarding overtime, see our May 2016 Employment Law Commentary [here](#), in which we discuss in greater detail this now-enjoined regulation.

In blocking the DOL's regulation from taking effect, the judge found that the DOL had exceeded its delegated authority and improperly supplanted the FLSA's duties test with a salary-level test. According to the

judge, if Congress had intended a salary requirement to supplant the duties test, then Congress, not the DOL, should be the one to implement such a change.

However, even if the DOL's overtime regulation had taken effect on December 1, it was likely that the incoming Republican-controlled Congress, now with a President Trump at the helm of the Executive Office, would have sought to repeal or significantly change this overtime rule. In fact, in September, the House passed H.R. 6094, which would have postponed the effective date of the DOL's Final Rule until June 1, 2017.⁵ Granted, the White House had made clear that President Obama would have vetoed the bill had it made its way through the Senate, but the Republican-controlled Congress had made its intention clear. Now, with the appeal of the judge's injunction set to be heard after the next administration takes office—the final reply brief is due January 31, 2017, and oral arguments are set to occur shortly thereafter—Trump, who has expressed skepticism toward the now-enjoined overtime rule, could decide to simply drop the defense of the Final Rule. Puzder has also opposed expanded access to overtime pay, and thus it is hard to see how the Final Rule will survive in its current form.

With the Texas judicial opinion now providing support, Congress will have the green light to implement its own preferred legislation. Lamar Alexander (R-Tenn.) is widely expected to retain the top Republican position on the Committee on Health, Education, Labor, and Pensions in the next Congress. He has authored an alternative overtime rule, S. 3464, which would implement a more moderate increase of the salary threshold as compared to the DOL regulation—to \$36,000 per year as compared to the DOL's \$47,476 per year.⁶ Alexander's proposed legislation would also exempt certain organizations, including nonprofits and universities, from future increases.

With Republicans now controlling both the presidency and Congress, it is much more likely that any new overtime rule, should one actually take effect in the near future, will look much more like Alexander's proposed legislation than the DOL's Final Rule. While Congress's proposed legislation may result in fewer disruptions and lower costs to employers, it is still important for employers to understand the financial and operational ramifications of any new overtime rules that may eventually take effect, and plan accordingly.

UNIONS

Many Republican lawmakers have long supported state laws that ban “union security” clauses in collective bargaining agreements (CBAs) and allow workers in collective bargaining units to decline to pay union dues, even if they are covered by a CBA. A total of 26 states currently have these “right-to-work” laws on the books, with nine states having approved such language in their state constitutions. Last month, proponents of right-to-work laws once again prevailed in Alabama and South Dakota, with voters in Alabama adding right-to-work language to their state’s constitution, and voters in South Dakota rejecting an initiative that would have negated the effects of right-to-work laws within the state. Missouri is likely to join the ranks of right-to-work states now that Republican Governor-elect Eric Greitens, who during the campaign stated he would sign a right-to-work bill into law if it were to pass the Republican-dominated legislature, is in office.

During the campaign, Trump rarely spoke about union-related issues such as collective bargaining and workers’ rights. However, his real-estate and hospitality background suggests that he will not be too supportive of unions going forward, as his hotels generally have been nonunion. Trump has also been known to hold grudges, and nearly all of the major unions supported Clinton during the campaign. Further, Vice President-elect Mike Pence has a record of supporting right-to-work laws in Indiana and, while in Congress, opposed legislation designed to strengthen workers’ rights to organize.

With Trump and Pence at the helm of the Executive Branch, Puzder potentially serving as labor secretary, and Republicans retaining control of both the House and Senate, some have predicted the introduction of federal right-to-work legislation on the congressional floor. While the current climate does seem to spell trouble for unions, unions should take some solace in the fact that Republicans did not get the 60 seats necessary for a filibuster-proof majority in the Senate, and thus they likely will need at least a few Democrats in the Senate to support such legislation. While such bipartisan support is always possible, in the current political climate, and with Democrats historically offering more robust support of unions and collective bargaining, this is one piece of federal legislation that will be difficult to pass, even with a Republican-controlled federal government.

Nevertheless, employees, union representatives, and employers undoubtedly will face significant changes over the next four years. For example, Trump’s impending appointment of a new U.S. Supreme Court Justice is likely to damage unions’ treasuries if, after deadlocking 4-4 earlier this year in *Friedrichs v. California Teachers Association*,⁷ the Court rules that public unions cannot compel nonunion workers to pay fees to support collective bargaining at the next opportunity. Further, it is widely expected that the now-enjoined “Persuader Rule,”⁸ which would have increased disclosure requirements for employers using third-party advisers and consultants to help them fight union-organizing campaigns, will die under a business-friendly Trump administration.

Finally, under the Obama administration, the National Labor Relations Board (NLRB) issued a series of employee- and union-friendly precedent-shifting decisions that employers throughout the country largely opposed. But now, with a Republican-controlled Senate set to confirm President-elect Trump’s nominations, it is expected that early next year Trump will tap two Republicans to fill the vacant seats currently found on the five-seat NLRB. By the end of his four-year term, it is likely that Trump will have the opportunity to appoint or reappoint all of the Board’s members, as Chair Mark Gaston Pearce’s term ends in 2018, and Members Philip A. Miscimarra’s and Lauren McFerran’s terms end in 2017 and 2019, respectively. NLRB General Counsel Richard Griffin’s term also will end in 2017. As a result, the NLRB, which describes itself as tasked with safeguarding employees’ rights to organize, and preventing and remedying unfair labor practices, will likely adopt a very different, and less progressive, approach in the near future. While this shift in ideology may take several years to be fully in place, the soon-to-be Republican-controlled NLRB will likely be less favorable to employees and unions, and more employer-friendly, in the years ahead.

JOB GROWTH

Throughout his campaign, Trump promised that he would invest in rebuilding and improving the country’s infrastructure, and create millions of jobs in the process. And just hours after his election victory, Trump reaffirmed that this would be a primary focus of his administration: “We are going to fix our inner cities and rebuild our highways, bridges, tunnels, airports, schools, hospitals. We’re going to rebuild

our infrastructure, which will become, by the way, second to none. And we will put millions of our people to work as we rebuild it.” While, as with many of Trump’s policy proposals and promises, details are limited, it is likely that Congress will get behind spending on infrastructure. After all, investment in the United States’ infrastructure was one issue on the campaign trail with bipartisan support; Clinton herself promised that she would pursue \$275 billion in investment in improving the nation’s infrastructure.

If Trump does in fact follow through on his infrastructure and construction promises, construction contractors that do public-sector work are likely to see considerable job growth and increased demand. On top of this, Trump has vowed to roll back many of the Obama administration’s regulatory policies, many of which have arguably discouraged job creation in the construction industry. During the campaign, President-elect Trump pledged to make an investment as much as \$1 trillion in transportation and infrastructure over the next decade. And out of all the promises Trump made on the campaign trail, this is one that the general public, and Wall Street, truly believes he will be dedicated to and successful in implementing. In the first month following Trump’s victory speech, in which he reaffirmed his devotion to spending on infrastructure, the stock market soared, setting records largely on the back of the new government’s economic policies and promises to invest in the country’s infrastructure.

Exactly how much money for transportation and infrastructure will be appropriated, how that money will be spent, and what entities will be doing the construction is more uncertain. Trump has indicated that he will emphasize public-private partnerships to rebuild the public infrastructure, as well as provide tax credits to private developers. Trump has also stated that he expects to issue bonds to help pay for the costs of construction. But no matter the form of this spending, the potentially massive government investment in infrastructure is expected to spur thousands of contractors and subcontractors to seek out this type of work and capitalize on the increased demand for their services—some of whom will be dipping their toes into government-funded construction projects for the first time.

With the national focus now squarely on Trump’s infrastructure plans, and the increased scrutiny

that follows, it would be wise for all businesses, contractors, and subcontractors that foresee themselves being involved with whatever infrastructure-related plans Trump actually implements to fully apprise themselves of the heightened regulations and plethora of compliance issues associated with government-funded construction projects.

IMMIGRATION

There may have been no bigger issue that propelled Donald Trump to the presidency than immigration. Trump’s promises to build a wall on the U.S.-Mexico border, protect the country from foreign threats, and deport millions of unlawful aliens from the United States resonated with those who eventually voted for him. While the Trump administration may have an extremely hard time pursuing some of the promises made during the campaign—few people actually believe that building a 1,000-mile wall on the southern border of the United States is economically feasible—it is expected that the Trump administration will devote considerable attention to and take a hardline stance on immigration in all forms in the coming years.

In terms of unlawful immigration, during his *60 Minutes* interview the week of his election victory, Trump stated that he planned to deport or incarcerate approximately 2 million to 3 million unlawful aliens who have committed crimes. But, more directly affecting employers, it would not be surprising if the Trump administration, with the support of the Republican-controlled Congress, attempted to criminalize the employment of those living in the country without legal permission. In fact, several states have tried to pass such laws in recent years, most notably Arizona. Though the Supreme Court ruled in 2012 that federal law preempted Arizona’s attempted criminalization of the hiring process for unlawful aliens,⁹ the passage of the law supposedly led to some “self-deportation” of undocumented workers who had been living in the country illegally. This may have contributed to labor shortages and rising wages in industries such as agriculture, tourism, construction, and landscaping, thus affecting not only the businesses employing workers illegally, but also those businesses with more legitimate hiring practices.

In terms of legal immigration, employers and employees in an even wider array of industries will be affected by Trump’s expected focus on immigration. President-elect Trump’s pick of Senator

Jeff Sessions (R-Ala.) as the next U.S. attorney general signals the administration's focus on re-evaluating visa programs of all types. During his nearly 20 years in office, Sessions has not only supported imposing severe limits on the immigration of high-skilled workers, but also argued that immigration in all forms threatens Americans' job security.

Federal law gives the president broad authority to enforce immigration law, and a Justice Department run by Sessions, who has long attacked visa programs as harmful to native-born Americans, could intensify scrutiny of employers who hire international workers. For example, even though Trump himself has benefited during his career from the hiring of H-1B visa workers, a program that is popular in Silicon Valley and currently permits up to 85,000 skilled workers to enter the country annually, on the campaign trail he suggested that he would seek to reform the rules governing the H-1B visa program. Further, there is considerable speculation that in rolling back many of President Obama's executive orders, President-elect Trump will rescind Deferred Action for Childhood Arrivals (DACA), Obama's 2012 order that allows undocumented immigrants who entered the country as children to receive temporary, renewable work permits. If DACA is rescinded, an estimated 740,000 young workers would no longer be permitted to work in this country once their visas expire. Businesses that have been employing these individuals would now be faced with the prospect of losing a considerable number of workers.

In fact, it seems that visa programs of all types may be within Trump's and Sessions' crosshairs from day one in office. In a video message on November 21, 2016, Trump stated that he will immediately order the Department of Labor to "investigate all abuses of visa programs that undercut the American worker."¹⁰ Further, Trump's transition website¹¹ promises to "reform legal immigration to serve the best interests of America and its workers," and his campaign website¹² promises "new immigration controls to boost wages and to ensure that open jobs are offered to American workers first" and to "vet applicants to ensure they support America's values, institutions and people."

Together, Trump and Sessions may not only take significant steps to cut illegal immigration, but also scale back legal immigration and chill prospective visa workers. With drastic changes in immigration policy

expected over the next four years, it is important for employers to think hard about how their workforce will be affected by the changes proposed by President-elect Trump, and begin planning for the potential loss of workers and the rising labor costs that may result.

WORKPLACE FAIRNESS AND EQUAL OPPORTUNITY

One of the biggest fears in the wake of Trump's victory is that the new administration will be hostile to minority groups. During the campaign, Trump made several comments that were widely regarded as offensive to Mexicans, Muslims, African-Americans, women, and the disabled. His selection of Pence as vice-presidential running mate has been perceived as a significant threat to the LGBT community based on Pence's public record and past statements. And in the weeks after President-elect Trump's victory, some observers counted hundreds of incidents of harassment and violence perpetrated by Trump supporters against minorities throughout the country, leading many individuals to fear for their safety and liberty in the years ahead. With Trump and Pence at the helm of the Executive Branch, and with a Republican-controlled Congress behind them, many believe that the progress that has occurred over the last eight years under President Obama in regard to workplace protections will be deterred or come to a halt.

For example, under President Obama's administration, the U.S. Equal Employment Opportunity Commission (EEOC) placed great emphasis on gender pay equity and expanding the rights of transgender individuals. Trump, however, will designate a new EEOC chair and flip the EEOC's composition to a 3-2 Republican majority sometime in 2017. In the process, it is possible that the Trump administration will direct the EEOC toward a less aggressive and less progressive enforcement approach, and the Republican-controlled Congress will appropriate fewer funds to the EEOC. If that occurs, the EEOC's 2017–2021 strategic enforcement plan,¹³ which includes a focus on "backlash discrimination" against Muslims, Sikhs, Arabs, and other persons who are perceived to be members of those religious or ethnic groups, may be scaled back. Instead, the EEOC might focus more on existing discrimination claims rather than pursuing expansive interpretations of statutes like Title VII and prioritizing workplace civil rights, as was done under President Obama.

In addition, on March 26, 2015, Indiana Governor Pence signed into law Indiana Senate Bill 101, titled the Religious Freedom Restoration Act.¹⁴ This law has been widely criticized as targeting the LGBT community by allowing individuals and businesses to discriminate based on sexual orientation for purported religious reasons. With Pence soon to be serving as the vice president alongside President Trump, it would not be surprising to see the Trump administration pursue similar legislation that would allow employers to discriminate in employment settings based on sexual orientation and transgender status. In fact, on November 30, 2016, Steve Russell (R-Okla.), who had been seeking to exempt religious corporations, associations, educational institutions, and societies from a 2014 President Obama Executive Order that barred discrimination by federal contractors against their workers on the basis of sexual orientation and gender identity, was purportedly assured by senior Trump officials that he need not pursue the legislation because it would be addressed through a Trump Executive Order.

Overall, it is widely expected that the momentum that led to significant advances in individual rights while President Obama was in office will slow considerably. Vice President-elect Pence's public record in regard to the LGBT community and women's rights supports such a notion. But President-elect Trump is anything but predictable, and his views and promoted policies

often do not follow the Republican script. As a result, there is great uncertainty in the area of workplace rights and protections over the next four years.

CONCLUSION

While it is relatively certain that the Trump administration will lead a significant shift in labor and employment policies over the next four years, exactly how businesses and workers will be affected is rather fuzzy. Overall, President-elect Trump is expected to promote and pursue a pro-business platform, and this overarching mentality likely will trickle down into the many areas of employment law discussed above. In addition, there are several other spheres of employment law where significant changes are expected to occur once President-elect Trump takes office, such as in regard to the joint employment standard recently laid out in the NLRB's controversial 2015 decision *Browning-Ferris Industries of California, Inc.*¹⁵ But, as the presidential campaign showed us, with Donald Trump, anything can happen. It will be an interesting next four years to say the least.

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1 See Senate Bill 3, available at https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB3 (California); New York's 2016-2017 Budget, available at https://www.budget.ny.gov/pubs/press/2016/pressRelease16_enacted.html (New York).

2 See Senate Bill 1532, available at <https://olis.leg.state.or.us/liz/2016R1/Downloads/MeasureDocument/SB1532> (Oregon).

3 See *Nevada v. United States Dep't of Labor*, No. 4:16-CV-00731, 2016 WL 6879615 (E.D. Tex. Nov. 22, 2016).

4 See 29 C.F.R. Part 541, 81 Fed. Reg. 32,391, et seq., available at <https://www.gpo.gov/fdsys/pkg/FR-2016-05-23/pdf/2016-11754.pdf>.

5 Available at <https://www.congress.gov/114/bills/hr6094/BILLS-114hr6094pcs.pdf>.

6 Available at <https://www.congress.gov/114/bills/s3464/BILLS-114s3464pcs.pdf>.

7 *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083, reh'g denied, 136 S. Ct. 2545 (2016).

8 See 29 C.F.R. Parts 405 and 406, 81 Fed. Reg. 15,924, et seq., available at <https://www.gpo.gov/fdsys/pkg/FR-2016-03-24/pdf/2016-06296.pdf>; *Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-CV-00066-C, 2016 WL 3766121 (N.D. Tex. June 27, 2016).

9 See *Arizona v. United States*, 567 U.S. ____ (2012), available at <https://www.supremecourt.gov/opinions/11pdf/11-182b5e1.pdf>.

10 Available at <https://www.youtube.com/watch?v=TgkNSEZxyCA>.

11 See <https://www.greatagain.gov/>.

12 See <https://www.donaldjtrump.com/>.

13 Available at <https://www.eeoc.gov/eeoc/plan/upload/sep-2017.pdf>.

14 Available at <https://iga.in.gov/static-documents/9/2/b/a/92bab197/SB0101.05.ENRS.pdf>.

15 *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (August 27, 2015).

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