

PREPARING FOR THE TRUMP ADMINISTRATION – WHAT EMPLOYERS MAY EXPECT

December 15, 2016



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San Francisco. Seattle. Shanghai. Washington, D.C. | dwt.com



Agenda



National Labor Relations Board (NLRB)



Equal Employment Opportunities
Commission (EEOC)



Department of Labor (FLSA, OSHA)
Regulations and Enforcement



Benefits, including the Affordable Care Act



Immigration Policy and Enforcement



National Labor Relations Board (NLRB)

Peter Finch, Presenter

(Some) Change Is Coming!



- Many of the key players at the NLRB aren't going anywhere.
 - The three sitting Board members have been appointed to terms that won't expire right away
 - December 2017 (Miscimarra),
 - August 2018 (Pearce), and
 - December 2018 (McFerren).
 - The General Counsel at the Board, Dick Griffin, is serving a four-year term that ends in November 4, 2017



(Some) Change Is Coming!



- At the local level, there will be few noticeable changes in the various regional offices.
- And, typically, the legal principles that make up the nuts and bolts of the National Labor Relations Act -
 - interference with elections,
 - alleged discrimination and retaliation,
 - the mechanics of bargaining
- tend not to shift much with a change in administration.

What's Changing?! When?! Who?!



- First, we'll get a full board.
- Recent Cabinet appointments suggest business groups and the management bar will be very happy to see two more Board members
- The position of chairman will likely shift to one of the new members or to Member Phil Miscimarra
- The new members will immediately impact the Board's agenda, which will likely favor management more often.



Sometimes Change is Subtle



- A new Board will also impact (what some see as) the General Counsel's advocacy.
- Mr. Griffin has pushed a relatively aggressive, pro-employee, pro-union agenda, and has used litigation to push new theories of violation
 - McDonald's cases
 - Pursuit of Uber and others operating in the so-called gig economy
 - Use of 10(j) injunctive relief

Immediate Impacts



- Severely restricting employers from withdrawing recognition from unions absent an election (now it can be based on a good faith belief the union has lost majority support), and
- Forcing employers to more frequently prove their rejection of union proposals based on their anticipated impact to the bottom line (pejoratively referred to as “pleading poverty”).



Probably No Immediate "Housecleaning"



- The Board (usually) does not reverse precedent for the sake of it
- The analytical framework matters, and there has to be a sound basis for reversing a decision
 - Member Miscimarra's (and former Member Johnson's) many dissents do suggest the Board is poised to make some changes when at full strength



An End to the Guessing Games



- A more reasonable test for evaluating the legality of workplace rules may be on the horizon.
- Member Miscimarra in the *Beaumont* case last April set forth a new test he would use to evaluate workplace rules.



An End to the Guessing Games



- The Board currently uses a “reasonably construes” test: if a reasonable employee would construe the rule as restrictive of protected concerted activity, it’s unlawful.
- But that test has led to inconsistent rulings based on context, leaving employers and practitioners to make their best guess when drafting rules and handbooks.
- Member Miscimarra advocates for a return to a balancing test, where the Board would weigh employees' Section 7 interests against an employer's business justification for a workplace rule.

A Return to the Rule of Reason?



- A Trump Board will likely address the Obama Board's rejection of class action arbitration Waivers.
- The days of DR Horton and Murphy Oil may be numbered.



Change or a Matter of Interpretation?



- A Trump Board will probably be less likely to find joint employer relationships in user-supplier, franchise, and contractor relationships.
- It might not look like an overruling of the principles articulated in Browning-Ferris, or underlying the McDonald's cases at first,
 - But the effect of the rulings will be to water down the principle that indirect control is sufficient to find a joint employer relationship.
 - Welcome news to the business community where such arrangements are commonplace and necessary.

Looking Down the Road . . .



- A Trump-appointed GC will have the opportunity to bring more cases against unions that use bannering and sidewalk displays to target arguably neutral employers.
- Specifically, a new GC and Board can better define what it means to “confront” customers and employees, or “disrupt” an employer’s business to constitute unlawful picketing or other secondary activity.
- Arguably, the current GC has required that conduct be confrontational and disruptive to constitute picketing.



It's a Long Shot, but . . .



- A Trump GC and Board will take a long, hard look at activist groups to determine whether they are agents of certain labor organizations, or act in a manner that makes them labor organizations in their own right.
- That would be a big deal, particularly if the definition of picketing will include confrontational and/or disruptive activity like marches through airports, massing outside an employer's business to restrict customers from coming or going, or deploying agents at doorways with huge signs and bullhorns.



Equal Employment Opportunity Commission (EEOC)

Michael Reiss, Presenter

EEOC: What to Watch for



- Commissioners
 - Priorities
- General Counsel
 - Litigation/Enforcement
- Budget
 - Staffing
- Local Focus



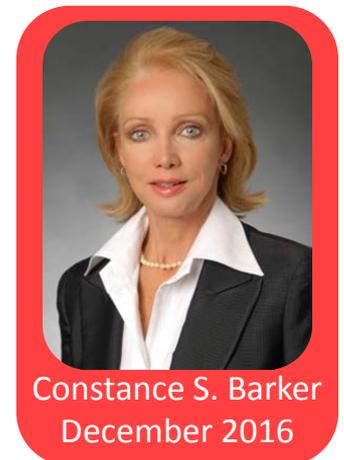
Current Commission



Democrats

Republicans

Chair



January 2017 Commission



Democrats

Republicans

Chair



Victoria A. Lipnic
July 2020



Charlotte A. Burrows
July 2019



Chai R. Feldblum
July 2018



Jenny R. Yang
July 2017

?

January 2017 Commission



Democrats

Republicans

Chair

?



Charlotte A. Burrows
July 2019



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July 2018



Jenny R. Yang
July 2017



Victoria A. Lipnic
July 2020

EEOC's Strategic Enforcement Plan



SEP Priorities

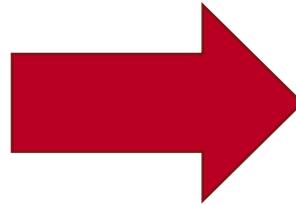
1. Eliminating barriers in recruitment and hiring.
2. Protecting immigrant, migrant and other vulnerable workers.
3. Addressing emerging and developing issues.
4. Enforcing equal pay laws.
5. Preserving access to the legal system.
6. Preventing harassment through systemic enforcement and targeted outreach.



Former



David Lopez



January 2017

?

EEOC – What to Watch for



Takeaways

- Charge-based agency; statutes unchanged
- Priorities will remain in place
 - Harassment
 - Sex, religion and national origin
 - Sexual orientation and identity
 - Agency unchanged; courts may dictate
- Possibly more business friendly?
 - Leave as an accommodation
 - EEO-1 form?





USDOL Regulations and Enforcement

Michael J. Killeen, Presenter

U.S. Department of Labor



29 agencies, including the following:

- OSHA (Occupational Safety and Health Administration)
- WHD (Wage and Hour Division)
- OFCCP (Office of Federal Contract Compliance Program)
- BLS (Bureau of Labor Statistics)
- PBGC (Pension Benefit Guaranty Corporation)
- ETA (Employment and Training Administration)
- OLMS (Office of Labor-Management Standards)
- OWCP (Office of Workers Compensation Programs)

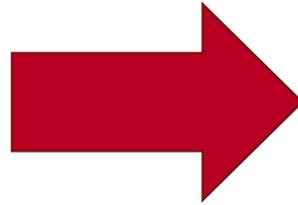
Secretary of Labor



Current



Thomas E. Perez



Trump Nominee



Andrew Puzder

Mr. Puzder obtained a law degree from Washington University, School of Law, in 1978 and practiced with Lewis Brisbois Bisgaard & Smith LLP and Stradling Yocca Carlson & Rauth PC. He is currently the CEO of CKE Restaurant Holdings, Inc. that operates quick service restaurant chains Hardee's and Carl's Junior. CKE is based in California and operates more than 3,300 restaurants in 42 states and in 28 countries. Mr. Puzder is formerly an economic advisor for the Mitt Romney campaign.



U.S. Senate – Health, Employment, Labor, and Pensions Committee

- 12 Republicans; 10 Democrats
- Chair: Lamar Alexander (R – TN)
- Ranking member: Patty Murray (D - WA)

U.S. House – Education and the Workforce

- Subcommittee on Health, Employment, Labor, and Pensions
 - 13 Republicans; 11 Democrats
 - Chair: David Roe (R – TN)
 - Ranking Member: Jared Polis (D – CO)
- Subcommittee on Workforce Protections
 - 8 Republicans; 6 Democrats

Trump DOL – Personnel Changes



- New appointments for assistant secretaries of the various agencies, plus one or two deputies for each.
- Career staff including district directors, agency directors, and Washington, D.C. headquarters will remain intact, although subject to transfer and reassignment.
- New U.S. Solicitor of Labor to replace Patricia Smith.

Trump DOL - Enforcement



Emphasis: More education and outreach; less egregious penalties, liquidated (double) damages, and civil monetary penalties (CMPs).

Inspections: Frequency and number will depend on size of budget. Typically, Republican administrations slow or freeze the rate of growth, not dramatic cutbacks from status quo.

Litigation: Depending on budget, USDOL lawsuits will likely plateau; however, private lawsuits, including collective/class actions (state and federal), will continue to grow.

Trump DOL – Anticipated Rule Changes



Statutes and regulations will largely remain the same

Anticipated changes:

FLSA white collar exemption regulation

USDOL “persuader” rule

Joint employer theory; independent contractor issue

“Blacklisting” E.O. (federal contractors)

Trump DOL - Potential Rule Changes



- Federal Minimum Wage?
- Workplace Violence in Healthcare?
- Jobless Statistics?
- Prevailing Wage?



State and Local Laws



- States and municipalities have dramatically increased and expanded laws regarding minimum wage, paid sick leave laws, scheduling requirements, safety and health regulations, joint employer coverage, and other issues that USDOL traditionally regulates.
- Expect state and local government, particularly on the two coasts, to continue actively expanding state and local law.

Federal Judicial Appointments



- U.S. Supreme Court
 - Class Action Waivers
 - Agency Rule-making
 - Statutory Construction
- Circuit of Appeals and District Courts





Benefits

Dipa Sudra, Presenter

On the Grapevine...



- ***“Our No. 1 priority is tax reform. This will be the largest tax change since Reagan”*** - Prop. Treasury Secretary – Steven Mnuchin
- ***“We urge you not to make any abrupt changes that could lead to significant instability for patients, providers, insurers and others...”*** - American Hospital Association
- Kaiser Family Foundation poll:
 - 26% of Americans want the entire ACA repealed
 - 17% want the ACA scaled back
 - 19% want the ACA to proceed untouched
 - 30% want it expanded

ACA: Repeal and Replace?



- Trump's vision: "repeal and replace the ACA". With what?
 - HSAs
 - High risk pools
 - Purchase of insurance across State lines
- There are popular parts of the ACA. E.g. ban on pre-existing condition exclusions, covering children up to age 26.
- Likely to see repeal with some form of transition period, but what will that look like?

Potentially Repealable Parts of the ACA



- 60 votes needed in Senate...
 - But budget reconciliation process can be used to repeal provisions affecting revenue or outlays of federal government
- “Test” bills meeting budget reconciliation rules included repeal of, e.g.:
 - Individual mandate/premium tax credits
 - Employer mandate
 - Cadillac tax
 - Annual contribution limits to Health FSAs
 - Prohibition on using HSA/FSA/HRA to purchase OTC medicines without prescription

Examples of Likely Reconciliation-Proof ACA Provisions



Prohibition of pre-existing condition exclusions

Coverage of children up to age 26

Ban on waiting periods longer than 90 days

Prohibition on annual and lifetime dollar limits for essential health benefits

Enhanced claims procedures and external review

Preventive care mandates

Prohibition on rescissions

Some Ideas from “A Better Way”



- ACA repeal
- Cap on IRC §106 income exclusion for ER group health coverage
- Increase HSA contribution limits/allow standalone HRAs*
- Portable health care coverage (backpack)
- Purchasing coverage across state lines
- No EEOC authority to regulate wellness incentives

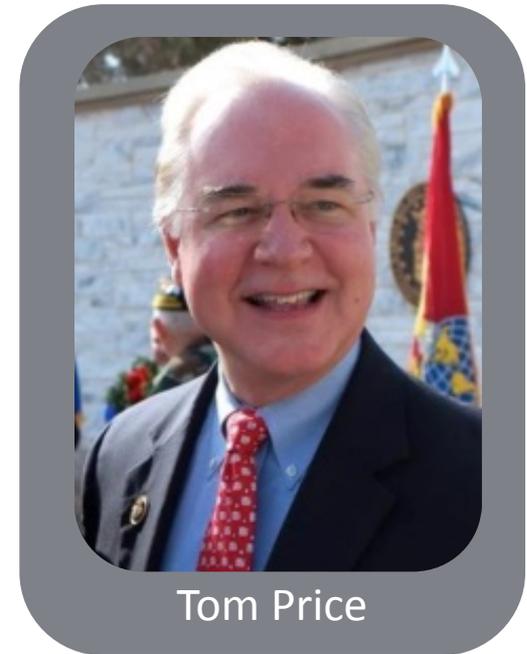
* Note the 21st Century Cures Act would allow small employers to use HRAs if certain conditions are met



Some Similarity in “Empowering Patients First”



- Bill repeatedly sponsored by Tom Price, proposed Secretary of Health and Human Services
 - Repeals ACA
 - Tax credits for those without access to employer/govt. programs.
 - Promotes HSAs (via tax credits and increasing contribution limits). Push toward “DC” plans for EEs to purchase ER plans or non-ER plans
 - High risk pools for those with pre-existing medical conditions
 - Insurers can sell policies across state lines



Tom Price

What Else Might We See?



- Through policy changes, regulations, interpretations and agency guidance:
 - Removing requirement for health plans to cover contraceptive services
 - Nonenforcement of nondiscrimination rules for fully insured plans?
 - Eliminate proposed changes to Form 5500
 - Nonenforcement of Section 1557
- Child care expenses
 - Day care expense deduction
 - HSAs for dependent care expenses
 - Incentivize employer on-site daycare

Retirement



- Limiting pre-tax contributions?
 - Cap on deferrals – forcing portion to be Roth?
 - Freeze on COLA adjustments – up to a decade?
- Fiduciary rule
 - Investment advice for a fee = ERISA fiduciary
 - Criticized by Trump advisors, action could take the form of legislation to repeal, no defense of lawsuits, SEC intervention
 - Possible delay. Eventual repeal? Or revised rule?





Immigration Policy and Enforcement

Megan Vogel, Presenter

An Era of Uncertainty and Enforcement



- Trump immigration advisors and appointees foreshadow future agency activities.
- Campaign rhetoric has contributed to fear and uncertainty among individuals, communities, and employers.
- Employers should be prepared for an era of increased compliance enforcement.

Trump Campaign's 10 Point Plan for Immigration



1. Build a wall on the southern border
2. End “catch and release” through detention until removal
3. Deport criminals in the country illegally
4. Defund sanctuary cities
5. Cancel Obama’s executive actions on immigration
6. Extreme vetting of immigrants from terrorist nations
7. Make all countries accept the return of deported individuals
8. Implement biometric entry-exit visa tracking system
9. Turn off the jobs magnet through worksite enforcement and E-Verify
10. Make legal immigration serve the best interests of American workers

Heads of Immigration Agencies



Gen. John Kelly
Dept. Homeland
Security



Sen. Jefferson
Sessions
Dept. of Justice



Rex Tillerson
Dept. of State



Andrew Puzder
Dept. of Labor

Deferred Action for Childhood Arrivals (DACA) Program



- Obama's executive action that has granted quasi-legal status and work authorization to childhood arrivals who have demonstrated commitment to education and avoidance of crime.
- Roughly 800,000 DACA recipients





- Cancellation as part of Trump's "First Day Project" is possible.
- Effect of cancellation
- BRIDGE Act and other advocacy efforts
- New applications and renewals for DACA-eligible individuals

Deportation of 2-3 Million with Criminal Records



- Deportations under Obama
- Trump's "immediate" deportation of 2-3 million
- 5,000 new Immigration and Customs Enforcement (ICE) investigators and officers
- Immigration court bottlenecks and feasibility of plan

Heightened Form I-9 Enforcement by ICE



- Civil fines for I-9 violations doubled in August 2016.
- Expect current level of 1,500 Form I-9 subpoenas per year to jump due to new ICE investigator hires.
- New and tricky Form I-9 must be used exclusively by January 22, 2017.
- I-9 training and periodic internal audits by employers are vital.

Worksite Raids and Compliance Monitoring Activity



- Worksite raids by ICE to identify and detain unauthorized workers will likely resume.
- Prevalent under Bush administration. Obama has favored I-9 investigations.
- Site visits and audit inquiries by fraud unit of U.S. Citizenship and Immigration Services and Department of State



**U.S. Immigration
and Customs
Enforcement**



Is Mandatory E-Verify Coming?



- E-Verify uses data from DHS and the Social Security Administration to confirm employment eligibility at hire.
- Trump likes E-Verify because it will allow him to track immigrants “like FedEx packages.”
- Mandatory E-Verify would require bipartisan approval in Congress.



- H-1B Specialty Occupation Visa for Professionals
 - More stringent enforcement of existing rules
 - Potential new regulations mandating higher wages and certification that employer didn't bypass U.S. worker applicants prior to its hire of H-1B
- Effect of NAFTA renegotiation or withdrawal
- Delays for employees coming from abroad due to extreme vetting
- Immigration filing fee increases to fund enforcement activities throughout DHS

Questions?



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