Trump Expected to Alter Labor Laws, Policies

Skadden

02 / 01 / 17

This article is from Skadden's *2017 Insights*.

Contributing Partner

John P. Furfaro
New York

Counsel

Risa M. Salins
New York

Four Times Square
New York, NY 10036
212.735.3000

skadden.com

Editor's note: This article was updated on February 1, 2017, to reflect new developments.

While President Donald Trump has not discussed in detail how he plans to address labor and employment issues, he likely will pursue a substantial shift in federal labor and employment laws, regulations and enforcement priorities. Indeed, when President Trump nominated Andrew F. Puzder as secretary of the Department of Labor (DOL), he said that Puzder will "save small businesses from the crushing burdens of unnecessary regulations that are stunting job growth and suppressing wages."

President Trump may have been referring to new workplace regulations the Obama administration put in place over the last eight years, including increasing minimum wage requirements for federal contractors and mandating that most large businesses file employee compensation reports with the federal government. Because President Barack Obama used executive orders and administrative rules to implement many of his initiatives in a challenging political environment, President Trump and his employment-related appointees will have opportunities to scale back the Obama administration's efforts and reshape the regulatory landscape for employers. Notably, on Trump's first day in office, White House Chief of Staff Reince Priebus issued a memorandum to all executive departments and agencies to freeze unpublished regulations and postpone for 60 days the effective date of published federal regulations that have not yet become effective. The actions the new administration takes could influence state and municipal governments in their regulation of employers, which may ultimately impact business trends.

We anticipate significant changes at the following federal agencies:

- **DOL, Wage and Hour Division:** One of President Obama's major labor-related achievements was the overhaul of overtime pay regulations in a manner that would nearly double the minimum salary level at which an employee can be exempt from overtime pay. However, just before the final rule was to go into effect on December 1, 2016, a federal district court judge suspended the regulation while considering a legal challenge from 21 states and a coalition of business groups. Puzder, whose confirmation hearing has been indefinitely postponed, has been critical of the overtime rule, arguing in a May 2016 op-ed in *Forbes* that it will "simply add to the extensive regulatory maze the Obama Administration has imposed on employers, forcing many to offset increased labor expense by cutting costs elsewhere." Although the DOL has filed an interlocutory appeal challenging the district court judge's preliminary injunction blocking the DOL's overtime rule, the new Trump DOL could either withdraw the appeal (assuming a third party does not intervene to continue the appeal) or begin the administrative rulemaking process to change the regulation. Alternatively, the new Congress may pass legislation nullifying the regulation.

  In addition, during Obama's presidency, the Wage and Hour Division issued administrator interpretations (guidance on how to interpret the laws, which are not legally binding on the courts) that sought to greatly expand when businesses can be held liable as joint employers and to narrow the circumstances in which workers could be treated as independent contractors exempt from federal wage and hour laws. Under President Trump, the Wage and Hour Division could scale back these administrator interpretations to provide more employer-friendly interpretations.

- **DOL, Office of Federal Contract Compliance Programs (OFCCP):** The OFCCP is the agency that ensures that employers doing business with the federal government (federal contractors and subcontractors) comply with laws and regulations requiring nondiscrimination. The Obama administration made numerous changes to affir-

mative action requirements via executive orders, bypassing the congressional and administrative rulemaking processes. President Trump has stated his intention to revoke President Obama's executive orders. Among the Obama initiatives that could be repealed under President Trump is the Fair Pay and Safe Workplaces executive order, known by its opponents as the "blacklisting" order. The order requires prospective federal contractors and subcontractors to disclose workplace law violations that occurred during the previous three years and to give wage statements detailing pay and hours to employees and independent contractors; it also prohibits arbitration agreements relating to Title VII of the Civil Rights Act or sexual assault. However, because the Federal Acquisition Regulatory Council issued a final rule implementing this order, it may take additional steps for the rule to be changed. Litigation to enjoin the final rule is pending. In the meantime, on January 30, 2017, Republican lawmakers introduced a joint resolution of disapproval, which would permanently block implementation of the final rule, under the Congressional Review Act. The law allows Congress to repeal new rules on an expedited basis through a resolution of disapproval, as long as the regulations were issued within 60 legislative days of the new Congress. The joint resolution will require only a simple majority of the House and the Senate and President Trump's signature. A number of other executive orders issued by President Obama may be scrutinized, including the executive order that raised the minimum wage contractors pay employees performing work on covered federal contracts ($10.20 per hour as of January 1, 2017) and the executive order that requires federal contractors to provide paid sick leave to employees working on government contracts. Meanwhile, a White House statement issued on January 31, 2017, stated that President Trump will continue to enforce President Obama's executive order barring discrimination against LGBT people working for federal contractors.

- **DOL, Occupational Safety and Health Administration (OSHA):** As DOL secretary, Puzder could review a number of OSHA standards that were issued over the last eight years. He is likely to curtail OSHA's new record-keeping rule, which requires covered employers to file injury and illness information electronically with the government by July 1, 2017 (and on an annual basis thereafter); the information will then be posted online for the public. Puzder also might focus on the standard by which OSHA enforces the more than 22 whistleblower statutes under the agency's whistleblower protection program. In the last several years, OSHA lowered the employee's burden of proof necessary to prove retaliation.

- **Equal Employment Opportunity Commission (EEOC):** On January 25, 2017, President Trump appointed EEOC Commissioner Victoria A. Lipnic as acting chair to take over the leadership role from Chair Jenny R. Yang. Lipnic joined the EEOC in 2010, and during her tenure, she was one of two commissioners who voted against the EEOC's July 2015 decision that sexual orientation discrimination is gender discrimination prohibited by Title VII. President Trump also will have the opportunity to nominate the EEOC's new general counsel to replace David Lopez, who left in December 2016. Given the change in leadership, the agency's enforcement priorities and litigation decisions will almost certainly shift. In recent years under Yang, the EEOC has made equal pay a top priority. In furtherance of this commitment, in September 2016, the EEOC announced final changes to the Employer Information Report (EEO-1), which will require employers to annually report aggregate compensation data for all employees by gender, race and ethnicity across pay bands. These changes are set to become effective in March 2018; however, under Lipnic, who had voted against the EEO-1 pay data report proposal, and other Trump appointees, the EEOC could seek to modify these changes before they come into effect.

- **National Labor Relations Board (NLRB):** On January 26, 2017, President Trump appointed Philip A. Miscimarra, the sole Republican member of the NLRB, as acting chairman, taking over from Democrat Mark Gaston Pearce. The NLRB currently has two vacant seats, both of which President Trump is likely to fill with Republican members. Additionally, the term of NLRB General Counsel Richard F. Griffin, Jr. will expire in November 2017. With these new appointments, the NLRB's controversial joint employer standard in *Browning-Ferris Industries of California, Inc.* could be reversed. The 2015 decision in *Browning-Ferris* broadened the joint employer standard to include relationships where the potential joint employer has the ability to control an employee's essential terms and conditions of employment — even if it never actually exercises such control. (See *2016 Insights* article "A New World for Joint Employers.") In addition, since its 2012 decision in *D.R. Horton, Inc.*, the NLRB has consistently maintained that the National Labor Relations Act prohibits arbitration agreements that require employees to waive the right to pursue labor-related class and collective actions. Recently, the U.S. Supreme Court agreed to hear, on a consolidated basis, three cases relating to the *D.R. Horton* decision and the circuit split that developed thereafter. Among the new president's first orders of business was to nominate conservative U.S. Court of Appeals for the Tenth Circuit Judge Neil Gorsuch as a Supreme Court justice to replace the late Justice Antonin Scalia. Judge Gorsuch, if confirmed, would restore the highest court to a Republican majority, but it is too early to predict whether he would join a majority in rejecting the board's position in *D.R. Horton*.

In response to less workplace regulation from the federal government, a number of states and municipalities are likely to initiate

Trump Expected to Alter Labor Laws, Policies

more legislative action. The idea that state and local governments can fill gaps in workers' rights left open under federal law is not new. Over the last eight years, numerous states and localities enacted ordinances to raise the minimum wage, guarantee paid sick days, provide paid parental leave and protect LGBT rights in the workplace. For example, while the federal minimum wage (for nongovernment contractors) has remained at $7.25 per hour since 2009, state and local laws enacted last year are expected to increase the minimum wage to $15 per hour in California, New York and Washington, D.C. over the course of the next five to six years. Likewise, various agencies charged with enforcing labor laws in states such as California, Illinois, Massachusetts and New York have issued guidance and taken enforcement positions in litigation that make it clear they have a narrow view of the permissible use of independent contractors and exemption from overtime requirements, as well as an expansive view of joint employer liability. Standing in contrast are some states that have stopped municipalities from instituting certain employment legislation (*e.g.,* statewide bans on paid sick leave in Florida, Michigan and Wisconsin).

If the Trump administration rolls back federal protections, we can expect to see countervailing trends from some state and local governments in the form of new legislation and greater employee protections. However, others may be just as happy not to substitute local rights for federal ones. How this will reverberate in the workforce, including with regard to job growth or decline, remains to be seen. With an improving economy, we anticipate that worker mobility will be on the rise, particularly among college-educated workers, and the degree to which a jurisdiction provides workplace rights and protections may play a role in where workers choose to seek jobs.