

The Era of President Donald J. Trump—What Employers Can Expect

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Now that Donald Trump has secured the presidency, what can employers expect moving forward? Given the vocal nature of Trump's election campaign, there are sure to be changes on the horizon for employers. Although the scope and timing of changes affecting the workplace were uncertain in the days and weeks immediately following the election, this article reviews the activities that employers will most likely see initiated or diminished over the course of the Trump administration, including:

- ❑ Fewer enforcement actions by federal agencies including the Equal Employment Opportunity Commission (EEOC), Department of Labor, and the Occupational Safety and Health Administration (OSHA), whose budgets may well be reduced and much more limited than under the Obama administration.
- ❑ Increased enforcement and more stringent processes for I-9 form compliance.
- ❑ Employer-friendly changes to wage and hour laws.
- ❑ Efforts to repeal the Affordable Care Act.
- ❑ A high likelihood of additional requirements and expenses for the employment of workers who are not US citizens and severe penalties for employers who do not comply with the US immigration laws and employ illegal workers.

- ❑ Added expenses to employers, possibly in the form of paid leave for working mothers.
- ❑ Conservative Supreme Court appointments by Trump making class- and collective-action waivers in arbitration agreements a safe bet.

IMMIGRATION CHANGES MAY RESULT IN AN INCREASED BURDEN FOR EMPLOYERS

Trump's presidency may well prove a headache for employers with respect to his clear anti-immigrant policies and his threat to make employers pay heavily for noncompliance.

During his election campaign, Trump promised to deport 11 million unlawful aliens from the United States. Although his staunch position on these issues may soften now that he has secured the presidency, his intent to end illegal immigration will have a large impact on employers. Employers should expect more stringent processes for I-9 form compliance and the potential for increased violations.

For one, employers can expect to see a decrease in the number of visas offered or an increase in the amount of time it takes for Immigration and Customs Enforcement to review and approve visas. In fact, Trump could deliver, without Congress's support or approval, on his promise to hand out fewer

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A further change may well be a federal mandate that all employers utilize E-Verify on all employees, and that employers reverify their workers on an annual or even quarterly basis. These requirements could prove problematic and taxing for many employers. More concerning is the potentially heavy penalty to those companies that fail to properly verify their workers, including potentially criminalizing the employment of illegal aliens. These changes may dissuade employers from hiring Latino, Hispanic, and other immigrant workers, which could potentially result in increased claims of race or national-origin orientation discrimination in the hiring process.

If President Trump fulfills his vow to deport millions of illegal immigrants and to crack down on companies that employ unlawful aliens, the result could be the creation of several million job vacancies. These vacancies will likely be created in typically lower-earning positions, which may be hard to fill at the same rate with US citizen employees.

REPEAL OF THE AFFORDABLE CARE ACT

President Trump remained clear throughout his election campaign that he would repeal (or, at least, vastly modify) the Patient Protection and Affordable Care Act (the ACA). While doing so would require an act (or

several acts) of Congress, Trump has vowed to take action to repeal the ACA within the first 100 days of his presidency. However, despite Trump's promise to take immediate action, it will likely take much longer to rescind some or all of the ACA provisions.

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Under Trump's proposed health-care plan, changes may include allowing health care to be purchased across state lines (in an effort to boost competition); allowing individuals to fully deduct individual insurance premium payments from their tax returns; allowing the importation of prescription drugs; negotiating drug prices with Medicare; expanding Medicaid; and promoting health savings accounts (HSAs) by ensuring that contributions to HSAs are tax free and allowed to accumulate.

CHANGES TO WAGE LAWS

A number of anticipated changes to wage laws will benefit employers, including those describe below.

Decreased Salary Threshold Requirement for Exempt Employees

The projected burden on employers, with respect to employee wage requirements, may well be lessened under a Trump administration. President Trump and a Republican-led House and Senate could take action to pass the Protecting the Workplace Advancement and Opportunity Act (PWAOA), which aims to limit the Department of

Labor's (DOL's) power in hiking the salary threshold for overtime-exempt employees.

Currently, salaried workers must make at least \$23,660 per year to qualify as exempt from overtime. The DOL proposed to raise the threshold to \$47,476 per year, with changes effective as of December 2016. However, Republicans are in vast agreement that, while the salary threshold should increase, it should be substantially less than what the DOL proposed. Republican legislation will not block the DOL from issuing an overtime rule, but it will require the DOL to consider the economic impact of any proposed rule on the business community—especially small businesses—before imposing any change. This means, if signed into law, the PWAOA may effectively repeal the DOL's new overtime-exemption regulations.

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Employers may welcome one further change under the PWAOA, a prohibition of the DOL's proposed automatic annual increases to the salary threshold. Currently, the proposed regulations include an automatic annual increase to the salary threshold requirement that allegedly mimics the rate of inflation. These automatic increases will likely be difficult to calculate and anticipate, and may prove difficult for employers in planning for the years ahead. However, if the PWAOA is enacted, the automatic increases fall away. This means that once an employer puts together a viable plan under the new salary threshold, that

plan can safely stay in place until further legislation is passed altering the salary threshold.

Minimum Wage

Trump has consistently held the position that the federal government cannot raise the minimum wage and remain economically competitive in the global community. Despite these comments, Trump also proposed raising the federal minimum wage to \$10. While markedly less than the minimum wage proposed by Democratic candidates, employers should be prepared for an anticipated increase in the federal minimum wage.

Regardless of what changes are made to the federal minimum wage, it is likely that, under a Republican president, House, and Senate, any further changes to minimum-wage requirements will be minimal. Employers should be mindful, however, that many state laws have stricter wage requirements than those proposed by the Trump administration. Companies should audit their practices and ensure their compliance with both the federal and state minimum-wage requirements.

Paycheck Fairness Act

The proposed Paycheck Fairness Act (PFA) aims to add procedural protections to the Equal Pay Act and the Fair Labor Standards Act in an effort to address the gender pay gap. However, the PFA is now unlikely to see the light of day under the Trump administration. Although Trump has, at times, commented that he is committed to equal pay, his position has wavered. This waver, coupled with his stance toward

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NATIONAL PAID MATERNITY LEAVE AND CHILD-CARE TAX DEDUCTIONS

In his campaign, Trump called for the federal government to guarantee six weeks of paid maternity leave to each new mother. Trump's proposal regarding paid maternity leave works through the existing system of state unemployment insurance. Trump's officials claim the cost of such leave will be financed through savings achieved by eliminating fraud in the unemployment insurance program, rather than in direct costs to the employer.

Significantly, under the proposed paid-leave policies, there are numerous groups who are excluded, including fathers, adoptive parents, and potentially even unwed mothers. Regardless of what the exact terms of paid maternity leave may entail, it is clear that employers must accept the fact that paid leave—in one form or another—is a near certainty. It will be important for companies to understand the coverage of paid maternity leave when evaluating and developing their own policies regarding leave.

In addition to paid leave provisions, Trump recently unveiled a proposal for lowering child-care costs by allowing parents to "fully

deduct" child-care expenses for up to four children. These proposed deductions would be capped at the "average cost of care" in the parent's state of residence, although it is unclear how such an average cost will be calculated. Further, the deductions would not be made available to parents with an annual income of more than \$250,000 individually, or \$500,000 jointly. These changes may well ease the burden on working parents, consequently aiding workforce morale and overtime availability of working parents.

A NEW SUPREME COURT JUSTICE AND CLASS-ACTION WAIVERS IN ARBITRATION AGREEMENTS

Following the passing of Supreme Court Justice Antonin Scalia, the fate of future Supreme Court decisions affecting labor and employment has largely been uncertain. Members of the Democratic Party have clearly stated their hopes to fill the vacant seat of Justice Scalia, a conservative and anti-LGBT justice, with a more liberal-minded individual. However, Trump has vowed to appoint a new justice to the Supreme Court of a similar mind-set to Scalia. The Trump appointment will essentially ensure that the Supreme Court will continue to have a conservative voice.

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A conservative Supreme Court may be of key importance for employers in the years to come. For instance, in 2014 the National Labor Relations Board (NLRB) reaffirmed its earlier decision in *D. R.*

Horton, Inc.,¹ that arbitration agreements in which employees were required to waive their right to bring class or collective actions violated the National Labor Relations Act. The Fifth Circuit struck down the NLRB's 2014 decision a year later, finding that class-action waivers were permissible. However, the circuits are currently split with respect to whether class-action waivers are permitted in arbitration agreements, with the Second and Eighth Circuits joining the Fifth Circuit in upholding such waivers and the Seventh and Ninth Circuits finding them illegal.

In September 2016, the NLRB asked the Supreme Court to rule on whether class-action waivers are permissible. With a conservative appointment to the Supreme Court, there may well be a ruling that class-action waivers are permitted. This finding could prove extremely useful to employers (particularly large employers) who wish to avoid the potential of costly and time-consuming class-action litigation by their current or former employees. If the Supreme Court provides a favorable decision, employers should strongly consider drafting and/or revising arbitration agreements to avoid unnecessary exposure to class-action claims.

UNCLEAR FUTURE FOR UNIONS

It is a near certainty that, under President Trump, a Republican general counsel will be nominated to the National Labor Relations Board (NLRB) in 2017. However, what is unclear is Trump's stance on union-related issues.

Although the typical Republican view is more antiunion, Trump's history in the hotel industry—a heavily unionized arena—makes his viewpoint a bit harder to determine.

Trump has avoided discussing union issues in his campaign speeches and on his website. At most, he has espoused vague statements that he has support for and within unions.

Vice President Mike Pence has been more vocal on this matter. Pence has historically held a more typically Republican view. While governor of Indiana, Pence worked to keep Indiana a right-to-work state. As a member of Congress, Pence opposed the Employee Free Choice Act—an Act designed to strengthen a worker's right to unionize. Pence's clear antiunion stance further muddies the waters.

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As such, it is difficult to predict the future of unions over the next four years. Employers should remain diligent in ensuring their awareness of any new regulations with respect to unionization and the NLRB.

AUTHORITY OF FEDERAL AGENCIES LIKELY TO BE SCALED BACK

Employers can expect changes in the scope of activities of the EEOC and OSHA.

EEOC and Antidiscrimination Policies

The EEOC has recently focused on investigating and prosecuting companies for alleged discrimination and harassment on the basis of sex, sexual orientation, and gender identity. Indeed, the EEOC has clearly stated its intention to focus on these issues in the years to come. As a result, savvy employers have been quick to update their equal employment opportunity policies to include prohibitions of discrimination and

harassment on the basis of sexual orientation or gender identity.

A Republican chair will be appointed to the EEOC in 2017. Indeed, with the resignation of EEOC general counsel David Lopez, President Trump has an opportunity to appoint a Republican general counsel to this post, which will further alter EEOC activities.

Moreover, under President Trump, federal agencies are expected to have less enforcement authority, and the EEOC is unlikely to escape this fate. Thus, the EEOC's recent push to identify and prosecute employers for sex, sexual-orientation, and gender-identity discrimination will be diminished. Although employers should still make an effort to include sexual orientation and gender identity in their antidiscrimination policies, employers may see less investigation and litigation regarding such matters by the EEOC in the years to come.

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Decreased Enforcement Action for OSHA

Employers can expect that President Trump will take action to repeal many of OSHA's regulations and initiatives and vastly decrease the federal government's presence in the workplace. This may include a repeal of the

new electronic record-keeping and retaliation rules. A Trump OSHA may be more focused on compliance assistance and cooperative programs, rather than enforcement—a welcome change for most employers.

EMPLOYERS ARE LOOKING TOWARD A GENERALLY FAVORABLE FUTURE

The changes that are expected to take hold under the Trump administration will undoubtedly be more employer friendly than those that have been made under President Obama. However, the changes that are likely to occur in the near future are significant. Employers should stay abreast of new laws and regulations to ensure that they are addressed immediately and properly. Companies are strongly encouraged to seek competent legal counsel in tackling these issues over the next few months and into the next four years. Those employers who properly prepare and respond to the changing landscape of employment law under President Trump may see a promising future.

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NOTE

1. D. R. Horton Inc., 357 NLRB No. 184 (2012).

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