YOU'RE HIRED: LABOR POLICY UNDER THE TRUMP ADMINISTRATION AND IN THE 115TH CONGRESS

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If personnel reflect policy, President-elect Donald Trump's selection of Andrew Puzder as the next Secretary of Labor signals a turning point for labor and employment policy. The Chief Executive Officer of CKE Restaurants, Mr. Puzder has been critical of many of the Obama administration's labor initiatives. His efforts to carry out Mr. Trump's job creation agenda will likely intersect with action in Congress and in the courts, where several pivotal labor-related cases are currently being heard on appeal. These dynamics mean that the early days of the Trump administration and the 115th Congress will be a time of flux for employers, with changes to existing regulations and new legislative and regulatory initiatives. This alert details several of the most important policy areas that are likely to undergo change. Employers should consider engaging in the policymaking process now to help shape legislation and regulations.

NEW PLAYERS, NEW PRIORITIES

As the leader of a major fast-food company, Mr. Puzder brings a "real-world" perspective on how policy decisions affect employers and employees. He has been a vocal critic of several Obama-era labor initiatives, especially its activities with respect to the joint employer standard, expanded eligibility for overtime pay and paid leave, among others.

Mr. Puzder's views on these topics are largely in alignment with the Republican leadership of the Congressional committees with jurisdiction over labor and employment issues. On the House Education and Workforce Committee, Representative Virginia Foxx (R-NC) is expected to become the new Chair following the retirement of current Chair John Kline (R-MN). Representative Foxx has promised "to do whatever [Republicans] can to stop the rules coming out of the [Obama] Labor Department – either block them or repeal them." She has named the repeal of the Department's overtime and persuader rules as top priorities, in addition to the National Labor Relations Board's (NLRB) broadened joint employer standard and rules related to the union election process. Representative Bobby Scott (D-VA) will remain the Ranking Member on Education and Workforce.

In the Senate, Senator Lamar Alexander (R-TN) will remain the Chairman of the Senate Health, Education, Labor, and Pensions Committee (HELP), while Senator Patty Murray (D-WA) will continue to serve as the top Democratic or ranking member.

OVERTIME RULE

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One of the key labor policies that Mr. Puzder, Rep. Foxx, and their Republican colleagues may consider for reform are the Obama administration's initiatives with respect to overtime pay. The overtime rule, which was published in the Federal Register on May 23, 2016, revises income thresholds for determining overtime pay for executive, administrative, professional, outside sales, and white collar employees exempt from regular minimum wage and overtime pay requirements, and raises the cut-off salary of employees eligible for overtime pay from $23,660 to $47,476 per year. The rule was due to become effective on December 1, 2016.

However, a U.S. District Court Judge in Texas on November 22 issued a nationwide preliminary injunction blocking implementation of the overtime rule, just a few days before its December 1 effective date.[1] This preliminary injunction has given businesses that had not yet moved to comply with the new rules a respite from updating their systems and notifying employees. In turn, knowing that some businesses have not yet had to comply, Congress has now prioritized repeal of the overtime rule as an early order of business in 2017.

Under complex procedural rules, repeal of the overtime rule could possibly be accomplished through use of the Congressional Review Act (CRA). CRA is a 1996 law that allows Congress to repeal new "major rules" through an expedited resolution of disapproval as long as those regulations were issued within sixty *legislative* days in the House or *session* days in the Senate of the start of the new administration. With the House and Senate still holding occasional pro forma sessions into mid-December, the Overtime Rule is in a grey area of the CRA window, and the final determination will be made by the Office of the Clerk. Notably, the Senate Republican Policy Committee has identified the Overtime Rule as a potential candidate for review under the CRA.[2]

PAID LEAVE

Another key issue is the Department of Labor's (DOL's) final September 2016 rule implementing President Obama's Executive Order 13706 to require federal contractors and subcontractors to provide certain employees with up to seven days of paid sick leave annually. President-elect Trump has not made any statements regarding his position on mandated paid sick leave for federal contractors. Delivering on a broad campaign promise to rescind executive orders issued by President Obama, it is possible that President-elect Trump may repeal the executive order, along with other Obama executive orders, during his first weeks in office.

On the other hand, the Trump administration and 115th Congress also could address issues surrounding paid leave. During the campaign, the President-elect proposed six weeks of mandatory paid maternity leave, as well as tax incentives to support child and elder care. Although the details of the plan, including what percentage of their salaries mothers will receive, have yet to be clarified, it could offer an opportunity for Democrats and Republicans to find common ground.

MINIMUM WAGE

President-elect Trump has not taken a strong position on the federal minimum wage and has indicated an openness to an increase in the minimum wage as recently as July 2016.

Federal minimum wage legislation was last considered by Congress in April 2014, but the Minimum Wage Fairness Act could not garner enough support in the Senate to proceed to a vote. This act would have gradually

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raised the federal minimum wage from $7.25 to $10.10 per hour over a two-year period. Notably, there were attempts at compromise, which although unsuccessful could serve as a foundation in the case the issue moves forward, perhaps prompted by state-by-state action.[3] For example, Senator Susan Collins (R-ME) proposed to increase the federal minimum wage to $9 per hour, a wage that the Congressional Budget Office had projected would greatly reduce the negative impact on jobs.[4]

A Trump administration may look favorably towards an increase in the minimum wage — indeed, in a television appearance Mr. Puzder said that he was "not opposed to raising the minimum wage rationally." However, Congressional Republicans have generally not voiced support for increasing the minimum wage, so prospects for action remain unclear.

JOINT EMPLOYER STANDARD

Mr. Puzder and Rep. Foxx will likely prioritize the NLRB's joint employer standard for repeal. The NLRB ruling broadens the standard for who is considered an employer from the company that is currently exercising control, to any company with *authority* to exercise control over the employee. The result is that when two or more companies are involved with a worker — such as a temporary employment agency and the current employer — they may be considered joint employers. The implication of this change is that it creates stronger grounds for organizing unions that represent workers at both of the joint employers, thus giving employees more leverage. The change also increases exposure to liability because a company can now be held liable for labor violations committed by sub-contractors, franchisees, and other companies to which it outsourced responsibilities.

The issue remains unsettled into the next administration because the underlying case that prompted the NLRB decision is currently on appeal in the D.C. Circuit.[5] In Congress, HELP Committee Chairman Lamar Alexander (R-TN) and House Education and the Workforce Chairman Kline introduced a bill to repeal the changes to the joint employer standard created by the NLRB's ruling in *Browning-Ferris Industries*. The Protecting Local Business Opportunity Act provides potential models for the next Congress. The legislation would reaffirm that multiple employers must have "actual, direct, and immediate" control over employees to be considered joint employers, rather than the "indirect" or even "potential" control over employment decisions permitted under the NLRB's new joint employer standard. Because the broadened standard was established by an NLRB ruling, it would require either future litigation or legislative action to overturn.

Additionally, the Committee on Education and the Workforce has been focusing its attention on this issue in part by conducting a year-long investigation of the Occupational Safety and Health Administration (OSHA) joint employer standard, which, they claim, instructs OSHA's inspectors to "delve into unrelated matters – financial and otherwise – far outside their expertise," and drifts from the agency's core mission of examining workplace health and safety in a way that benefits union leaders. In October, the Committee wrote a letter to Labor Secretary Thomas Perez expressing these concerns.

PERSUADER RULE

In March of this year, the DOL finalized its much-anticipated "persuader rule," which requires employers to report any third-party arrangement entered into with the goal of persuading employees, whether directly or indirectly,

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regarding their right to organize or bargain collectively. Critics of the rule argue that it will have a chilling effect on employer speech and prevent employers from hiring legal counsel or speaking on labor issues.

Since its passage, the persuader rule has faced significant hurdles in the form of lawsuits challenging its enforcement as unconstitutional, unlawful, and exceeding DOL's authority. Although it was set to go into effect July 1, a U.S. District Court judge in Texas granted a nationwide preliminary and later permanent injunction against enforcement of the rule.[6] The DOL is appealing the injunctive relief to the U.S. Court of Appeals for the Fifth Circuit.[7] However, since the persuader rule is based on an administrative determination of the DOL, it is likely that Trump administration changes in DOL priorities or personnel would moot the appeal at some point. Relying in part on the assumption that a Trump DOL would abandon the rule and the permanent nationwide injunction issued in Texas, a federal judge in Minnesota faced with a similar case recently stayed that litigation, despite his earlier decision not to grant injunctive relief.[8] The split suggests that the issue could ultimately make its way to a federal court of appeals or to the Supreme Court.

BLACKLISTING RULE

Another DOL regulation following a path similar to that of the Persuader Rule is the DOL's guidance for implementing E.O. 13673, Fair Pay and Safe Workplaces. The DOL's rule is popularly referred to as the "Blacklisting Rule," and it was published on August 25, 2016. E.O. 13673 requires that federal contracting officers consider a contractor's compliance with certain federal and state labor laws as part of the determination of contractor responsibility in awarding federal contracts. The Blacklisting Rule requires that federal contractors bidding over $500,000 report violations of fourteen different labor laws, as well as similar state laws, to the federal government. Contractors are obligated to report violations even if they are still being contested in court.

The rule was due to become effective on October 25, but just two days before that date, the U.S. District Court for the Eastern District of Texas granted a temporary injunction blocking parts of the rule from going into effect. Judge Marcia Crone ruled that the portion requiring disclosure of labor law violations — even if those violations are being challenged in court or have been settled without any actual violation of the law — was in violation of the First Amendment.[9] While the injunction is temporary, it demonstrates that the court is likely to eventually rule in favor of the plaintiffs, Associated Builders and Contractors, and strike down the rule. The ruling left intact the rule's paycheck transparency provision, which requires employers to note on paychecks information such as whether the person is an independent contractor or an employee under the Fair Labor Standards Act.

In the event that the injunction is lifted, Congress may pursue repeal of the Blacklisting Rule through use of the CRA. Since the rule was published on August 25, it falls within the CRA's sixty-legislative or -session day window. Similar to the Overtime Rule, the Senate Republican Policy Committee has identified the Blacklisting Rule as a potential candidate for review under the CRA.[10]

PREDICTIVE SCHEDULING

Proposed legislation to regulate work schedules has emerged at the state and local levels in the wake of San Francisco's enactment of its "Retail Workers Bill of Rights" ordinance in November 2014. A similar law, which applies to retail and food service establishments employing 500 or more workers, will take effect in Seattle on July

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1, 2017. The provisions of these scheduling laws vary, but most require employers to give good faith estimates of an employee's work hours in advance and provide additional compensation to employees whose hours are changed on short notice, among other provisions.

Proposals similar to the San Francisco and Seattle laws are pending in state legislatures in California, Connecticut, Illinois, Indiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, and Rhode Island, as well as in major cities like New York and at the federal level.

In the event state and local scheduling laws begin to gain momentum, the Republican majorities in the House and Senate could advance federal legislation to preempt such efforts. As a veteran of the fast-food industry, which has been a target of the push for restrictive scheduling, Mr. Puzder could be sympathetic to calls for a federal solution that balances the interests of employers and employees.

For a more detailed analysis of this scheduling legislation, please see our Food Industry Alert blog.

CONCLUSION

The Trump administration and leadership of the 115th Congress are charting a different course with respect to labor and employment policy than the outgoing Obama administration on the issues described above as well as many others. The incoming administration and Congress will almost certainly advance efforts to repeal some of the Obama administration's key labor and employment initiatives, and Congress will also position itself to react to state-based initiatives and legal challenges. These developments promise a period of changing obligations for employers, as well as opportunities to shape the future of this important policy area.

Labor Regulation/Issue	Status	Options for Repeal/Change
Overtime Rule	Under temporary injunction	▪ Possibly CRA repeal ▪ Congressional action ▪ Final court ruling
Paid Leave for Federal Contractors	Obama executive order and DOL implementing regulation passed	▪ President-elect Trump can repeal with an executive order
Federal Paid Leave Legislation	Currently none	▪ Congressional action
Federal Minimum Wage	Currently $7.25; no pending Congressional action	▪ Congressional action
Joint Employer Standard	NLRB ruling issued, currently on appeal in the D.C. Circuit	▪ Congressional action ▪ Final court ruling
Persuader Rule	Under permanent injunction	▪ Congressional action

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		▪ Final court ruling
Blacklisting Rule	Under temporary injunction	▪ CRA repeal ▪ Congressional action ▪ Final court ruling ▪ Reversal of underlying executive order
Predictive Scheduling	This is currently being handled at the state and local level	▪ Congressional action

NOTES:

[1] State of Nevada v. U.S. Dep't of Labor, No. 4:16-CV-00731 (E.D. Tex. Nov. 22, 2016).

[2] *Reining in Obama Regulatory Overreach*, SENATE REPUBLICAN POL'Y COMM. (Dec. 6, 2016) http://www.rpc.senate.gov/policy-papers/reining-in-obama-regulatory-overreach.

[3] Alexander Bolton, *Centrist Republicans Cool to Minimum Wage Hike Compromise*, THE HILL (Apr. 4, 2014 6:00AM) http://thehill.com/homenews/senate/202641-centrist-republicans-cool-to-wage-compromise.

[4] *Id.*

[5] Browning-Ferris Indus. of California, Inc. d/b/a Newby Island Recyclery, 362 NLRB No. 186 (Aug. 27, 2015).

[6] Nat'l Fed'n of Indep. Bus. v. Perez, Case No. 5:16-cv-00066-C (N.D. Tex. June 27, 2016) (preliminary injunction); Nat'l Fed'n of Indep. Bus. v. Perez, Case No. 5:16-cv-00066 (N.D. Tex. Nov. 16, 2016) (permanent injunction).

[7] Lawrence E. Dubé, *DOL Persuader Rule Blocked by Federal Judge*, BLOOMBERG BNA (Nov. 17, 2016) https://www.bna.com/dol-persuader-rule-n57982082867/.

[8] Vin Gurrieri, *Persuader Case Halted Pending Trump DOL Action*, LAW 360 (Dec. 8, 2016, 6:27 PM), https://www.law360.com/articles/870551/persuader-case-halted-pending-trump-dol-action; Labnet, Inc., d/b/a Worklaw Network v. U.S. Dep't of Labor, Case No. 16-CV-0844 (PJS/KMM) (D. Minn. June 22, 2016) (stay of proceedings issued on Dec. 7).

[9] Assoc. Builders and Contractors of Southeast Texas v. Anne Rung, Administrator, Office of Fed. Procurement Policy, Office of Mgmt. and Budget, Case No. 1:16-CV-425 (E.D. Tex. Oct. 23, 2016).

[10] *Reining in Obama Regulatory Overreach*, SENATE REPUBLICAN POL'Y COMM. (Dec. 6, 2016) http://www.rpc.senate.gov/policy-papers/reining-in-obama-regulatory-overreach.

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