



THE HOSPITALITY LAW CONFERENCE

April 24 - 26, 2017 • Houston, Texas

How Hospitality Will Be Affected by the Trump Administration's Labor & Employment Agenda

2017 HOSPITALITY
LAW CONFERENCE

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- Counsels employers on compliance with federal and state law, including issues related to hiring, discipline, internal investigations, and termination.
- Advises unionized and non-unionized workplaces regarding the employer's rights under the National Labor Relations Act.

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How Hospitality Will Be Affected by the Trump Administration's Labor & Employment Agenda

The Hospitality Law Conference

April 25, 2017

Kara M. Maciel and Jordan B. Schwartz

Conn Maciel Carey LLP

Agenda

- ❖ Legislation and Executive Orders
 - Major shift in how Executive agencies operate
- ❖ Agency Action
 - Department of Labor
 - EEOC
 - NLRB
- ❖ New Supreme Court

Employment Law Legislation and Executive Action in 2017



Major Shift in How Executive Agencies Function

- Historic shift in executive agency operations
 - After four months in office, one thing is certain -- the way that executive agencies function is changing dramatically.
- Immediate steps to overhaul executive agency functions and regulations that were harmful to employers:
 - Preibus Memo and Executive Orders
 - Beachheads running Executive Agencies
 - Proposed Budget Cuts

EO13781 – Reorganizing the Executive Branch

- Goal → improve the “efficiency, effectiveness, and accountability of the executive branch by directing the Director of the Office of Management and Budget to propose a plan to reorganize governmental functions and eliminate unnecessary agencies, components of agencies, and agency programs.”
- What does this mean for employers?
 - Opportunity for comment to help reshape the executive branch, including the Department of Labor

Executive Orders Aimed at Slashing Government Regulation

- **EO 13771 (Jan. 30, 2017)**
 - Requires that an agency eliminate two regulations for every new rule.
 - Each agency must ensure that the total incremental costs of all new and repealed regulations shall not exceed zero, unless otherwise required by law or as consistent with the advice of the OMB.
- **EO 13777 (Feb. 24, 2017)**
 - Directs the head of every agency to designate an agency official as its Regulatory Reform Officer to “oversee the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms.”
 - Establishes Regulatory Reform Task Forces (RRTF), consisting of the agency RROs and other designated agency officials, which will evaluate existing regulations and make recommendations to the agency head regarding their repeal, replacement, or modification.

How Do these Actions Affect Hospitality Employers?

- Pro-employer administration significantly restructuring DOL to focus on assisting employers rather than harshly penalizing them.
- Decrease in enforcement and increase in collaboration and compliance assistance.
- Rules subject to review and mandate to consider further notice-and-comment rulemaking due to court ordered temporary injunctions:
 - Persuader Rule
 - Overtime Rule
 - Fair Pay and Safe Workplace Rule (blacklisting rule)

Persuader Rule

- Requires employers and their consultants to report when consultants “persuade workers.”
- Purpose of rule – To give workers the information that they need to decide how to exercise their voice and cast their votes.
- Northern District of Texas issued a nationwide permanent injunction against the persuader rule on November 16, 2016.

Fair Pay and Safe Workplace Rule (Blacklisting Rule)

- In 2016, the Federal Acquisition Regulatory (FAR) Council and the DOL issued its controversial Fair Pay and Safe Workplaces rule.
- Among other things, this executive order would have forced federal contractors to prove they are in compliance with 14 antidiscrimination laws (including laws safeguarding the LGBTQ community from discrimination and harassment based on their sexual orientation or gender identity).
- On October 24, 2016, the U.S. District Court for the Northern District of Texas granted a preliminary injunction blocking the “blacklisting” portion of the rule from taking effect.
- Law has now officially been repealed.

Proposed FLSA Overtime Rule

- Increase in Salary Basis Test: From \$23,660 to \$47,476 (\$913/week)
- Rising salary threshold would have brought 4.2 million workers into non-exempt status
- Continuously updated salary threshold to prevent it from becoming outdated
- Effective Dec. 1, 2016



Fate of DOL Overtime Rule

- Nationwide injunction entered by federal judge in the Eastern District of Texas (appealed to the Fifth Circuit).
- Subject to review under Preibus memo but what Trump will do is still largely uncertain.
- Trump may be forced into the difficult position of backing his party and potentially alienating the working-class voters who elected him to power.

Now What?

- New Administration has not announced how it will proceed.
- Potential options/outcomes:
 - District Court Judge could rule on industry motion for summary judgment
 - Trump could instruct DOL to drop the case but Texas AFL-CIO is seeking to intervene as a party Defendant to take the lead defense on the case and the fight to uphold the rule.
 - DOL repeals rule / implements new threshold
- What should employers do now?
 - Utilize resources to get ahead of the anticipated changes by lobby Congress and influencing the direction of the new rule
 - Begin implementing steps to comply with the proposed regulations in case they are passed

Previous Executive Actions on the Chopping Block that May Affect Employers

- 27 of Obama's 240 executive orders focused on the workplace or societal actions that benefit minorities, younger workers and under-served communities among federal contractors and employees.



- Obama Executive Orders that may be voided by President Trump:
 - EO 13658: raising minimum wage for federal contractors to \$10.10 per hour
 - EO 13706: establishing Paid Sick Leave for federal contractors
 - EO 13673: federal contractor disclosure of past labor law violations

A Revamped DOL, a New Agenda, and Steps to Stay Ahead



DOL Secretary Nominee Alexander Acosta

- 1st Hispanic member of Trump's cabinet
- Former Law Clerk to Justice Alito
- Bush (W.) appointee as Member of NLRB
- Unlike Puzder, he has not been outspoken in criticizing new overtime regs, minimum wage increases, or paid sick leave policies
- Past work at DOJ and as U.S. Attorney suggests he is also less anti-enforcement than Puzder
- Nomination likely to be accepted (even supported by unions)
- Confirmation expected by the end of April 2017



Proposed 2018 DOL Budget Cut by \$2.5 Million

- 2018 Budget Proposal would scale back DOL funding by 21% - approximately \$2.5 billion.
- Programs that will be impacted:
 - Senior Community Service Employment Program
 - Underperforming Job Corp. centers
 - OSHA training grants
 - Office of Disability Employment Policy
 - Eliminates funding for Chemical Safety Board
- Increase funding for Reemployment and Eligibility Assessments program that is intended to root out fraudulent unemployment insurance claims.



What to Expect with the New DOL

- The New DOL will focus on:
 - more compliance assistance;
 - more opportunity for employers to come into compliance before enforcement actions are pursued;
 - more outreach and attempts to assist employers – particularly small employers who may not have the ability to obtain counsel.
- Acting Solicitor Nicholas Geale has stated that DOL is going to “listen to the regulated community a little more” under the new administration, and offer employers, particularly small ones, more opportunities to come into regulatory compliance before lodging enforcement actions.
- What does this mean for employers?
 - fewer investigations and enforcement actions
 - more time to bring company into compliance
 - friendlier interactions with DOL / less adversarial

Proactive Steps to Prepare for New DOL

- Employers should nonetheless remain vigilant in ensuring compliance with Wage and Hour, OSHA, and other DOL rules.
- Bush-era enforcement resulted in “poster child” enforcement.
- Proactive Steps to Prepare for New DOL:
 - Submit comments pursuant to EO13781 (reorganizing the executive branch)
 - Get in front of DOL to lobby for repeal of the overtime rules or creating a more favorable/workable threshold
 - Review employee handbook policies for compliance with federal and state laws
 - Conduct internal wage and hour audits
 - Review job classifications for overtime purposes
 - Conduct safety and health audits to identify compliance gaps

Other Potential Legislative and Executive Action to Watch Closely

- **Minimum Wage Law**
 - May 2016 – minimum wage should be left to the states
 - July 2016 – federal minimum wage should be \$10 per hour
 - November 2016 – wages are too high
- **Pay Equity**
 - Political climate ripe for some form of equal pay legislation at federal level



Other Potential Legislative and Executive Action to Watch Closely

- **Paid Leave Law**
 - Trump plan during campaign promised 6 weeks paid maternity leave for mothers after childbirth
- Current Action in Congress with regard to a Federal Paid Leave Law:
 - Democrats introduced the Family and Medical Insurance Leave Act (Family Act) in House and Senate on February 7, 2017
 - Republicans introduced the Strong Families Act in Senate on February 8, 2017

Be Aware of State & Local Legislation and Rules on Employment Law Topics

- **State and Local Minimum Wage Laws**
 - DC area alone has several different minimum wages between DC, Virginia, and Maryland (county specific).
- **Overtime Rules**
 - Lawmakers in Connecticut, Rhode Island, Wisconsin, Michigan, and Maryland are preparing bills modeled on the DOL's rule.
 - New York, California, and Alaska already have higher overtime exemption rates.
 - Compliance with state salary and duties requirements

Be Aware of State & Local Legislation and Rules on Employment Law Topics

- **Paid Family Leave Laws**
 - Five States and the District of Columbia currently have laws that provide paid family leave for employees
 - The laws have different coverage, length of leave periods, eligibility criteria, and methods to fund the leave.
- **Paid Sick Leave**
 - Seven states and the District of Columbia have passed laws requiring paid sick.
 - Several localities have also passed paid sick leave laws, such as Montgomery County, MD
- Takeaway for Employers
 - Employers should take time to review local and state laws regarding minimum wage, overtime, and pay equity and transparency.

Equal Employment Opportunity Commission



Immediate EEOC Reform

- Appoint new Commissioners and General Counsel
 - Appointed Victoria Lipnic as Acting Chair on January 25, 2016.
 - One Vacant Seat to Fill
 - Jenny Yang term expires on July 1, 2017



- Employee friendly reforms of Obama administration will be aborted:
 - EEO-1 Report Opposition to Equal Pay reform
 - Gender identity and sexual orientation discrimination

What Can We Expect?

- There remains many open questions about what to expect under President Trump.
- Low on Trump's Agenda – may not see a major shift at the EEOC given that it is a low priority for the new administration and already runs on a tight budget
- Anticipated changes:
 - Less aggressive tactics
 - Reform policy regarding delegation to general counsel to decide what cases to file in federal court
 - Focus on mediation rather than enforcement
 - Modify position on LGBT rights under Title VII
 - Revise EEO-1 Report – removing requirement to report summary compensation data categorized by race, gender and ethnicity.

EEO-1 Report

- First reporting deadline is March 31, 2018 so there is time to repeal the changes.
- Likely reform but uncertain as to how or when.
 - One option is to modify the report to decrease the burden by, for example, replacing W-2 data with annualized base pay.
- What should employers do?
 - At this time, employers should continue collecting data for 2017 and ensure their HRIS systems can organize the necessary information
 - Conduct internal pay analysis to determine if there are significant pay gaps based on sex, race, and ethnicity

Form D140290 EQUAL EMPLOYMENT OPPORTUNITY 2014 EMPLOYER INFORMATION REPORT CONSOLIDATED REPORT - TYPE 2

SECTION B - COMPANY IDENTIFICATION
 1 APPLE INC.
 1 INFINITE LOOP
 CUPERTINO, CA 95014

SECTION C - TEST FOR FILING REQUIREMENT
 1-Y 2-N 3-Y DUNS NO. 060704780

SECTION E - ESTABLISHMENT INFORMATION
 NAICS: Y

SECTION D - EMPLOYMENT DATA

| JOB CATEGORIES | HISPANIC OR LATINO | | NOT HISPANIC OR LATINO | | | | | | | | | | | | | OVERALL TOTAL |
|-------------------------------|--------------------|--------|------------------------|--------------------------|-------|-----------------------------------|------------------|-------|--------------------------|------------------|-------|-----------------------------------|-------------------|-----|-------|---------------|
| | MALE | FEMALE | WHITE | BLACK OR AMERICAN INDIAN | ASIAN | AMERICAN INDIAN OR ALASKAN NATIVE | PACIFIC ISLANDER | WHITE | BLACK OR AMERICAN INDIAN | PACIFIC ISLANDER | ASIAN | AMERICAN INDIAN OR ALASKAN NATIVE | TWO OR MORE RACES | | | |
| EXECUTIVE/HR OFFICIALS & MGRS | 1 | 0 | 60 | 0 | 0 | 7 | 0 | 0 | 12 | 2 | 0 | 1 | 0 | 0 | 83 | |
| PROF/ADM OFFICIALS & MGRS | 305 | 107 | 2898 | 120 | 0 | 911 | 0 | 42 | 1114 | 81 | 4 | 320 | 1 | 26 | 5942 | |
| PROFESSIONALS | 518 | 280 | 6415 | 176 | 15 | 4178 | 24 | 135 | 1855 | 80 | 9 | 1737 | 12 | 80 | 15494 | |
| TECHNOLOGICAL | 1322 | 542 | 7022 | 958 | 52 | 607 | 59 | 229 | 1844 | 561 | 15 | 231 | 18 | 122 | 13380 | |
| SALES WORKERS | 1954 | 852 | 8798 | 1516 | 107 | 830 | 52 | 275 | 3443 | 758 | 45 | 408 | 36 | 136 | 19210 | |
| ADMINISTRATIVE SUPPORT | 583 | 489 | 1740 | 253 | 16 | 207 | 10 | 68 | 1402 | 287 | 18 | 279 | 13 | 64 | 5429 | |
| CRAFT WORKERS | 10 | 0 | 65 | 2 | 1 | 15 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 94 | |
| OPERARIES | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | |
| LABORERS & HELPERS | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | |
| SERVICE WORKERS | 59 | 65 | 41 | 13 | 5 | 18 | 1 | 1 | 15 | 4 | 1 | 10 | 1 | 3 | 237 | |
| TOTAL | 4752 | 2135 | 27039 | 3036 | 202 | 6773 | 152 | 750 | 9685 | 1773 | 92 | 2986 | 81 | 413 | 58869 | |
| PREVIOUS REPORT TOTAL | 4601 | 1962 | 25021 | 2727 | 225 | 5534 | 147 | 803 | 8971 | 1523 | 89 | 2563 | 80 | 398 | 54644 | |

SECTION F - REMARKS

SECTION G - CERTIFICATION
 DATES OF PAYROLL PERIOD: 07/01/2014 THRU 07/11/2014
 CERTIFYING OFFICIAL: MARTHA BURRAGE-SIMS
 EEO-1 REPORT CONTRACT PERSON: MARTHA BURRAGE-SIMS
 EMAIL: MBURRAGESIMS@APPLE.COM
 TITLE: SR. COMPLIANCE LEADER
 TELEPHONE NO: 4087632431
 CERTIFIED DATE(TIME): 11/06/2014 12:54 PM

National Labor Relations Board



Pro-Employer National Labor Relations Board

- Return to Pro-Employer Board with shift from Democrat Board to Republican.
- Current Board:
 - Philip Miscimarra (Republican/Acting Chair): term expires Dec.16, 2017
 - Mark Gaston Pearce (Democrat): term expires Aug. 27, 2018
 - Lauren McFerran (Democrat): term expires Dec. 16, 2019
 - 2 Vacancies to Fill
- Union-activist friendly NLRB General Counsel Richard Griffin, former general counsel of the International Union of Operating Engineers, will also be replaced when his term expires on Nov. 4, 2017.
- Board may be “punished” through large budget cuts.

Precedent the Board will Seek to Change

- Shift to a more employer friendly Board.
 - Even with new majority, the Board cannot simply undo the precedent from the last eight years.
 - Must wait to rule on a case-by-case basis as new matters are appealed to the full Board.
- Positions that a new Board will seek to change:
 - Union Election Rule
 - Joint Employer Standard
 - Rulings that opposed mandatory class-action waivers for workers
 - Social Media policies

NLRB and Social Media Activities

- What is social media?
- Section 7 of the National Labor Relations Act affords all employees – not just union Members – the right to:



*” self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, **and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities ...”***

- Any employer policy or practice that restricts such rights is vulnerable to a charge of unfair labor practices under NLRA Sec. 8.

Lawful Employer Restrictions

- NLRB Protections → employees have the right to use social media to engage in concerted activities
 - NLRB has traditionally found unlawful restrictions on the right to engage in social media activities in two categories:
 - 1) discipline or discharge of an employee; and
 - 2) overbroad social media policies
- Activities that are not protected and can be used in an employer's social media policy:
 - Personal issues that don't impact others
 - Spreading false information that harms the company's business or defames their brand/services
 - Threats of violence
 - Workplace harassment, discrimination, and retaliation
 - Publishing trade secret/confidential information
 - Unlawful use of company logos and trademarks
 - Prohibiting against unauthorized postings *in the name* of the company

Unlawful Employer Policies

- Overbroad policies:
 - Prohibiting posting of non-public company information or confidential information without any definitions
 - Forbidding “rude, offensive, demeaning or abusive” comments or activities that would damage the company
 - Restricting employee from posting photos, video, or comments about the company
 - Requiring posts to be accurate or not misleading
 - Requiring employer approval before posting
 - Requiring employees to report inappropriate social media activity
- Example:
 - Chipotle case (2014)
- Social Media Policies under Trump



Trump on Union Walkabout Rights

- 2013 Interpretation Letter permitted employees at a worksite w/out a collective bargaining agreement to designate union rep as representative during OSHA inspection
- Trump Admin likely action:
 - Rescind and replace Letter of Interpretation
 - Roll-back other union and organizing rights at NLRB

Changes in the Supreme Court



The State of the Supreme Court

Conservative Justices

- JOHN G. ROBERTS, JR.
- CLARENCE THOMAS
- SAMUEL A. ALITO, JR.
- ANTHONY M. KENNEDY

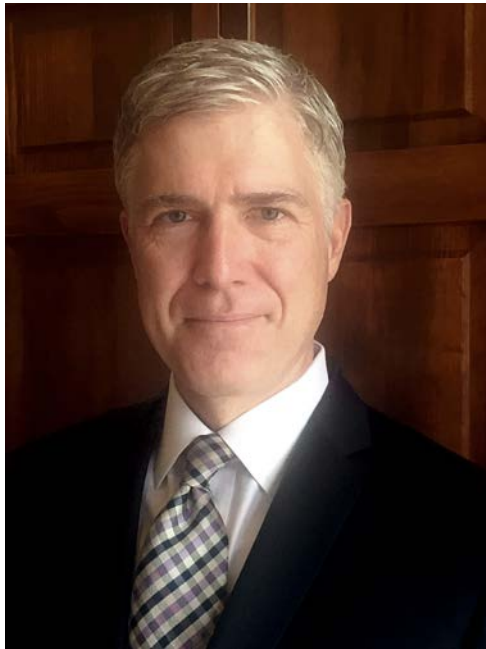
Liberal Justices

- RUTH BADER GINSBURG
- STEPHEN G. BREYER
- SONIA SOTOMAYOR
- ELENA KAGAN



Newest Supreme Court Justice Neil Gorsuch

Neil Gorsuch (10th Circuit)



- Appointed to Tenth Circuit by President George W. Bush in 2006.
- Conservative approach; expected to fill conservative ideals embodied by Justice Scalia
- Stance on Labor Issues:
 - Pro-business stance
 - Criticized courts for giving too much power to government agencies that enforce the nation's labor and employment laws
 - Previously defended cases seeking to restrict class-action lawsuits – a topic that the Supreme Court has heard multiple cases on in recent years.

Effect on Supreme Court

- Zubik v. Burwell, 136 S. Ct. 444 (2015)
 - Challenges the ACA contraception mandate
 - Court issued a decision that directed the parties to work out a compromise, but the case could return when a new Justice is nominated.
- Friedrichs v. California Teachers Association (2016)
 - Heard in January 2016, with a skeptical Scalia in attendance, but in March the Court issued a 4-4 decision that left a lower court's decision upholding union's ability to charge public workers union dues, even if they aren't a member.
- Class Action Cases
 - Nomination of a conservative justice will likely give employers more room to challenge class actions on constitutional grounds, and decrease the effectiveness of the class action tool in employment case.
 - Class action waiver case to be heard by Supreme Court this term.
- Transgender and Sexual Orientation Discrimination

Trump's Larger Impact on Federal Court

- Ability to re-shape the judiciary
- Trump has vowed to choose ideologues in the mold of the late Supreme Court justice Antonin Scalia, a conservative icon
- Responsible for filling an additional 113 vacancies in the federal courts
 - 17 at Circuit Court of Appeal Level
 - 88 at the District Court level
- State gun control laws, abortion restrictions, voter laws, anti-discrimination measures and immigrant issues are all matters that are increasingly heard by federal judges and will be influenced by the new composition of the courts

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QUESTIONS?



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