The 2016 Election - What Does a Trump Victory Mean for HR Professionals?
About Littler

Littler is the largest management side labor, employment, and benefits law firm in the world with over 1,200 attorneys devoted exclusively to representing the interests of management relating to the workplace.
Agenda

- Presidential Appointments
  - SCOTUS
  - EEOC
  - NLRB
  - DOL
- The Affordable Care Act
- Minimum Wage
- Overtime
- Maternity Leave
- Immigration
- LGBTQ Rights
The Current U.S. Supreme Court

- Passing of Justice Antonin Scalia has left a vacant seat
- Current composition is evenly split between four Republican and four Democrat appointees
- Trump has announced he will appoint a new justice within the first two weeks of his taking office
The Future U.S. Supreme Court

• Trump has said he would select a jurist "based on Constitutional principles, with input from respected conservative leaders."

• To date, Trump has named 21 potential nominees, any of whom—if confirmed by the R controlled Senate—would secure the conservative tilt to the 9-member bench

• President Trump said Tuesday morning that he would make his choice by Friday and would announce next week his choice of “a truly great” justice. The three leading contenders — Judge William H. Pryor Jr. of the federal appeals court in Atlanta, Judge Neil M. Gorsuch of the federal appeals court in Denver and Judge Thomas M. Hardiman of the federal appeals court in Pittsburgh

• Potential for additional conservative Trump-appointees, as Justices Ruth Bader Ginsburg (age 83), Anthony Kennedy (age 80), and Stephen Breyer (age 78) are all liberal or moderate with retirement plans unknown
SCOTUS Employment Decisions Potentially in Peril

- There are several important labor and employment cases pending before the Court, including:
  - *Griggs v. Duke Power* – a decision finding that employment practices which are neutral on their face but have a differential impact on race are discriminatory unless the Employer provides a substantial business justification.
  - *U.S. v. Arizona* – where the Court ruled that Arizona’s criminalizing the willful employment of illegal aliens was preempted by Federal legislation.
    - Future: Change to Federal law could eliminate the Court’s grounds for striking down the state statute.
  - *Price Waterhouse v. Hopkins; Oncale v. Sundowner* – instances where the Supreme Court has recognized Title VII protections against discrimination based on gender norms, which lower courts have used to award verdicts in sexual orientation discrimination cases.
    - Future: The federal religious freedom laws could potentially be amended to match Vice President Mike Pence’s controversial Indiana bill. This could allow employers free reign to discriminate based on sexual orientation and transgender status.
Regulatory Appointments - EEOC

• The party controlling the White House holds majority of the five members on the Commission. All of them and the General Counsel are appointed by the President.
• All five current members (including the Chair) will turn over before the end of 2020.
• It is uncertain whether President Trump will re-appoint any particular member.
• David Lopez, EEOC General Counsel since 2010, announced that he is leaving in December.
• Trump just announced Victoria Lipnic, a commissioner since 2010, to serve as the agency’s acting chair
Future EEOC Practices

- Conservative Commission may focus less on pay discrimination and LGBTQ rights and become less expensive in terms of its litigation agenda.
- Systematic Litigation Slowdown – Laws may pass requiring a majority vote by Commissioners before commencing or intervening in litigation with multiple plaintiffs or systematic pattern and practice allegations. EEOC will want to be more tempered in approach and not risk and drive down pursuit of systematic cases in favor of cheaper options.
- EEO-1 Pay Transparency Changes – Current regulation requires all businesses with 100 or more workers to submit pay data by gender, race and ethnicity for workers in 12 different specified pay bands. Employers protested, citing burdensome costs, and Trump Administration will likely put this regulation on its chopping block.
The Composition of the NLRB

• Board has five members – two current vacancies.
• Board Members are appointed by the President to 5-year terms, with Senate consent, the term of one Member expiring each year.
• Within the next two years, Trump will fill the two vacancies and replace two outgoing members
• New Appointees will likely lead the Board away from recent pro-union activism.
Revisiting Recent NLRB decisions

- Likely return to recently-questioned, longstanding precedents.
- **Class Action Waivers** – Conservative SCOTUS will revisit Board’s 2012 decision in *D.R. Horton*. Court will almost certainly reaffirm the supremacy of the Federal Arbitration Act and the right to enter into voluntary agreements to use individual arbitration.
- **Joint Employer Standard** – Conservative Congress will likely pass legislation to undo the Board’s 2015 decision in Browning-Ferris(BFI), which loosened the Board’s standard for determining joint employers. Decision allowed for a secondary employer to merely retain the right to control work to be considered joint-employer. New bill will return law to old standard where secondary employer need actually exercise control to qualify as joint-employer.
Secretary of Labor Appointee – **Andrew Puzder**, CEO of CKE Restaurants, the parent company of Hardees and Carl’s Jr.

While Puzder has definite, real-life business experience, he will likely slow the labor movement.

Puzder **opposes**:
- Strengthening overtime protections;
- Increasing minimum wage;
- Reinforcing worker health and safety precautions.
TrumpCare?

The "Unaffordable" Care Act will soon be history!

ISIS is starting its own currency. May be stronger than the dollar if ObamaCare is fully implemented.
2:38 PM - 24 Nov 2014

The Boston killer applying today for ObamaCare. He demands that medical bills be taken care of immediately. Does this include dental?
9:45 AM - 24 Apr 2013

If Syria was forced to use Obamacare they would self-destruct without a shot being fired. Obama should sell them that idea!
3:49 PM - 6 Sep 2013
Trump’s Executive Order re Obamacare

- Doesn’t change the current law
- Changes direction
- Allows federal agencies to interpret or delay any part of the law that imposes a financial burden
- Loosens enforcement of any provision found financially burdensome
- Allows law and policy makers to chip away at the ACA
Initially Proposed Changes to Obamacare

• Initially, Trump vowed to Repeal and Replace Obamacare immediately.

• A complete repeal, however, would be chaotic.
  – 20 million Americans would lose health insurance overnight, and
  – The healthcare exchanges and the federal subsidies promised to those who purchased plans exchanges may be eliminated.
Possible Changes to Obamacare

• Rather than a complete repeal, a slower phase-out is more likely.
• Trump’s proposed healthcare reforms include:
  – Elimination of penalty mandates
  – Removing the prohibition on employer stand-alone reimbursement arrangements and employer premium payment plans
  – Elimination of the cap on healthcare flexible spending accounts
  – The ability to purchase health insurance across state lines
  – Letting states manage Medicaid funds
  – The introduction of special health savings accounts
  – Eliminate Medicaid expansion to individuals up to 138% of the federal poverty level
  – An allowance for people to deduct the cost of health insurance from their personal income taxes
Potential Long-Term Healthcare Reforms

• Conservatives and Republicans have floated things like:
  – Possible taxation of employer-provided health insurance coverage.
  – Expansion of the sale of insurance across state lines with limited open enrollment windows and state high-risk pools to better protect the insurance industry from adverse selection.
The Future of Minimum Wage

• Federal minimum wage has not increased since 2004, and Trump opposes proposed increases, calling such increases “job-killers” for new workers entering the market.
• Trump may also look to repeal President Obama’s Executive Order 13658, which increases the minimum wage for government contractors to $10.20/hour in 2017.
Trump’s Impact on Overtime

• After rulemaking and comment, the DOL issued new white collar exemption regulations, raising the exempt salary threshold to $913/week (or $47,476/year).

• A federal district court in Texas then granted a preliminary injunction barring the DOL from enforcing its revised overtime rule, which was scheduled to take effect on Dec. 1, 2016.

• The Obama administration has appealed to the Fifth Circuit, known to be a conservative court, but the appeal has not yet been heard.

• The Trump administration could abandon the appeal, or it could pass legislation to nullify or modify the rule which would make an appeal moot.
Trump’s Plan for Maternity Leave

Trump’s Plan:

- Applies only to employed, biological mothers whose employers do not supply paid family leave
- Plan proposes six weeks of partially paid leave, with a weekly payout of around $300
- Paid for by tightening the federal unemployment insurance program
- **Excludes**: unemployed mothers, adoptive parents, fathers, male same-sex couples
Trump’s Impact on LGBTQ Employees

- Trump the candidate claimed to support LGBTQ rights, but his appointees do not.
  - Vice President Mike Pence has not only opposed marriage equality and voted against the repeal of “don’t ask, don’t tell,” but also signed into law the Religious Freedom Restoration Act as Indiana governor, which created widespread discrimination against LGBTQ individuals.
  - Trump’s Chief Strategist, Steven Bannon, is the executive chair of the conservative website Breitbart News, which has continuously featured anti-LGBTQ rhetoric.
  - Trump’s nominee for U.S. Attorney General, Senator Jeff Sessions, has opposed LGBTQ legislation throughout his 20 years in Congress and co-sponsored the proposed First Amendment Defense Act, which prohibits the government from taking action against a person on the basis that they believe marriage and sexual relations should be between a man and a woman.
EEOC

- EEO-1 reporting requirements getting the ax?
- EEOC wellness rules – criticism from both sides
- Strategic Enforcement Plan 2017-2021
  - Temporary workers/independent contractors
  - Equal pay
  - LGBTQ rights
- Redirected to address backlog
Labor Policy

• Executive Orders
  – Rescind 13502 promoting project labor agreements (a.k.a. “pre-hire” collective bargaining agreements)
  – Reissue 13201 requiring federal contractors to post notices of employee rights regarding dues under Communication Workers of America v. Beck
  • Rescinding Obama’s EO 13496 requiring notices of employee rights to unionize
Labor Policy

- Abolish persuader rule
- Resource shift to compliance assistance
- Support state right-to-work laws
Labor Policy

• President and Congress could stem tide of pro-union actions
  – Defund/revise “quickie election rule”
  – Reverse restrictions on class waivers
  – Reverse joint employer analysis
  – Scale back expansion of protected conduct under Section 7 of NLRA

• Require increased transparency
  – Union members know how dues are being used
In Trump’s crosshairs:
- Penalty increases (close to 80%)
- Injury and illness reporting requirements
- Raise complainants’ prima facie burden
- Union officials allowed on non-union worksites

Increase state plans’ jurisdiction
Shift towards compliance assistance
Government Contractors

• Reverse Executive Orders
  – EO 13706: paid sick leave
  – EO 13763: “Fair Pay and Safe Workplaces” requires employers to inform employees of exempt/independent contractor status and hours/pay data
  – EO 13673: Blacklisting for labor law violations
• Revisions to Obama Administration’s OFCCP regulations
Wage and Hour Law

- New revisions to the overtime rule
- Administrative Interpretations on joint employment status and Independent Contractors on the chopping block
- Gig economy and worker status
- Updates to FLSA to reflect 21st century workplace?
Wage and Hour Law

• Administrative Interpretations
  – Joint employment status
  – Independent contractors
• Gig economy and worker status
  – Lesser focus on misclassification
Immigration and Employment

• Ramp up enforcement of employment verification
  – Strengthen and expand E-verify
• H1-B Visas for Foreign Workers
  – Decrease number of visas issued
  – Increase prevailing wages
• Dismantle NAFTA?
• No support for Deferred Action for Childhood Arrivals and Deferred Action for Parents of Americans
The Legal Future of Immigration

• Trump’s signature policy objective is to end illegal immigration quickly and completely, and there are two legally reasonable ways in which his administration might try to accomplish this goal:

1. By following *Chamber of Commerce of U.S. v. Whiting*, where SCOTUS upheld a strict immigration law that requires all Arizona employers to use the federal government’s E-Verify system to verify work authorization. The E-Verify system flags any discrepancies and is not incredibly reliable.
   - Arizona applies the death penalty to businesses that commit two willful violations of immigration law by pulling its license to do business.
   - This approach is flawed, as it over-penalizes employers and encourages discrimination against Latinos to avoid risking a corporate death penalty.
2. By following Arizona’s S.B. 1070, a harsh law designed to motivate unlawful immigrants to leave the state by making employers criminally liable for immigration lapses. Trump could enact the employment provisions of the bill in an Executive Order or push for federal legislation from Congress.

- While SCOTUS struck down S.B. 1070 in *Arizona v. U.S.*, the decision was based primarily on its interference with federal law. Nothing in the Court’s decision precludes Congress from making employers criminally negligent for immigration lapses.

- Such a change would discourage employers from offering jobs by criminalizing the hiring process, and employers would likely take more jobs out of the country to avoid going to jail for hiring the wrong people.
The Practical Future of Immigration

• NOTE: U.S. Citizenship and Immigration Services has released a new I-9 form, which employers must begin using as of Jan. 22, 2017.
• Trump’s deportation of an estimated 11 million illegal aliens would leave severe job vacancies in the agriculture, construction, healthcare and hospitality industries.
• Automatic firing of employees with discrepancies in the E-Verify system would also require firing numerous citizens and authorized aliens with discrepancies not based on fraud, but rather on mistake or complications due to divorce, remarriage or hyphenation.
The Practical Future of Immigration (cont.)

• Following the tragedy in San Bernardino, Trump reacted by saying he would bar all Muslims from entering the United States.

• While unlikely, this would have a substantial impact on employers:
  – Any Muslim currently in the United States would be denied re-entry if he or she left for any reason
  – Employers could not hire any Muslims currently abroad
  – Those Muslims currently abroad with U.S. citizenship or visas could not re-enter

• Although extreme, this type of discriminatory act is not without precedent, as the Supreme Court sustained the constitutionality of the Chinese Exclusion Act in 1889 before it was repealed by Congress in 1943.
Questions?

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Thank You!

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