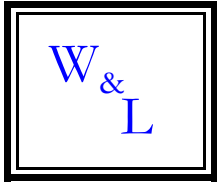


EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues



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TRUMP'S WIN SUPPORTS MOST, BUT NOT ALL, EMPLOYER POLICIES

Donald Trump not only won the Presidency, but also almost came close to winning a majority of the votes; the Republicans flipped four Senate seats to go from 49 to 53 seats and appear to be maintaining their prior House majority of at least 220-215. Republicans also made some gains in the state legislatures, particularly in Michigan, Minnesota, and Pennsylvania. While most view the election results as favorable to employer interests, particularly compared to the previous Administration's most pro-union President in history, some developments will moderate the shift and in a few areas employers have cause for concerns.

How He Did It

While working-class white Americans were the backbone of Trump's victory in 2016, in the 2024 election it could probably be said that Trump won because of increased support among Black and Latino voters, Asian voters, young persons, and even females. According to AP Vote Cast, Trump doubled his share of the Black vote from 8% to 16%, increased his share of the Latino vote from 35% to 42%, and improved his showing among Asian voters from 28% to 39%. He improved his showing among 18- to 29-year-olds from 36% to 46%. While the Democrat's campaign focused on abortion to mobilize women, Kamala Harris' share of the women's vote of 53% was short of the 55% President Biden had won in 2020.

Some say it is time to abandon the term of "people of color," which assumes uniformity of outlook and behavior among non-White groups. It appears the nation is becoming less divided by race and ethnicity, but more divided by other factors as the largely metropolitan professional class while the working class moves farther apart politically. Working class Americans appear to be moving to the right, and professionals are moving in the other direction. The Democrats' edge in party affiliation, which stood at 9 points in 2012, according to the Wall Street Journal/NBC Polling, changed to a 1-point deficit this year, in large part by working class persons.

Trump's campaign main issues were restricting immigration, cutting back on foreign interventions, reducing taxes, and imposing tariffs on imports, particularly from China. He also made an effort to reach out to working class voters. Indeed, the President of the Teamsters Union spoke at the Republican National Convention, and several Republican senators, including Vice-President-Elect Vance, have significant union support. We will now address how the Administration may change relevant federal agencies dealing with employment issues.

The New Administration Will Address the NLRB Early

In this writer's view, the National Labor Relations Board (NLRB) was changed more by the Biden Administration than by any Administration in history. This is the federal agency that is most likely to see early change under the Trump Administration.

Probably the most powerful office at the NLRB is that of General Counsel, the chief prosecutor who decides what cases to bring and what theories to argue before NLRB judges. The current NLRB General Counsel, Jennifer Abruzzo, is likely to be fired on Trump's first day of office, just as President Biden fired the Republican General Counsel as the first official act in his Administration, a firing that at the time was unprecedented in NLRB history. Abruzzo seemed to turn out pro-union memoranda directing agency policies at the rate of a couple a month. The new Trump-appointed General Counsel will likely invalidate all those memoranda, by the stroke of a pen, early in the term of the new Administration. Changing the decided cases, however, could take more time. There are currently three Democrats and one Republican on the five-member NLRB in Washington, and the term of one of them, NLRB Chair McFerran, expires in December. The Biden Administration will attempt to re-appoint her to another term before leaving office, and it will be a critical issue in terms of timing. If McFerran is confirmed for another term, Democrats will have a majority on the Board until sometime in 2026, but if she is not confirmed for another term, Republicans can appoint a majority during 2025. However, it will take some time for the NLRB itself to reverse some of the rulings during the Biden Administration that were particularly hostile to employers.

Some other changes at the NLRB could occur more rapidly, however. It has been suggested that President Trump might "fire" some of the NLRB members, but this would be unprecedented and unlikely to happen. However, a new Trump-appointed NLRB General Counsel could simply refuse to bring certain cases in the future, in spite of the fact that such cases are viable under some of the current Biden-era rulings. This happened a number of years ago when the Democrat-majority NLRB refused to prosecute various secondary boycott cases brought against unions, even where there were NLRB rulings warranting such prosecution.

One of the most important doctrines instituted during the Biden Administration will likely be overturned is a November ruling (overturning 76 years of precedent) that prohibits mandatory "captive audience" meetings in which companies argue against unionization. The second most likely doctrine to be overturned established during the Biden Administration is that of the *Cemex* case, basically establishing a "card-check" process in the guise of an unfair labor practice charge. Other doctrines sure to receive NLRB review during the upcoming Trump Administration include issues dealing with employee handbooks, and rulings limiting employer free speech while expanding employee rights to use inappropriate conduct in promoting union organizing.

The New Administration Has Limited Ability to Make Quick Changes at the EEOC

At the five-member Equal Employment Opportunity Commission (EEOC), converting to a Republican-appointed majority is unlikely to occur until 2026. Currently, there is only one Republican appointee serving on the Commission, Commissioner Andrea Lucas, and she is likely to be named the new Chair quickly in the Trump Administration. Like at the NLRB, Trump will likely call on the EEOC General Counsel to resign, as Biden also fired the Trump-appointed EEOC General Counsel when his Administration began, and Trump will appoint a new General Counsel. However, the General Counsel and the EEOC Chair lack the ability to roll out major policy changes until Republicans come into the majority in 2026. When Lucas becomes part of a new Republican majority,

she may continue her prior positions on various issues including her opposition to the Harassment Guidance's strong protections for LGBTQ workers, misgendering, and the interpretations of the Pregnant Workers' Fairness Act to include abortion, infertility and menopause. In the long run, it is likely the EEOC under Trump will focus less on litigation and more on compliance. On the other hand, religious freedom will likely get more support. Workplace diversity, equity and inclusion efforts are also an area where the EEOC is likely to change policies.

Government Contractor Rules to Be Affected

As at the EEOC, the Trump Administration is likely to take a closer look at diversity, equity and inclusion programs. The prior Trump Administration had an executive order that limited DEI trainings, and also had a rule that protected companies from extra agency scrutiny over contractor decisions motivated by religious belief. In his first Administration, Trump issued an executive order on "Combating Race and Sex Stereotyping." This executive order limited federal contractors covered by the Office of Federal Contract Compliance Programs (OFCCP) from carrying out certain DEI trainings that the Administration said would "promote race or sex stereotyping or scapegoating" or that could cause an individual to feel "guilt" based on their race or sex. Trump, in his first term, made an attempt to merge OFCCP with the EEOC. The Trump Administration is more likely than that of President Biden to support the Supreme Court decisions that limit administrative power, such as *SEC v. Jarkesy*, the ruling that defendants have a Constitutional right to take their case to a federal jury when an agency is seeking financial penalties, rather than an in-house administrative judge. Current federal rules dealing with construction project labor agreements, basically mandating union representation on federal projects of \$35 million or more, are likely to be addressed early in the new administration.

DOL is Likely to Be More Balanced to Traditional Employment Positions

Opportunities will occur early in the Trump Administration to change policies that were viewed by some as too pro-worker. One way to quickly do this is to drop its legal defense of various Department of Labor (DOL) regulations that have been attacked in court. These include the expansion of overtime pay eligibility, classification of independent contractors as employees, expansion of labor rights for temporary agricultural workers, and updating the prevailing wage rules. The new Administration could re-visit programs that allowed private entities to oversee apprenticeship programs and still receive credit from the DOL, and reinstating a program allowing employers to self-report minimum wage and overtime violations to receive legal protection from litigation or penalties.

In general, the DOL is most likely to promote more training in employer compliance than litigation, offering more guidance through opinion letters for employers, the labor community and employees to interpret the DOL's rules.

The New Administration's Policies Regarding OSHA

At least two new Occupational Safety and Health Administration (OSHA) rules will likely change with the new Administration, one in effect and one proposed. The OSHA "walk-around" rule allows OSHA inspectors to be accompanied by non-employee worker representatives is likely to be withdrawn, as business groups have already filed a lawsuit to block it, and it is likely that OSHA's proposed heat stress standard will be delayed.

Trump's Approach Towards Anti-Trust and Competition Issues Is Mixed

Anti-trust enforcement has always been one of the most non-partisan issues, and this general concept is unlikely to change under President Trump. During the first Trump Administration, the Department of Justice (DOJ) applied a broad review of competitive conditions in labor markets, and the first Trump Administration supported anti-trust guidance for Human Resource professionals (issued in 2016) and announcements that the DOJ intended to proceed criminally against wage-fixing and no-poaching agreements. With the Trump and DOJ history, it is likely that such cases will continue but more likely as civil cases, particularly since this approach was largely used during the Trump Administration.

There is one area of anti-trust enforcement that is likely to be affected by the new Administration that relates to non-compete agreements. Republican commissioners at the Federal Trade Commission (FTC) have not been inclined to condemn traditional non-compete agreements under the FTC laws, and therefore it is unlikely that the FTC under a Republican administration will address non-compete agreements under the FTC rules. Republicans recently objected to the FTC's attempt to regulate non-compete agreements through the use of its rule-making authority. Last July, a federal district court in Texas found the final rule on this subject to be unlawful, and the FTC has appealed the ruling.

While it is unknown how the new Administration will address the merger guidelines of the prior Administration, most believe the Trump Administration will create a more favorable environment for mergers and acquisitions. However, Republicans and Democrats generally support the prosecution of price-fixing and monopolization cases.

Immigration Enforcement May Prove Negative for Employers

One area where employers have negative prospects in the Trump Administration concerns the labor supply through immigration. Mr. Trump will move quickly to reinstate the border policies of his first term, such as Remain in Mexico. On the other hand, it is much less clear how he will conduct "the largest deportation operation in the history of our country." According to his new Border Czar, Tom Homan, the priority will be "public safety threats and national-security threats," as well as migrants who "had due process" and "their federal judge said they must go home, and they didn't." At the same time, Mr. Homan says there will be a return of surprise raids of companies suspected of employing unauthorized immigrant workers, and employers will likely also see increased I-9 audits that could be disruptive for many companies.

In another immigration area, the hiring of high-skilled foreign graduates of US colleges, the new Administration will require more red tape, and the number of refugees granted Temporary Protected Status (TPS) and granted work authorization status may be reduced, as Trump has already promised to end protections for refugees from certain countries. The TPS program shields immigrants in the US facing unsafe conditions from war or national disaster in their home countries, and currently immigrants from some 16 or 17 countries are granted such temporary status, including countries like Venezuela, Afghanistan and Haiti. There are currently more than 3.3 million US immigrants with such temporary status. The protections only last for 18 months before migrants must reapply.

It is hoped that the Trump Administration will be open to a new approach concerning the current guest worker program. The new approach would involve a bipartisan idea that was introduced in the past that would have the

individual states through the state labor departments to determine bona fide labor shortages while still adhering to various federal immigration guidelines. Thus, the states and not the federal government would determine how many guest workers are needed.

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