**Cornell ILR**

**Labor and Employment Law Program**

**“The Impact of the Trump Administration on Labor and Employment Law”**

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1. **Introduction**

Understanding the impact of a Trump administration on labor and employment law is not as simple as assuming that eight years of Obama-administration progressiveness and activism will be rolled back (though that is a potential element). Just as important are state, local and private reaction and resistance to what many perceive will be an anti-labor, anti-civil rights administration.

1. **What President Trump Can Do**
	1. Judicial Appointments.

There are approximately 100 openings in the Federal Judiciary to which Trump can be expected to nominate conservative judges, who will not be subject to Senate filibuster, and thus likely seated. In comparison, when Obama took office in 2008, there were about half the number of openings. Currently, in terms of the district courts, Republican appointees hold about 35 percent of the judgeships. By 2020, that number is expected to rise to about 50 percent. With respect to the circuit courts, Republican appointees hold a little less than half of all seats. By 2020, that will likely rise to 55 to 60 percent. (Source: Trump to inherit more than 100 court vacancies, plans to reshape judiciary, Washington Post, 12/25/16).

Trump can also be expected to quickly nominate a Supreme Court Justice to fill Antonin Scalia’s vacant seat. This appointment is subject to filibuster in the Senate, and thus less quickly filled. At some point, however, a new Justice will be confirmed who will bring back a 5-4 conservative majority to the Court.

With a conservative majority, a similar case to ***Friedrichs v. California Teacher’s Association*** can be expected to be brought back to the Court. *See Friedrichs*, 2014 WL 10076847 (Nov. 18, 2014) affirmed by equally divided court in *Friedrichs*, 136 S.Ct. 1083 (March 29, 2016).If this happens, unions would lose crucial non-member “agency fees,” which support union efforts to improve wages, benefits, and working conditions for all employees. Nonmembers would be allowed to be freeriders. The amount of revenue lost would be significant. One analysis estimated that the NEA and the AFT (and their affiliates) could lose as much as a half-billion dollars annually. (Source: Education Next, Teachers Unions at Risk of Losing “Agency Fees,” Winter 2016, Vol. 16, No. 1). In 2011, Wisconsin barred agency fees and subsequently membership in the state's largest teachers union dropped from roughly 100,000 to 40,000.

In terms of a similar case to *Friedrichs* in the pipeline, *Rauner v. AFSCME* (now *Janus v. AFSCME*) stands out. The case involves Illinois Gov. Bruce Rauner, who in February 2015 issued an executive order directing state agencies to stop deducting “fair share” union fees from the paychecks of state workers who have said they don’t want to join a union. Rauner simultaneously filed a lawsuit claiming the First Amendment required him to issue the order to protect workers. The federal district court in Chicago ruled Rauner did not have standing to bring the suit and dismissed the case.

Three employees, with backing from the National Right to Work Legal Defense Foundation and the Liberty Justice Center, filed as intervenors. The case is now *Janus v. AFSCME*. It was dismissed at the district level and is now in the Seventh Circuit. Plaintiffs want it dismissed again so the Supreme Court can take another stab it. The Janus and Friedrichs cases are almost identical - both are premised on the idea that there is no line in the public sector between political and non-political activity.

* 1. NLRB Appointments

There are two Board seats now vacant—one Democratic and one Republican. [Current seats are held by Chairman Mark Gaston Pearce (D), Lauren McFerran (D), and Philip A. Miscimarra (R). Vacant seats were most recently held by Harry Johnson (R) and Kent Hirozawa (D).] Trump can immediately nominate two Republicans, not subject to Senate filibuster. This will create a majority Republican Board. The term of General Counsel Richard Griffin (Democrat) expires in 2017 and Trump will have the opportunity to replace him with a Republican.

It’s a matter of custom, not law, that no more than three of the five

NLRB members belong to the President's political party. *See* Ideologicial Voting on the National Labor Relations Board, U. Pa. Journal of Labor and Employment Law, Ronald Turner. For the first eighteen years of the agency's existence, "most Board members were drawn from government or academia-never from industry or labor,' and "the notion of appointing someone from the management or union side to the Labor Board was considered completely verboten; it was generally agreed that such a person could not possibly be fair to both sides, much less be perceived as such." *Id.* This practice changed in November 1952 with the election of President Dwight D. Eisenhower, the first Republican elected to the presidency since the 1935 enactment of the NLRA. *Id.* In 1953 Eisenhower appointed management lawyer Guy Farmer to the chairmanship of the Board as well as Albert Beeson, a non-lawyer industrial relations director. *Id.* Eisenhower's departure from the nomination-of-neutrals norm was not followed by Democratic Presidents John F. Kennedy or Lyndon B. Johnson, as both appointed Board members who were not from union or management backgrounds. *Id.* Thereafter, in 1970, Republican President Richard M. Nixon nominated management lawyer Edward B. Miller and other management-side members; since that time, "a majority of the Board members appointed have come from management or union-side rather than neutral backgrounds. *Id.*

With a majority Republican Board, and a Republican General Counsel, we can anticipate changes in well-publicized legal issues: graduate student representation, joint employer status, and speedy union election rules,.

The greater significance of these issues relates to the general climate within the Presidential administration to union organizing efforts. The current Board’s rulings with respect to each of these issues has been consistent with the stated policy and general desire under the NLRA at the NLRB to encourage unionization. We can expect this desire to decline in a Trump administration.

1). Graduate Student Representation. We can expect a roll back of current Board law regarding Graduate Student representation, *See* ***Columbia University****,* 364 NLRB No. 90(Aug. 23, 2016)***.*** The question of whether Graduate Students are employees within the meaning of Section 2(3) of the NLRA has gone back and forth with each change in Board majority (Prior to the *Columbia* decision: ***Brown University***, 342 NLRB 483 (2004); ***New York University***, 332 NLRB 1205 (2000)).

2). Joint Employer Status (both in the sub-contractor and franchisor/franchisee context). [Ongoing D.C. Circuit case: ***Browning-Ferris Industries of California v. NLRB***, Docket #16-1028 (2016) reviewing 362 NLRB No. 186 (2015); Multiple cases are before the NLRB involving McDonald’s and joint employer status including ***McDonald's USA, LLC, a joint employer, et al.***, 02-CA-093893***.*** Oral arguments in the D.C. Circuit case are expected to take place in early 2017. Final briefs were filed in November. The D.C. Circuit has not announced which judges will sit on the three-judge panel hearing the case].

Factually the two cases are very different. The Browning-Ferris case involves a recycling company and a staffing agency (Leadpoint). Meanwhile, the McDonald’s case deals directly with the franchisor-franchisee relationship.

In the Browning-Ferris decision, the NRLB said that “two or more entities are joint employers of a single workforce if “they share or codetermine those matters governing the essential terms and conditions of employment,” both directly and indirectly. It added that in evaluating whether an employer possesses sufficient control over employees to qualify as a joint employer, it will – among other factors – “consider whether an employer has exercised control over terms and conditions of employment indirectly through an intermediary, or whether it has reserved the authority to do so.”

Leadpoint provided most of the employees who regularly worked at Browning-Ferris. Browning-Ferris always maintained considerable control over the terms and conditions of employees supplied by its staffing firm.

Meanwhile, McDonald’s argues it does not have “authority to direct or co-determine the hiring, firing, wage rates, hours, or any other terms of employment of our franchisees’ employees.”

 3). Union Election Rules. We can also expect a slowdown of the current board’s election rules, which Republicans call “ambush elections”; and an attempt to limit or rollback the ***Specialty Healthcare*** standard, which make it easier for groups of workers to organize bargaining units within larger units. Under the decision, the NLRB presumes a union bargaining unit is appropriate and puts the onus on the employer to prove otherwise. *Specialty Healthcare*, 357 NLRB No. 83 (August 26, 2011). The Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits have all upheld the *Specialty Healthcare* standard. But a recent dissent in the Fifth Circuit could provide a basis for a challenge to the standard. The dissent expressed concern about the proliferation of micro-units and the possibility of “mini-strikes occurring continually over the working year.” *Macy's, Inc. v. NLRB*, 2016 WL 6832944 (2016).

c. Agency Appointments

1. Department of Labor

Trump has named Andrew Puzder, the CEO of CKE, a large franchise restaurant operation to be Secretary of Labor. Puzder opposes an increase in the Federal minimum wage, which has been at $7.25 per hour since 2009. He also opposes the application of joint employer theories to franchisors and their franchises. In a Puzder Department of Labor we can expect a great resistance to increasing the minimum wage. (At the same time, we can expect union, state legislative, and grass-roots activism to raise the minimum wage.) We can also expect a hostility to the new **overtime rules**, **fiduciary,** and **persuader rules**, all of which were developments in the Obama administration, and all of which have been characterized by “pro-business” interests as executive overreaching. Thus, any rollback of DOL developments in the past eight years will likely be characterized by the Trump administration as a return to settled legal principles that did not need to be disturbed or expanded.

* **Overtime rule -** The rule was to go into effect December 1, 2016, but a Texas judge issued a nationwide preliminary injunction on November 22. With an injunction in place, Republicans in Congress say they will move quickly to repeal it.
* **Fiduciary rule –** The rule is to go into effect April 10, 2017. On Jan. 6, 2017, Rep. Joe Wilson (R-S.C.) introduced a bill that would delay the effective date of the rule by two years. And the House Education and Workforce Committee, led by Chairwoman Virginia Foxx (R-N.C.), said last week she wants to get rid of the rule. Meanwhile, the U.S. Chamber of Commerce is “already working” with Trump administration transition officials to “undo” the rule, Thomas Donohue, the Chamber’s president and CEO, said in December.
* **Persuader rule –** The rule was to go into effect July 1, 2016. However, a Texas judge issued a nationwide preliminary and later permanent, injunction. The DOL is currently appealing the injunctive relief to the Fifth Circuit. It’s likely a Trump DOL will moot the appeal at some point. In the meantime, a federal judge in Minnesota stayed a similar case after not granting injunctive relief. The split suggests the issue could make its way to a circuit court or to the Supreme Court.

2. Department of Justice

Trump has nominated Senator Jeff Sessions to be Attorney General.

The DOL and the DOJ enforce Section 302 of the LMRA, and heightened scrutiny of Unions and arrangements such as employer paid release time for Union stewards will likely receive increased scrutiny, as was the case in the George W. Bush Administration.

A conservative Justice Department under Attorney General Jeff Sessions, is also likely to set its sights on labor unions themselves, seeking to criminalize, or at least civilly bring a civil action challenging union activists wherever it can.

3.. Department of Education

Trump has nominated Betsy DeVos to be Secretary of Education. DeVos is an outspoken advocate of Charter schools and the use of voucher to promote attendance at private schools. We can expect battles between DeVos and others pushing this agenda and the AFT, NEA, and their affiliates.

1. **What Trump Can’t Do**
	1. State Legislative Action
		1. Legislative efforts
			1. Minimum wage laws

While The Federal minimum wage has been stuck at $7.25 since 2009, many States and localities have increased their minimum wages beyond that amount. As of 2017, the minimum wage is set to rise in 21 states, at least 22 cities, four counties and one region. These increases run from as low as $7.70 per hour (Missouri) to as high as $15.35 per hour in (Sea Tac) the area which includes the Seattle airport. Most are in the $10 per hour to $15 per hour range, and some are scheduled to increase in the years between 2017 and 2020.

These minimum wage improvements have, in many cases, been in response to the “Fight for Fifteen” movement, an amalgam of non-union fast food and retail workers, and others, supported in part by the SEIU and the UFCW, and also by private foundations.

* + - 1. Paid Sick Leave and Paid Family Leave

There have also been paid leave provisions enacted in states and localities such as New York, California, New Jersey, and Rhode Island. These have been pushed for by various coalitions of organizations and others.

* **Paid Sick Leave Law –**New York City law. In 2013, the City Council overrode Mayor Bloomberg to pass the law. In 2014, under Mayor de Blasio, the law was revised to cover all businesses with more than five workers, down from 15. Under the law, employees who work more than 80 hours a year at a business or a nonprofit can earn up to 40 hours of sick leave each year, which can be used when they’re sick, or when a child or family member is sick.
* Paid Family Leave Benefits Law –New York state law. It was passed in 2016. It’s a series of amendments to the New York State Workers’ Compensation Law.

When the amendments are fully phased in, covered employees will be eligible for up to 12 weeks of paid family leave annually to care for an infant or a family member with a serious health condition, or to assist with family obligations when a family member is called into active military service. Eligible employees will be paid by a state fund – not their employers – financed by deductions taken directly from employees’ wages, not from tax contributions paid by employers.

Like workers’ compensation benefits and state disability benefits, paid family leave benefits will be available to employees regardless of the number of employees a business employs. The law will be phased in beginning Jan. 1, 2018 and fully phased in January 1, 2021.

* + - 1. Other
		1. State executive efforts
			1. New York
			2. Other
1. **The Changing Work Place and the Evolution of Worker Advocacy**

Many longtime Union activists have concluded that addressing the decline in the labor movement density since Ronald Reagan broke PATCO in 1981 will require more than pushing back against unfavorable changes in the administration of the NLRA and other laws.

Factors such as **technology,** the growth of attenuated employment relationships resulting from the expansion of part-time employment, the growth of sub-contracted employment and the **gig economy** generally have contributed. Where there were once huge factories with thousands of employees, there are now fragmented work environments and virtual industries with employees not connected to each other, and not easily organized.

This has the evolution of IRC Section 501(c)(3) and (4) organizations to supplement the efforts of a down-sized labor movement comprised of Section 501(c)(5) labor unions. These 501(c)(3) and (5)s and coalitions of such organizations have the benefit of being more fluid and spontaneous and less subject to attack by a hostile NLRB or DOL.

Our current system of collective bargaining will likely continue to decline, except in certain industries such as healthcare, in which there is a high density of Union representation in an industry that cannot be moved to abroad; and certain other industries in which unions have an ability to protect their current bargaining strength, and structures, such as in construction, transportation, airlines, and certain highly skilled crafts.

The *Fight for Fifteen* has been waged by such organizations, with the financial and organizational support of the labor movement and others **Worker Centers** serving drywall workers in Los Angeles, and food workers in New York provide lobbying, and other forms of assistance to unorganized and difficult to organize workers, whether employees or independent contractors. Other examples of organizations pursuing such activity are the **Partnership for Working Families, The Los Angeles Alliance for a New Economy, The Restaurant Opportunities Center of New York, Warehouse Workers of Justice, to name a few.**

For example, **Domestic Workers United** is an organization of nannies and other household employees who can’t be organized under current labor law because they largely work in one person units.

**Domestic Workers United** is a voluntary membership that successfully lobbied for 2010’s Domestic Workers Bill of Rights which set a minimum standards for time-off, overtime, and other worker protections.

The **Freelancers Union**, which has 170,000 voluntary members, provides a variety of services for freelancers,including assistance with negotiating and writing contracts with their employers and providing affordable healthcare through its own insurance company.

Membership in these organizations and numerous similar organizations is voluntary and structured to be impervious to attack on them as Unions. They can and do receive contributions from foundations, and they often coalesce around objectives such as paid sick leave and family leave and have been able to successfully push for legislation establishing or expanding these employee benefits.

Unlike most unions, which are 501(c)(5) organizations, 501 (c)(3) and (4) not governed by federal or state labor laws, and they can receive contributions from Unions and others. In fact, they have received many millions of dollars from such foundations as the Ford Foundation, The Ben and Jerry Foundation, The Kresge Foundation. Although these organizationsare generally safe from challenge under the labor laws, they are subject to attack under the Internal Revenue Code, and these activities are strictly constrained under The Code.

This, however, is the subject of another program, which should be scheduled for those interested.

1. **Employer Responses and Opportunities in Labor**
	1. Opportunities. The U.S. Chamber of Commerce sees significant opportunities for employers to roll back many changes implemented during the Obama administration. In general terms, the Trump administration has vowed to deregulate the workplace. As a result, employers will have an opportunity to protect their businesses from unionization efforts in an environment with fewer rules that have been perceived as pro-union, and with less federal administrative resistance to such efforts in closer calls.
	2. Other Employer Responses. The new, deregulated opportunities for employers under a Trump administration are largely theoretical in workplaces with mature union-management relationships, since maintaining a good working relationship between employers and unions will continue to be of paramount importance. Even outside the context of mature union-management relationships, employers still must address HR concerns, employee morale, competitive factors relating to wages and benefits, and a host of other issues that are immediate pragmatic concerns for employers. Put differently, employers will be unlikely to take all the latitude afforded by a purportedly anti-labor Trump administration given the practical importance of maintaining loyal, satisfied, productive workforces.
2. **Other areas in which labor is at risk legislation**

1. Project Labor Agreements

2. DR Horton/Murphy Oil – class and collective arbitrations

3. Purple Communications

4. Rico actions

5. Free Employers Act what is name of Free Employers Act statute

 a) Codification of Dana:

 b) Do not contact lists;

 c) Return of authorization cards in case of employee remorse,

 d) Expanded decertification rights.

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