

Fast-Food Restaurant CEO Tapped to Head Labor Department: What to Expect

December 12, 2016

President-elect Donald Trump has announced his intention to nominate Andrew Puzder, Chief Executive Officer of CKE Holdings, the parent company of Carl's Jr. and Hardee's, to head the U.S. Department of Labor.

Puzder was a lawyer in St. Louis and represented the founder of Carl's Jr. He later became the general counsel for CKE and then its CEO. He has criticized state and local minimum wage increases, the Affordable Care Act (ACA), and government overregulation, among other things.

If Puzder is confirmed as Secretary of Labor, employers should look for the following changes.

Wage and Hour

- Puzder is no fan of the DOL's regulation expanding overtime protection.
- Employers are holding their breath as the U.S. Court of Appeals for the Fifth Circuit considers an appeal by the DOL of a nationwide preliminary injunction issued by a Texas district court judge enjoining the DOL from implementing its highly publicized regulation expanding overtime coverage. Puzder's nomination as Secretary of Labor could affect the regulation's fate. In May 2016, the DOL issued a Final Rule more than doubling the required salary level required to satisfy the exemptions from overtime for "white collar" employees from \$23,660 to \$47,476. The Rule was set to become effective December 1, 2016. On November 22, 2016, however, days before the effective date, a Texas district court judge issued a nationwide preliminary injunction, blocking the regulation. The DOL filed an appeal, asking for expedited briefing, and the Fifth Circuit granted that request, requiring all briefing to be completed by January 31, 2017, just days after inauguration, with oral argument to be scheduled quickly after briefing is completed.
- Whether the DOL under a Trump Administration would support the overtime Rule is unclear. However, Puzder has been an open critic of the overtime regulation. Writing in *Forbes Magazine* in May 2016, after the DOL published the final regulation, Puzder stated the regulation would not help workers, and "will simply add to the extensive regulatory maze the Obama Administration has imposed on employers, forcing many to offset increased labor expense by cutting costs elsewhere." In practice, he said, "this means reduced opportunities, bonuses, benefits, perks and promotions."
- Fearing the DOL under Trump might abandon the appeal, and citing Puzder's writings on the overtime rule specifically, the Texas AFL-CIO has filed a motion with the district court to intervene as a defendant and defend the Rule even if the DOL back out. Puzder's criticisms of the regulation, and a Republican-controlled Congress, could mean one of Secretary of Labor Thomas Perez's signature regulations, for which the DOL worked for over two years developing, may be at an end. The new Congress could simply pass legislation that would invalidate the rule and present it to Trump, regardless of the outcome of the Fifth Circuit appeal.
- Puzder also has been a critic of large increases to the minimum wage.

Employee Benefits

- Puzder has criticized the ACA repeatedly as another government mandate that has caused labor cost increases and led to job cuts. The DOL, along with the Department of Health and Human Services (HHS) and Internal Revenue Service (IRS), is responsible for the majority of the regulations issued under the ACA. With Puzder heading the DOL, Trump will have an ally and partner in dismantling the ACA.
- Puzder's anti-regulation perspective likely will mean strong opposition to the DOL's fiduciary rule, which expands the scope of who acts as a fiduciary and has significantly affected the financial services industry. Currently slated to go into effect in April 2017, the fiduciary rule will be at the top of the Secretary's list of priorities.
- Generally, Puzder's favoring of market forces, as opposed to government regulation or mandated benefits, signals a penchant toward steering the DOL in ways that favor competition between employers for talent based on compensation and benefit packages. Appointments of the assistant Secretary of Labor of the Employee Benefits Security Administration (EBSA) and members of the ERISA Advisory Council also are eagerly anticipated as they are key in the direction of rulemaking and

Practices

Affirmative Action, OFCCP and Government Contract Compliance
Disability, Leave and Health Management
Employee Benefits
Immigration
Labor Relations
Restrictive Covenants, Trade Secrets and Unfair Competition
Wage and Hour
Workplace Safety and Health

enforcement of ERISA and other employee benefit initiatives.

Federal Contracts (Office of Federal Contract Compliance Programs)

- A new, more business-friendly Director of Office of Federal Contract Compliance Programs (OFCCP) likely will be focused on the regulatory burdens on mid-size and small businesses. This should shape an agenda of deregulation that may roll back regulations, including those governing paid sick leave, minimum wage, pay transparency, sex discrimination, and lesbian, gay, bisexual, and transgender (LGBT) discrimination.
- A shift in how OFCCP approaches its auditing function also may come from a new leader. For example, a move away from the OFCCP's current Active Case Enforcement system to one closer to that used by the George W. Bush administration (Active Case Management) would bring more efficient, high-level compliance reviews in most instances, with deeper dives reserved for the few audits with major indicators of potential discrimination.
- There also may be a change in OFCCP enforcement priorities. OFCCP likely will not look to push boundaries, create new law through litigation, or publicly shame employers. We can expect a shift in the OFCCP's push to address the gender pay gap and it may step back from comparable worth theories of pay discrimination. Finally, such programs as the Class Member Locator, the online registry of employers that OFCCP had cited for a discrimination violation, likely will disappear.

Immigration

- As the CEO of CKE, Puzder brings a unique perspective on the role of foreign-born workers in U.S. businesses. Puzder has stated frequently that immigrants play a vital role in growing U.S. businesses, spurring innovation and creating jobs. Puzder will be an important and potentially moderating voice related to immigrant and nonimmigrant work visas.

Labor

- The nomination of Puzder and the recent deal to keep an Indiana facility from closing to retain more U.S. jobs signal both Trump's and nominee Puzder's focus on ensuring that labor relations fits within a broader economic picture.
- Puzder believes, as does Trump, that free enterprise will result in job growth. It is likely that the new Secretary of Labor will seek to remove burdensome regulations and be more business-friendly. For example, we anticipate changes to the DOL's efforts to expand the definition of joint employer status, which the National Labor Relations Board (NLRB) also has expanded under the Obama Administration. Consistent with this approach, Trump (immediately after his inauguration) may repeal many of President Barack Obama's executive orders, including (among others) Executive Order 13658 (Establishing a Minimum Wage for Contractors), Executive Order 13673 (Fair Pay and Safe Workplaces), and Executive Order 13502 (Use of Project Labor Agreements for Federal Construction Projects).

Workplace Safety and Health

- Puzder currently heads a company that is not heavily regulated by the Occupational Safety and Health Administration (OSHA). He has stated, however, that new regulation may not be the best way to effect policy change and that view could trickle down to OSHA and the Mine Safety and Health Administration.

Non-Competes and Protection Against Unfair Competition

- Puzder would be unlikely to latch onto the assault against non-compete agreements advanced by the Treasury Department in its March report and by the White House in its May report and October "state call to action." Given his business background, Puzder would understand the utility of non-compete agreements, even with respect to low-wage earners, because they serve to protect the employer's investment in training such workers.

Disability, Leave and Health Management

- Puzder may be more willing to reduce or eliminate the burdens associated with the paid sick leave executive order that is scheduled to go into effect for new contracts after January 1, 2017. The Executive Order currently makes it very difficult for businesses to identify when paid sick leave accrues (pushing many employers to provide more than required), makes it difficult to coordinate with state and local paid sick leave laws, and makes it easier for employees to abuse the system and use the benefit to thwart any attendance policy. Businesses that operate in multiple states likely would welcome some form of federal measure that simplifies paid sick leave benefit administration, aligns federal, state, and local benefits, and provides an ERISA-type preemption.
- Under Puzder, the DOL likely will be more business-minded with respect to issues under the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA). This would result in the administration taking less aggressive stances (including in terms of litigation) on these laws and fewer attempts to expand the coverage of these statutes.

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