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# Federal agencies: What happened in 2016—will 2017 be different?

## Highlights

- ✔ New EEO-1 Report disfavored
- ✔ DOL regulations stymied
- ✔ NLRB still reaching
- ✔ Plenty of action at OSHA

## Inside



By Pamela Wolf, J.D.

It's safe to say that 2016 was historic: President Barack Obama was in the final year of a two-term presidency, an unusually contentious national election brought what was to many, an unexpected victory, and a post-election transition that played out on social media for incoming President Donald J. Trump.

Some of the most controversial developments in 2016 came at federal agencies, particularly on the labor and employment regulatory front, which saw new regulations roll out only to be met with steady judicial and congressional efforts to stop them in their tracks. And 2017 will likely see more regulatory rollback as the Trump Administration implements an agenda that, though still unpredictable, will move away from the Obama Administration's notable push for greater worker protections.

*Employment Law Daily* reached out to a team of experts to explore the most important developments in 2016 at the Equal Employment Opportunity Commission, the Department of Labor, and the National Labor Relations Board. What can we expect in 2017 from the Trump Administration? The first days of the new administration have seen substantial executive action and a fair amount of unpredictability—whether that will continue, is anyone's guess.

## EEOC's expansive view

In 2016, the EEOC continued what many consider to be an expansive approach, particularly given its ongoing interpretation of Title VII employment antidiscrimination prohibitions to include protections for the lesbian, gay, bisexual, and transgender community. The agency also updated guidance on retaliation and national origin harassment, and further clarified its position on leave as a reasonable accommodation under the Americans with Disabilities Act. In a category by itself, if measured by controversy generated, was the revision of the EEO-1 Report to add pay data information.

## The big picture

Sherman & Howard attorney Brooke A. Colaizzi sketched out the big picture at the EEOC. The commission's Strategic Enforcement Plan (SEP) for the next five years continues the agency's emphasis on systemic investigations and lawsuits, she noted. "The EEOC justifies this emphasis as an efficient use of government resources," Colaizzi explained. "However, employers frequently find themselves fighting EEOC attempts to broaden single-complainant charges into systemic investigations."

Colaizzi pointed to the EEOC's substantive priorities, as outlined in the SEP: (1) eliminating barriers in recruitment and hiring; (2) protecting vulnerable workers; (3) addressing selected emerging and developing issues;

(4) ensuring equal pay; (5) preserving access to the legal system; and (6) preventing systemic harassment. The EEOC has identified the following as "emerging and developing issues" worthy of significant attention:

- qualification standards and inflexible leave policies;
- pregnancy accommodations;
- LGBT discrimination;
- "complex employment relationships" including temporary workers, staffing agencies, and independent contractors; and
- "backlash" against individuals who are Muslim or Sikh or of Arab, Middle Eastern, or South Asian descent.

"Employers defending charges that fall within these areas of emphasis are likely to face more intensive investigation and scrutiny from the EEOC, including requests for systemic data and an increased chance of EEOC-initiated litigation," Colaizzi suggested. As the Sherman & Howard attorney she sees it, the SEP itself is not likely to change as a result of the incoming Trump Administration and a Republican-controlled Congress. However, the change in administration may affect how strongly the EEOC pursues enforcement of its objectives, she observed.

## Expansive interpretation of Title VII sex discrimination

One theme that continued throughout 2016 is the EEOC's determination to firmly establish that Title VII's prohibition against discrimination based on sex includes protection against employment discrimination based on sexual orientation and gender identity. "Since 2012, the SEP has included 'coverage of lesbian, gay, bisexual and transgender' individuals under Title VII as a top enforcement priority," Colaizzi pointed out, noting also that in 2016, the EEOC initiated several lawsuits seeking recovery for gender identity and sexual orientation discrimination and/or harassment.

"The EEOC's position that Title VII prohibits discrimination and harassment based on sexual orientation and gender identity is controversial because the statute does not identify these classes as protected, and prior case law has held that Title VII does not extend to sexual orientation," she explained. "Although some of these lawsuits seek recovery by claiming the discrimination or harassment occurred because of a 'failure to conform to gender stereotypes,' which courts have long held constitutes discrimination or harassment based on sex, most of the lawsuits also seek recovery on the basis of gender identity and/or sexual orientation as protected classes in and of themselves."

Attorney Chris Bourgeacq (The Chris Bourgeacq Law Firm) echoed Colaizzi's sentiments, noting that in 2016, the EEOC continued its push to expand Title VII to cover sexual orientation, primarily through new lawsuits claiming discrimination based on sexual identification, including transgender. "Most courts continue to recognize Title VII's relatively clear silence in this area and have not been that receptive of the EEOC's attempt to bypass Congress," he observed.

**Seventh Circuit about face?** "The Seventh Circuit, however, may soon fall into the EEOC's camp following its *en banc* rehearing in the *Hively v. Ivy Tech Community College* case," Bourgeacq added. Indeed, employment practitioners are eagerly awaiting the Seventh Circuit's full-court ruling in *Hively*, which many believe will be the pathbreaker declaring that Title VII protects against discrimination based on sexual orientation. In July, a three-judge Seventh Circuit panel acknowledged that "perhaps the writing is on the wall," but the court nonetheless felt constrained by precedent not to extend Title VII's protections to a female math teacher who, after seen kissing her girlfriend in the parking lot, failed to advance and was ultimately fired. That ruling, was vacated in October to permit *en banc* consideration of the case. The fact that federal law guarantees a same-sex couple the right to marry, yet fails to protect either partner from employment discrimination based on sexual orientation is arguably difficult to reconcile.

**Will the Trump EEOC change course?** Colaizzi noted that in November 2016, a judge in the Western District of Pennsylvania declined to dismiss the EEOC's lawsuit against Scott Medical Health Center, holding that sexual orientation is protected under Title VII as "[t]here is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality." "The fact that at least one district court has accepted the EEOC's interpretation of Title VII with respect to sexual orientation makes it less likely that the recent change in administration will result in a pullback on the EEOC's position," Colaizzi said.

Notably, on January 31, the Trump Administration said that President Obama's executive order protecting LGBTQ employees of federal contractors from workplace discrimination will remain in force. That announcement, at least for the time being, has quieted speculation that the new administration will back off of LGBTQ rights.

**What does this mean for employers?** "Employers should be cognizant of this shift in interpretation of Title VII and look out for workplace conflicts or disputes that may implicate these new allegedly protected classes," according to Colaizzi. "It may be appropriate for employers to approach complaints based on gender identity or sexual orientation as they would complaints

## New agency guidance

Sherman & Howard attorney Brooke A. Colaizzi noted that in 2016 the EEOC released new guidance in several areas, notably including leave as an accommodation under the ADA, and national origin and retaliation discrimination.

**Leave as an accommodation.** Colaizzi pointed first to a "resource document" released in May that addresses when, in the EEOC's view, leave must be granted as a reasonable accommodation under the Americans with Disabilities Act. "The EEOC confirmed its view that in the absence of undue hardship, an employer must provide unpaid leave as a reasonable accommodation even if the employer does not otherwise provide leave, the employee is not eligible for leave, or the employee has exhausted his or her leave," the Sherman & Howard attorney explained. "The EEOC also reminded employers that leave as an accommodation includes the right of the employee to return to his or her regular position."

**Other guidance updated.** In 2016, the EEOC's retaliation and national origin guidance documents were updated to reflect the courts' development of the law in these areas, Colaizzi added, noting that each includes "Promising Practices" for avoiding claims of retaliation and national origin discrimination or harassment. "These pieces of guidance largely reflect the case law as the courts have developed it but predictably take an expansive, pro-employee approach to unsettled issues in the law," she observed. "The guidance documents are useful to employers because they provide general guidance and concrete examples of how the EEOC may view specific fact situations should a dispute result in a charge of discrimination."

of sex discrimination or harassment to preserve their best defenses in the event of a dispute."

Bourgeacq noted that for the most part many large employers internally continue to recognize sexual orientation as a protected class. And, he predicted, sexual orientation laws will continue to be a battleground in 2017, especially in state legislatures.

## EEO-1 Report expanded

Perhaps the most controversial move at the EEOC in 2016 was its expansion of the EEO-1 Report to include pay data information. As Jackson Lewis attorney *K. Joy Chin* explained, "In collaboration with the Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), the EEOC revised the annual EEO-1 Report to add W-2 earnings and hours worked data reporting requirements." She pointed out that many employers and employer advocacy groups objected to the burden the new requirements impose and voiced concerns about confidentiality of the data.

In February, the EEOC published its proposed revision to the EEO-1 Report and requested comments. The move drew immediate and sharp criticism. Chin noted that the EEOC and the OFCCP contend the revised EEO-1 Report will assist the agencies with identifying possible pay discrimination and assist employers in promoting equal pay in their workplaces. Also, the EEOC plans to publish EEO-1 information aggregated by geography and industry.

**Revised data collection.** Noting that in September 2016, the EEOC confirmed that it will begin collecting summary pay data from certain employers beginning in March 2018, Colaizzi broke down the information collection revision. "The data will be collected through amendments to the EEO-1 form completed by employers with 100 or more employees, as well as federal contractors and subcontractors," she explained. "The data collection is part of a broader effort at both the federal and state levels to address issues of pay inequality, especially gender pay inequality."

The new EEO-1 form will require that employers report, within each job classification, by gender and by race, the number of employees who fall within the annual salary ranges identified on the form, Colaizzi explained. The OFCCP will also use the data to address perceived pay inequalities among federal contractors.

**How does it affect businesses?** "Employers likely will face increased scrutiny of pay practices from both agencies, based solely on the data as reported on the EEO-1 form, which does not provide any context or reasons for the pay decisions underlying the data," according to Colaizzi.

The new EEO-1 reporting obligations will place significant burdens on employers and have been criticized for likely providing little useful information in return," according to Chin. "Most employers will have

to gather the required data from multiple record-keeping systems—HRIS for race, sex, and position information; payroll for W-2 earnings; and timekeeping for hours worked—creating logistical problems," she explained.

"The EEO-1 revisions, requiring most employers to report wage data along with corresponding demographic data, ask employers to paint a bullseye on their backs," according to Bourgeacq. "How the EEOC intends to slice and dice these big data remains less than clear, but what is clear is after it finishes collecting wage data and passing them through a disparate impact filter, many employers could find themselves on the receiving end of burdensome investigations and nasty class action litigation," he continued. "Putting aside this not so unlikely result, the new EEO-1 requirements also add yet another timely and expensive layer of regulatory compliance on employers."

**Will the data collection continue under Trump?** "More than likely, the incoming Trump Administration will shelve the requirements," Bourgeacq predicted. "But since the new reporting requirements are effective this year, employers should keep a close eye specifically on any changes to the EEO-1."

Colaizzi agreed, saying, "This collection effort is another decision that in the abstract is not likely to be supported by the new Trump Administration." However, she cautioned that it remains to be seen whether or not the new administration will devote any time or energy to reversing this collection effort.

"We likely will not see any change to the new EEO-1 reporting rule until the second half of 2017 at the earliest, after the current EEOC Chair's (Jenny Yang) term expires on July 1st and President Trump appoints a new Chair and a Republican-appointed majority of commissioners," Chin suggested. [Trump has made Victoria Lipnic Acting Chair, but Jenny Yang remains a Commissioner.] "Given the vocal criticism from the employer community about the increased burden the new reporting requirements will impose, and with a new administration anticipated to be more business-friendly, the Trump Administration likely will consider either rescinding the revised EEO-1 before the first reporting is due in 2018, or substantially revising the reporting requirement to reduce the burden on employers," the Jackson Lewis attorney said. "Those changes may include submission of annualized base pay rather than W-2 earnings or elimination of the hours worked data reporting piece."

**Best practices for employers.** Given the White House transition and the Republican-dominated Congress, what are the best practices for employers required to file an EEO-1 Report? "Employers should prepare for the possibility of having to report this data by evaluating their pay practices to determine whether any discrepancies exist and identifying the best sources of information for reporting and for defending pay decisions if challenged," Colaizzi suggested.

Although EEO-1 Reports submitted under the new reporting requirements will not be due until the first quarter of 2018, the EEO-1 Reports must be based on information as of 2017, Chin noted. "Given the tight timeframe between the first deadline for the new reports (first quarter of 2018) and the likelihood we will not see any changes by the new administration until the middle of or late 2017, employers should, at a minimum, review their workforce data (race, sex and title information) and EEO-1 job category assignments," she suggested. "Employers also should begin reviewing their data systems to ensure they will be able to pull and consolidate the required data into a single report and perhaps conduct a trial run to prepare 'mock' EEO-1 Reports. Unless the pay reporting requirements are wholly rescinded, employers proactively should analyze any pay before submitting the data, and conduct any such analysis under the cloak of privilege."

## On the joint-employer front

Bourgeacq underscored one more development at the EEOC in 2016 that he thought important. "The EEOC made clear that it will follow the lead of the NLRB and DOL in the area of joint employment," he said. "Significantly, the EEOC stated in its *amicus brief* filed in the appeal of the NLRB's *Browning-Ferris Industries of California* case that it would apply the same criteria as the NLRB in determining joint employment." Bourgeacq also pointed out that in its SEP for 2017-2021, the EEOC disclosed that it intends to scrutinize gig economy relationships, "focusing specifically on temporary workers, staffing agencies, independent contractor relationships, and the on demand economy."

**What should smart employers do?** According to Bourgeacq, best practices for employers in the area of joint employment "include scrubbing their agreements for contract labor to remove or minimize control over the contract labor workforce, as well as auditing current activities relative to contract management to reduce actions that exercise too much control over the contracted labor."

## What's ahead at the EEOC?

If President Trump's first days in office are any indication, there could be substantial change in store at

federal agencies on the whole, and at the EEOC in particular. Our experts weighed in with their best forecasts for 2017.

"Employers will especially be watching the EEOC's newly implemented EEO-1 reporting rules and the EEOC's initiatives regarding Title VII coverage for LGBT individuals," according to Jackson Lewis attorney Paul Patten. He reiterated that the EEOC's expressed goal has been to use this information to more effectively target perceived pay discrimination. "President Trump has expressed some support for pay equity," Patten observed. "Time will tell if a Trump-led EEOC will continue with aggressive pay equity enforcement over the next four years."

**Change in ideology and leadership.** At the threshold, it's important to recognize that changes at the top of the agency will influence its direction. As Patten put it, "the EEOC has substantially upped its game under the tenure of General Counsel David Lopez and Chair Jenny Yang," citing "an increased nationwide coordination and focus that has led to EEOC litigation successes and the agency pushing the envelope on theories of discrimination." With Lopez stepping down and President Trump having the authority to designate the EEOC Chair, Patten said we can expect changes in the ideology of EEOC leadership.

"There are currently three Democrat and one Republican Commissioners, and one vacancy," Patten observed. "President Trump will nominate a Republican to fill the vacancy. Chair Yang's seat on the Commission expires on July 1, 2017, and President Trump will nominate a Republican to replace her," he predicted. "After Senate approval of these two slots, there will be a Republican-majority Commission."

**No dramatic shift, though.** According to Patten, there are two factors that mitigate against the EEOC changing dramatically. "First, many of the decisions that impact employers are made at the local level by field investigators and trial attorneys who are passionate about enforcing antidiscrimination statutes," he explained. "Second, historically, Republican Presidents who have replaced Democratic administrations have not made drastic changes at the EEOC." The agency has a comparatively small budget, Patten noted, and Republican presidents have been sensitive to allegations that they are undermining civil rights. "The Reagan Administration did implement significant changes at the EEOC," Patten observed. "However, even with changes that, in theory, reigned in EEOC field offices, the EEOC continued to litigate large-scale class lawsuits during the Reagan-Bush 41 era."

**SEP will continue to guide the agency.** "The EEOC's Strategic Enforcement Plan is the best framework for predicting, in general, the EEOC's focus in the coming year," according to Colaizzi. "The Trump administration and Republican-controlled Congress could affect the substantive areas of desired enforcement, but more than likely the impact, if measurable, will be to the aggressiveness of the EEOC's enforcement efforts," she predicted. "The biggest impact on enforcement is likely to come from tighter budgetary restraints, which are predictable from a Republican Congress and presidency."

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>
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**Will the revised EEO-1 Report survive?** Colaizzi said the most vulnerable EEOC objective in terms of reversal from the new administration is the EEO-1 data collection and related pay equity issues. "Republican-nominated personnel at the EEOC could impact whether or not the collection efforts move forward in March of 2018 as planned, or at all," she explained.

Bourgeacq also suspected that the EEO-1 reporting requirements will be placed on hold, if not this year, then in the future with no penalty for employers who fail to report this year.

Chin offered a similar forecast. "Given the vocal criticism from the employer community about the increased burden the new reporting requirements will impose, and with a new administration anticipated to be more business-friendly, the Trump Administration likely will consider either rescinding the revised EEO-1 before the first reporting is due in 2018, or substantially revising the reporting requirement to reduce the burden on employers," she predicted. "Those changes may include submission of annualized base pay rather than

W-2 earnings or elimination of the hours worked data reporting piece."

**All quiet on the regulatory front?** The 2017 EEOC may slow down the pace of regulatory action. "Budgetary restrictions on the EEOC's enforcement efforts could lead to a relatively quiet period in terms of regulatory development," Colaizzi suggested. "On the whole, it remains to be seen how the political changes in Washington will impact the EEOC's operations and focus."

"President Trump will replace the EEOC chair and general counsel with very conservative appointments, bringing to an end the regulatory expansion or attempt to engraft LGBT protections under Title VII without Congressional action," Bourgeacq suggested.

**Takeaway for employers.** What does all this mean for employers? Patten put it all in context, suggesting first that based on the past history of Republican-majority EEOCs, the agency will continue to pursue investigations and litigation in a number of areas. "Challenging religious discrimination and failure to accommodate enjoy bipartisan support," he noted. "While the EEOC might not dial back on novel ADA and pregnancy discrimination issues, employers should continue to be mindful of the need to accommodate persons with disabilities and engage in the interactive process. Employers that decide to not hire or terminate a newly hired employee who discloses a pregnancy will also face cause findings and litigation from the EEOC."

Turning to hostile work environment issues, Patten said that it will be a good idea for employers to continue with anti-harassment training and respond swiftly to complaints of harassment. "The EEOC has had a number high-dollar settlements where hostile work environments went unchecked at isolated facilities, and very often, this now involves national origin or race harassment as well as sex harassment," he noted. "The EEOC has issued proposed guidance regarding unlawful harassment and employers would be well served to review this document, particularly the final sections which provide advice on training and prevention." The proposed guidance is the product of an EEOC task force that was co-chaired by Republican Commissioner Victoria A. Lipnic [recently appointed Acting Chair by President Trump], Patten pointed out.

As a final suggestion, Patten urged employers to "pay attention to workforces that do not 'look' like the surrounding community and take preventative steps to ensure that hiring and promotion decisions are consistent with EEO laws." The EEOC will continue to file class disparate treatment lawsuits when statistics and anecdotal evidence support a claim of discrimination, he suggested.

## Labor Department battleground

As the Obama Administration moved through its final months, fierce battles raged between the White House and the Republican-controlled Congress over regulations deemed essential to update worker protections by the former and greatly overreaching by the latter.

"For the DOL, 2016 was the best of times and the worst of times," as Sherman & Howard attorney John Doran described it. And not many agency watchers would disagree. The DOL published several controversial rules in 2016—the white collar exemption rules, the investment fiduciary rule, the paid sick leave rule for federal contractors, and broad guidance on joint employment, Doran noted. "Yet, 2016 saw the DOL's crown jewel—the white collar exemption rules—enjoined nationally by a federal trial court," he said. "And, the DOL saw the announcement of President Trump's proposed appointment to head the agency, Andrew Puzder, who has been a vocal critic of many pro-employee rules," he added, suggesting that Puzder's pick as the DOL chief "signals a dramatic sea-change in the agency's mandate."

Andrew Puzder's nomination was surrounded by considerable controversy. Opponents pointed to his job as CEO of CKE Restaurants, which operates Hardee's and Carl's, Jr., and the many labor violations found under his watch, among other things. Following several delays in the hearing on his nomination, Puzder withdrew from consideration on February 15. As we were headed to press, President Trump nominated law school dean and former federal prosecutor Alexander Acosta to fill the spot. We have included our experts' comments about Andrew Puzder and his likely impact on the Labor Department because we believe they reflect current expectations of change under the Trump White House.

## Crown jewel tarnished

The DOL'S white collar exemption regulations were widely publicized as the Obama Administration's crowning achievement in this space, Doran observed. "The regulations would have doubled the base salary necessary to treat an employee as exempt under the overtime laws," he explained. "The regulations also included other provisions that made it considerably harder for employers to exempt their workers from overtime under the Fair Labor Standards Act."

**Updating the exemption.** Jackson Lewis attorneys Jeffrey Brecher and Richard Greenberg recapped what they called the Labor Department's "signature regulatory

activity in 2016." The final rule raised the salary level requirements for the white collar exemptions from $23,660 to $47,576 for the standard exemption and the compensation level requirement for the highly compensated exemption from $100,000 to $130,004.

**Bottom falls out.** The regulations continued to spark sharp controversy, though. "Employers across the country scrambled to restructure their compensation systems in light of the new regulations," Doran noted. "For many employers, the restructuring involved raising current salary levels for exempt employees to maintain exempt status." And then the bottom fell out for the DOL, as Doran put it. Immediately before the effective date of the regulations on December 1, a federal court issued an injunction preventing them from taking effect. The DOL has taken an expedited appeal of that decision in the Fifth Circuit, but the appeal was not heard before the Trump Administration took over.

The preliminary injunction, in *State of Nevada v. U.S. Department of Labor*, consolidated a pair of cases brought separately by 21 states and a business coalition. Two big questions in the case are whether the rule's salary floor below which executive, administrative, and professional (EAP) employees must be paid overtime *regardless* of their duties, supplants the duties test, and whether the DOL had statutory authority to set or alter the salary floors.

**Very broad impact.** "The final rule affects millions of workers and required employers to spend thousands of hours determining what impact the rule would have on its workforce and how to respond to the new salary level requirement," Brecher and Greenberg pointed out.

"The impact of the overtime rules in the first year, had they gone into effect, by some estimates would have cost employers at least $1.5 billion in more overtime," according to Bourgeacq, "as well as around $500 million simply to implement, affecting nearly four million employees—staggering numbers from anyone's perspective."

**What will happen under the Trump Administration?** Brecher and Greenberg suggested that the Trump Administration may take steps to permanently block the rule. "It could abandon the appeal, issue new regulations withdrawing the final rule, or Congress could pass legislation that nullifies the rule or repeals and replaces it," the Jackson Lewis attorneys explained. "Employers must closely monitor developments regarding the final regulation and be prepared to react quickly if the Fifth Circuit reverses the injunction."

According to Doran, the Trump Administration is likely to push back on much of the Labor Department's 2016 efforts. "Given Andrew Puzder's views on minimum wage issues, it is reasonable to expect the administration to withdraw the appeal or otherwise put an end to the case with the injunction still in place," Doran said.

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## Investor fiduciary rule

In 2016, the Labor Department also published another controversial regulation, its "investor fiduciary rule," which, as Doran noted, requires all financial advisers to recommend what is in the best interests of the clients, rather than the financial advisers, when advising on employer benefit plans, 401(k) plans, and IRAs. "The rule broadly expanded the definition of fiduciary to cover an extremely broad swath of investment advisers and, if effective, would force financial advisors and institutions to discontinue pay schemes that created potential conflicts of interest between the adviser and the investor," according to Doran. "The rule appeared to be a solid win for investors with ERISA-governed investments, while many in the investment community complain that the rule's requirements are onerous and incredibly burdensome."

**The rule.** The best interest contract exemption to the final rule would have let fiduciary advisers and their firms collect fees not typically permitted to them under existing laws—but only if they acknowledged their fiduciary status and met other criteria. Even though many advisers act in accord with their customers' best interest, not everyone is legally obligated to do so, the DOL

underscored in issuing the final rule. "Many investment professionals, consultants, brokers, insurance agents, and other advisers operate within compensation structures that are misaligned with their customers' interests and often create strong incentives to steer customers into particular investment products," according to a DOL fact sheet. Under current regulations, these conflicts of interest are not always subject to disclosure.

**Court challenges withstood.** So far, the fiduciary rule has fared well in court. The National Association of Fixed Annuities challenged the Labor Department's classification of insurance agents as "fiduciaries." But in November, a D.C. federal court refused to enjoin the rule. The court, in *The National Association for Fixed Annuities v. Perez*, found the fact that commission-based compensation is standard practice among sellers of fixed annuities did not impermissibly convert the best interest contract exemption into an impermissible mandate.

On February 8, a federal court in Texas also upheld the fiduciary rule in a challenge leveled by the U.S. Chamber of Commerce, the Indexed Annuity Leadership Council, and the American Council of Life Insurers, granting summary judgment to the Department of Labor.

**How is the rule affecting employers?** "Employers are focusing on their service providers and looking closely at who stands in a fiduciary relationship with the plan," according to Jackson Lewis attorney Joy Napier-Joyce. "Many service providers have already asked employers/plan sponsors to agree to amendments to their service contracts, taking into account the new rule."

**Under the new administration.** What can we expect from the Trump White House with regard to this particular regulation? Doran said that, while "Puzder has not stated his position on the investor fiduciary rule, members of President Trump's DOL transition team have been outspoken critics of the rule, so we can expect pushback there as well."

Napier-Joyce expressed similar sentiments. "While it is of course impossible to predict with certainty, the fiduciary rule has been an early subject of conjecture," she said. "Set to go into effect in April of 2017, there have been discussions of at least a delay in enforcement and a real chance that the rule could be significantly modified or eliminated."

In the interim, the White House released a directive on the controversial "fiduciary" rule. The memorandum to the Secretary of Labor calls for a review of the rule, specifically directing the Labor Department to "examine the Fiduciary Duty Rule to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice." To that end, the DOL is required to prepare an updated economic and legal analysis on the likely impact of the rule, among other things, taking into consideration:

- Whether the anticipated applicability of the rule has harmed or is likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;
- Whether the anticipated applicability of the rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and
- Whether the rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.

Should the Labor Department "make an affirmative determination" on any of these considerations, or conclude for any other reason after appropriate review that the rule is inconsistent with the Trump Administration's "priority," the department is required to "publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and as consistent with law."

**What should employers be doing?** As to what businesses should be doing now, Napier-Joyce said, "For employers, this is a good opportunity to look at fiduciary status, both internally and externally, and ensure that documentation and processes are in place to best position the plan from a fiduciary standpoint."

## Joint-employment guidance

Both Doran and Bourgeacq saw the Labor Department's release of guidance last January on joint employers as another important development in 2016. The guidance "caught the eye of employers and staffing agencies, alike," Duran observed. "This guidance bears on a very important issue that impacts minimum wage and overtime liability, particularly with respect to the construction, agricultural, janitorial, warehouse/logistics, staffing, hospitality, health care, and security industries," he explained.

**The new DOL test.** Broader than the common law test, broader than the recently announced test under the National Labor Relations Act, broader than the OSHA test—the test for joint employment under the FLSA (and the Migrant and Seasonal Agricultural Worker Protection Act) uses the same expansive "suffer or permit" language as does the FLSA's definition of employment, according to the DOL Wage and Hour Division's Administrator's Interpretation No. 2016-1 on joint employment. The

15-page guidance "ensures that the scope of employment relationships and joint employment under the FLSA and MSPA is as broad as possible."

**What's the motive behind the test?** In a January 20 DOL blog, Wage and Hour Administrator Dr. David Weil, who issued the Administrator's Interpretation, reiterated the DOL's focus on protecting employees in what it calls the "fissured workplace—where there is increasingly the possibility that more than one employer is benefiting from their work." He cited the changing nature of work due to economic forces and technological advancements, which have resulted in different organizational and staffing models that use third-party management companies, independent contractors, staffing agencies, or other labor providers to "share employees."

But Doran looked at it from a slightly different angle, underscoring the DOL's admission that it issued the guidance in an attempt to expand the reach of the FLSA. "The problem for many employers is that the guidance fails to appreciate industry-specific, unique ways of doing business," he said. "And the stated purpose of the guidance—to increase the DOL's chances of recovering back wages regardless of the actual day-to-day employer—lacks support or reason in the FLSA."

Bourgeacq saw it similarly: "The clear message from that guidance was that, like the NLRB, the DOL too intended to continue an expansive approach in favor of finding joint employment relationships and would broadly apply its liberal 'economic realities' test when scrutinizing such relationships."

## Persuader rule

Another important development on the regulatory front was the permanent injunction that a federal district court in Texas ordered in November against the so-called "persuader rule." The court that enjoined the rule, in *National Federation of Independent Business v. Perez*, found it was "defective to its core."

**Expanded reporting requirements.** The final rule would have expanded the reporting requirements when employers hire third-party consultants—including attorneys—to help craft and deliver messages to employees about unionization. The final rule revised the two public disclosure reporting forms that must be filed under the Labor-Management Reporting and Disclosure Act when an employer engages an external labor relations consultant to undertake efforts to persuade employees to reject a union organizing campaign. The proposed reporting changes would have applied to arrangements, agreements, and payments made on or after July 1.

Previously, employers and labor relations consultants had to file a report when the consultant communicated *directly* with the employer's workers. Under the new rule, both *direct* and *indirect* activities undertaken by a consultant would have been required to be reported. An example of *indirect* consultant activity is conducting a union avoidance seminar for supervisors—provided it's undertaken to persuade employees.

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>
> *—Attorney Chris Bourgeacq*

**Unnecessary and deeply flawed.** "The revised persuader rule's demise, while not nearly as costly as the overtime rule, was a completely unnecessary revision from the outset," according to Bourgeacq. "The final rule was ridiculously vague and unclear, despite potential criminal penalties for noncompliance, and also denied employers fundamental constitutional protections and attorney-client privilege.

## OSHA on the move

In 2016, the DOL's Occupational Safety and Health Administration issued new standards, some of which were a long time in the making. Notably, OSHA rolled out new standards on crystalline silica, walking-working surfaces, and electronic submission of illness and injury data. The agency also amended its illness and recordkeeping regulation.

**Crystalline silica standard updated.** Sherman & Howard attorney Patrick Miller saw the long-awaited rule on crystalline silica as perhaps the most important new standard finalized by OSHA in 2016. [In August, the rule was amended to correct typographical errors in the formulas in preceding permissible exposure limits retained in the final rule; in May corrections in the display of formulae to Table Z-3—Mineral Dusts, Table Z–Shipyards, and "Threshold Limit Values of Airborne Contaminants for Construction" were made.] The standard "drastically lowers" the permissible exposure limit of crystalline silica and also requires employers, in certain situations, to perform employee exposure monitoring and medical surveillance, Miller explained. The new rule, which applies to both construction and general industry employers, is being challenged in the courts by various industry groups, he noted. The effective dates for the new standard are being rolled out in phases.

***Why was the standard updated?*** The rule was updated to improve protections for workers exposed to respirable silica dust. It was last updated in 1971. The regulatory action is aimed at curbing lung cancer, silicosis, chronic obstructive pulmonary disease, and kidney disease in workers by limiting their exposure to respirable crystalline silica.

***Two decades in the making.*** The updated standard was nearly 20 years in the making. This current round of rulemaking on the silica standard began in 1997, during the Clinton Administration, when OSHA put the item on its regulatory agenda. George W. Bush's White House declared the proposed silica rule a priority in 2002, but delays continued. Like its predecessors, the Obama administration put silica at the top of its agenda in 2009. The proposed silica rule was submitted to the Office of Management and Budget (OMB) in February 2011. But the proposed rule still stalled. According to Public Citizen, corporate lobbyists meeting with OMB officials consistently outnumbered the labor and public health advocates calling for the higher standard.

**Walking-working standard.** Miller identified another important standard finalized by OSHA in November which revised and updated general industry standards on walking-working surfaces. "With this standard, OSHA incorporated many of the fall protection provisions, especially with respect to scaffolding, that have long been applicable to construction," he observed. "This new rule goes much further, though, and requires general industry employers to inspect walking-working surfaces 'regularly and as necessary' to guard against hazardous conditions," according to Miller. "It also adds corrosion, leaks, spills, snow, and ice to the list of hazards that employers must eliminate from their walking-working surfaces." The majority of the provisions of this new standard were effective January 17, 2017, Miller noted, adding, "This is a very short compliance date given the complexity of the rule." This standard is also the subject of a legal challenge.

**Injury and illness recordkeeping.** In December, OSHA issued a final rule amending its injury and illness recordkeeping regulation. "The change states that an employer's duty to make and maintain accurate records of work-related injuries and illnesses is an ongoing obligation lasting five years," Miller explained.

The new rule came in direct response to a 2012 federal appeals court decision, commonly referred to as *Volks,* Miller said. There, OSHA cited the employer for failing to maintain records between January 2002 and April 2006. "Volks argued that the citations were barred by the six-month statute of limitations in the OSH Act, which provides that no citation may be issued six months or more after the 'occurrence of any violation,'" Miller noted. "Volks asserted its failure to maintain injury and illness records occurred more than six months before the citations were issued in November 2006, and as such the citations should be barred." The court agreed and vacated the citations. "This new rule will allow OSHA to cite employers for recordkeeping violations going back five years, much longer than the [six-month] statute of limitations," the Sherman & Howard attorney observed.

**Electronic submission of data.** While not directly addressing employee safety and health, Miller pointed to what he saw as one of the more controversial new standards promulgated by OSHA in 2016, this one issued in May—the final rule on electronic submission of injury and illness data, which includes anti-retaliation provisions. "Employers have long been required to keep track of their injuries and illnesses on what are known as 'OSHA 300' logs," he explained. "In the past, these logs were only reviewed by OSHA upon request. The new rule, however, will require employers of a certain size (over 250 employees at a given establishment at any point during the year) to electronically submit this information to OSHA." Miller noted that smaller employers in certain industries will only be required to electronically submit annual summaries of their OSHA 300 logs. This requirement is being phased in slowly while OSHA works out various logistical issues, but the regulated community "has already voiced a strong objection to the new requirements, primarily because it will make injury and illness information available to the public," Miller observed.

**Anti-retaliation rules.** The new anti-retaliation rules are also gaining much attention, according to Miller. "These new rules require that employers enact 'reasonable' rules for reporting workplace injuries and illnesses and that they not retaliate against employees for exercising their right to make such reports." Although this requirement is not by itself controversial, "OSHA has interpreted the rule to mean that certain employer practices, such as safety incentive programs and post-accident drug and alcohol testing, may violate its terms," Miller explained. "Of additional concern to employers is that fact that OSHA may now issue citations alleging retaliation and require, as abatement of the purported violation, reinstatement and back pay," he said. "In other words, cases of retaliation will now move from the employment law arena to the administrative process under OSHA," Miller said, noting that this rule is also being challenged in federal court.

## DOL of 2017

What can we expect from the Department of Labor in 2017? Any forecast must begin with a caveat: The first weeks of the Trump Administration have ushered in both sweeping change and considerable confusion, described by some as "chaos." Moreover, as mentioned earlier, President Trump's nominee for Labor Secretary, Andrew Puzder, withdrew from consideration and has been replaced by a new nominee. Given this backdrop, it remains difficult to predict with any degree of certainty what will take place at the Labor Department during 2017. We include our experts' observations about Mr. Puzder because we believe they also reflect anticipated changes in direction under the Trump Administration.

Most DOL watchers expect substantial change. Contrasting the former Secretary of Labor, Thomas Perez, with nominee Andrew Puzder, Bourgeacq observed "The only thing Perez and Puzder have in common is the first letter of their names."

**General outlook.** "The Trump Administration is likely to push back on much of the DOL's 2016 efforts," according to Doran. Referring to the DOL's currently enjoined overtime rule, Doran said that "Given Andrew Puzder's views on minimum wage issues, it is reasonable to expect the administration to withdraw the appeal or otherwise put an end to the case with the injunction still in place."

"Expect the Trump Administration, and Congress as well, to deploy several efforts to undo the DOL's multi-year attack on employers," suggested Bourgeacq. "That's not to say wage and hour or workplace safety enforcement will go out the window. But the days of extending purely academic economic theory and union-friendly policy are over. Same with the $15/hour movement and similar minimum wage revisions [as] sponsored or supported by the DOL."

**Fiduciary rule.** As to the fiduciary rule, Doran observed that, although Puzder has not stated his position on the investor fiduciary rule, members of Trump's DOL transition team "have been outspoken critics of the rule, so we can expect pushback there as well."

> *The Labor Department may retract positions unfavorable to business and shift its focus to compliance, not enforcement.*
>
> *—Jackson Lewis attorneys Jeffrey Brecher and Richard Greenberg*

**Joint employment.** "Joint employment is not as pressing or as sexy as the exemption regulations or the fiduciary rule, and the DOL's guidance is just that—*mere guidance*, so perhaps the guidance will remain on the books," Doran said, "but the DOL's enforcement strategies with respect to joint employment are likely to change over time as the new DOL team settles in."

Bourgeacq's prediction: "Joint employment and gig economy regulations will receive a fresh look, making it more conducive for employers to hire contract labor and for franchisers/franchisees to collaborate again."

**Enforcement.** Doran observed that 2016 saw a continuation of the DOL's extremely aggressive enforcement strategies, particularly with respect to settling claims. "It is likely that the new DOL team will take more balanced and conciliatory positions once the new team settles in," he predicted. "While the DOL has essentially adopted a 'my way or the highway' settlement strategy in recent years, we hope the new team will direct those in the field to be more open-minded in the context of settlements."

**What about pay initiatives?** As to what we might expect on the wage front, Doran had this to say: "Ivanka Trump has been outspoken with respect to gender pay equity, so we can expect some DOL initiatives in furtherance of gender pay equity. What we

won't see from the DOL is any leadership with respect to raising the minimum wage. Mr. Puzder has been an extremely vocal opponent of raising the minimum wage during the campaign."

Bourgeacq agreed. "Puzder will not support reviving or revising the enjoined overtime rules," he added.

**Shift in focus.** As Brecher and Greenberg see it, the Labor Department may retract positions unfavorable to business and shift its focus to compliance, not enforcement. Before the Obama Administration, there was a long-standing DOL practice by the WHD Administrator to issue official opinion letters regarding application of the FLSA upon which employers could rely, the Jackson Lewis attorneys noted. Under the Obama Administration, however, the DOL stopped issuing opinion letters, choosing instead to issue less frequent "Administrator Interpretations," but with wider applicability and scope.

"Two significant Administrator Interpretations concerned 'joint employment' and 'independent contractor' status under the FLSA, both viewed as expanding the rights of workers," Brecher and Greenberg continued. "A Trump Administration would likely resume the practice of issuing opinion letters on a variety of topics and could also scale back or withdraw the Obama Administrator Interpretations, thereby permitting employers greater flexibility in using independent contractors and permitting businesses more certainty in expanding through use of franchises."

**Paid family leave.** Acknowledging that it's difficult to predict what the new Labor Department will do beyond the Trump team's campaign statements, Doran pointed to the fact that Trump has "repeatedly promised voters a paid family leave entitlement if elected." However, the contours of that program sound less like true paid family leave and more like temporary unemployment benefits for those on family leave, Doran explained.

**In the government contracts arena.** On the OFCCP-government contractor front, Doran sees "ample opportunity for the new administration to make a lasting imprint, but little hint at what will actually happen." Both Trump and Puzder strongly disfavor government regulations that hamper businesses, he explained. "But what that means with respect to specific government contractor issues is anyone's guess at this point."

Chin expects there will be no immediate change at the OFCCP in 2017, at least not until new leadership is in place and established at the DOL and the OFCCP. Until then, she expects the OFCCP to maintain the status quo.

***Regulation rollback?*** Looking forward, some new OFCCP regulations may be rolled back. "The Fair Pay and Safe Workplaces regulation, most of which is currently enjoined, seems to be a fair target for the new administration; the reporting and disclosure requirements and the prohibition on many arbitration agreements are paradigm examples of contractor-unfriendly requirements that run afoul of the new administration's philosophies," Doran suggested. "The new contractor minimum wage increase also appears to be ripe for undoing, as Mr. Puzder is a staunch opponent of increasing the minimum wage."

***"Head-scratchers."*** Doran said that some contractor requirements may be "head-scratchers" for the Trump Administration because they pit other social issues against Trump's regulatory philosophy. "For example, paycheck transparency is consistent with Ivanka Trump's stated intention to promote gender pay equity," he explained. "Likewise, the OFCCP's rule protecting employees of federal contractors from sexual orientation or gender identity discrimination seems consistent with [Trump's] stated support of LGBT rights during the campaign, but inconsistent with his regulatory agenda."

***Change in auditing practices.*** Chin suggested that the OFCCP may change the way "under the Obama administration, the OFCCP adopted its Active Case Enforcement approach, leading to more intense 'deep dive' scrutiny of contractors' workforce data and records during compliance reviews, with a particular focus on finding systemic pay discrimination, and aggressive, controversial enforcement methods." She also pointed to a recent General Accounting Office (GAO) report that was highly critical of the OFCCP regarding several of the agency's enforcement methods, including relying solely on statistical 'red flags' without any anecdotal evidence to support claims of systemic discrimination.

"If DOL and OFCCP leadership under the new administration is as business-friendly as anticipated, once established, we can expect a significant shift in how the OFCCP approaches its auditing function, especially in light of the GAO report," Chin said. "The OFCCP likely would move away from Active Case Enforcement to an approach closer to the Active Case Management process followed under the George W. Bush Administration," she predicted. "A return to an Active Case Management approach would bring more efficient, high-level compliance reviews in most instances, with deeper dives reserved only for the few audits with major statistical indicators of potential discrimination."

***Less aggressive enforcement.*** Chin also suggested that the OFCCP may see a change in enforcement priorities. "The OFCCP likely would move away from many of its aggressive, controversial enforcement methods and return to traditional theories of discrimination

## Look for executive action

Attorney Chris Bourgeacq predicted that President Trump would undo several executive orders affecting the workplace and federal contractors that President Obama signed while in the White House. The "blacklisting" rule for contractors, he suggested, "will likely be permanently erased by Trump's pen." Obama's minimum wage order for federal contractors may suffer the same fate, and "we can also expect the *Beck* posters to go back up in the workplace, informing unionized employees of their rights to recover partial dues payments," Bourgeacq commented.

One executive order to keep an eye on, and which may not meet the same fate as many other Obama labor-related orders, Bourgeacq said, is EO 13706, which requires federal contractors to provide paid sick leave to employees. "Both Trump and his daughter Ivanka emphasized the need for paid sick leave during the presidential campaign, leaving us to wonder not only will this rule remain intact, but also whether the new Congress may actually pass a broader paid sick leave law proposed by the White House," he explained.

Bourgeacq's comments seem prescient—during his first days in office, President Trump sparked considerable controversy by quickly entering a series of memorandums and executive orders. These included directives implementing a regulatory freeze pending Office of Management and Budget review; ordering agencies to delay, exempt, defer and otherwise not enforce certain provisions of the Affordable Care Act within their discretion; temporarily banning immigrants from seven Muslim-majority countries; and requiring that most agencies repeal two regulations for every new one issued.

recognized by federal courts," she said. "For example, we could see a lessening of the OFCCP's push to address the gender pay gap, and the agency may step back from its aggressive 'comparable worth' approach to investigating pay discrimination."

***Legislative action.*** The new Congress has already taken action to roll back the back the federal contractor "blacklisting" rule. The House, on February 2, passed a joint resolution of disapproval that would block the rule. H.J. Res. 37 uses a procedural move under the Congressional Review Act that permits Congress to pass a resolution of disapproval to prevent, with the full force of the law, a federal agency from implementing a rule or issuing a substantially similar rule without congressional authorization. The 236-187 vote fell mostly along party lines, with three Democrats joining Republicans to approve the resolution and one Republican siding with Democrats who gave it a thumbs-down. Given that the Senate, like the House, is dominated by Republican lawmakers, and President Trump has said he would sign the resolution, the final rule is on the way out.

**OSHA rulemaking.** Miller observed that with the election of Donald Trump there has been much speculation as to the future of OSHA. "While a new head of OSHA has not been selected, and likely will not be picked for a few more months, it is safe to say that OSHA's rulemaking agenda is likely to be put on hold," he suggested. Miller pointed to some of the more important rules currently in the OSHA pipeline that may be delayed: a new standard dealing with exposure to beryllium and another dealing with exposure to infectious diseases in the healthcare industry. Longer term initiatives that may get shelved are a rule requiring that employers implement injury and illness prevention programs, as well as a combustible dust standard for general industry.

***Rule rollback?*** Under the Obama Administration, OSHA for the most part was successful in promulgating a large number of standards on which it had been working, Miller pointed out. "It is unclear at this point what action the Republican-led Congress will take, if any, to roll back any of these existing standards." The Sherman & Howard attorney noted that under the Congressional Review Act, "Congress may have the ability to review and reject some of the newer rules, such as the walking-working surfaces standard and the injury and illness recordkeeping rule regarding the five-year retention period." Why? Because these rules were issued less than 60 legislative days prior to the end of the last congressional term. "For regulations not subject to the CRA, Trump's OSHA can either undertake efforts to amend or repeal the standards, or simply not enforce them," Miller said.

***Non-regulatory enforcement.*** It is also likely that the new OSHA will reduce the extent to which it relies on non-regulatory means of enforcement, according to Miller. "In the past eight years, for example, OSHA has had a practice of issuing controversial 'Letters

of Interpretation' which in many cases simply have rewritten a standard," he observed. "It then has relied on these interpretations in enforcement actions." Also likely to go away is OSHA's "practice of issuing scathing press releases in significant cases," Miller predicted.

***Budget cuts.*** "The biggest way in which the Trump Administration can affect OSHA is by simply reducing the agency's enforcement budget," Miller noted. "OSHA is stretched thin as it is, and with even fewer compliance officers to conduct inspections, employers may very well see a large drop-off in enforcement activity."

## NLRB's growing regulatory reach

The National Labor Relations Board continued to expand its regulatory reach in 2016, issuing several decisions that either broke new ground on the agency's jurisdiction and/or overturned long-standing precedent limiting the NLRB's regulation of the American workplace," as Sherman & Howard attorney Patrick Scully put it. This description of the Board's activity is shared by many who saw it as part of a broader aggressive executive branch push under the last term of the Obama Administration.

## Joint employment NLRB style

Like the EEOC and the Labor Department, the NLRB continued its efforts in 2016 to hold those it deemed to be joint employers liable for labor law violations. As Scully noted, at the end of 2015, the Board issued its controversial *Browning-Ferris Industries* decision, in which the majority concluded that it was unnecessary to demonstrate *actual* joint control over terms and conditions of employment to hold two companies to be "joint employers" under the National Labor Relations Act. "The Board noted that it need only be shown that an employer *had the authority* to affect terms and conditions of employment of another employer," Scully explained. "As we learned in 2016, that authority could be lurking in virtually any business agreement."

**The *McDonald's* case.** Notably, the General Counsel has continued to pursue the multi-region prosecution of the *McDonald's* case, in which various independent franchisees are alleged to be joint employers with McDonald's Corporation based primarily on the franchisor-franchisee relationship, Scully pointed out. "In 2016, the Board majority in a series of rulings indicated that it may ultimately agree that McDonald's business relationship with its various franchisees amounts to joint employment sufficient to extend unfair labor practice liability to the Corporation."

**Impact on 2016 decisions.** Given the NLRB's premise in *Browning-Ferris* that it is unnecessary to show any *actual* joint control over employees' terms and conditions, the Board's July decision in *Miller & Anderson* was highly significant, according to Scully. There, the Board overturned the requirement that a supplier employer and a user employer of a contingent workforce consent to joint bargaining, he noted. In its 2004 *Oakwood Care Center* decision, the Board had "returned to the long-standing rule that the agency *could not* compel two employers to bargain jointly without their consent," Scully explained. That rule had stood since the Board's 1973 decision in *Greenhoot, Inc.*, save a brief period when the "Clinton Board" found in 2000, in *M.B. Sturgis*, that consent was unnecessary.

Jackson Lewis attorneys Howard Bloom and Philip Rosen also found *Miller & Anderson* significant, underscoring the Board's decision that bargaining units combining employees who are: (1) jointly employed by a user employer and supplier employer, and (2) solely employed by the user employer, do not require the consent of either employer.

**What does it mean?** "Now, in light of *Miller* and *Browning-Ferris*, the Board has given unions and employees the tools to effectively invalidate contingent employment arrangements," Scully suggested. "It will no longer to be required that charging parties show that the user employer actually controls the supplier employer's employees." Moreover, "if the employees are organized, the user employer will be forced to bargain jointly with the supplier employer," Scully added.

**But it's not over yet.** Bloom and Rosen pointed out that as expected, Browning-Ferris Industries has appealed to the D.C. Circuit from what they called "the NLRB's ground-breaking decision changing the analysis to be applied in deciding whether two or more employers are 'joint employers' of certain employees, and making it easier for the NLRB to find joint employer status." They also noted that the Board subsequently found in January 2016, that Browning-Ferris, as a joint employer of employees that it used from Leadpoint Business Services, unlawfully refused to bargain with Teamsters Local 350. On November 16, 2016, BFI filed its final reply brief in the circuit court and oral argument is set for March 9, 2017, according to the Jackson Lewis attorneys.

## Protected activity

The NLRB has also continued to expand its definition of what constitutes "protected concerted activity," according

to Scully. In its decision in August in *Wal-Mart Stores, Inc.*, the Board "found intermittent walkouts of Wal-Mart's employees in support of the 'OUR Wal-Mart' campaign to be protected largely because the labor unions that were supporting the campaign claimed that they had no intention of trying to organize Wal-Mart's employees," Scully observed. "In other words, while intermittent strike activity is usually unprotected under the NLRA, the fact that the unions were not attempting to bargain with Wal-Mart insulated the intermittent employee walkouts from disciplinary measures," he explained. "It is likely that this theory will be applied to other campaigns, such as 'Fight for 15,' in which organized labor disclaims any intent to become the bargaining representative of the employees it intends to 'mobilize.'"

Bloom and Rosen also saw the *Wal-Mart* decision as significant, noting the Board decided that six employees who stopped work and engaged in an in-store protest over their alleged mistreatment by a supervisor and to secure permanent jobs for temporary employees were unlawfully disciplined. "The Board termed the protest a 'relatively small, brief, peaceful and confined work stoppage' that did not lose the protection of the National Labor Relations Act under its 10-factor test set forth *in Quietflex Mfg. Co*.," the attorneys explained.

## Employer handbooks

As Scully, saw it, the NLRB's "attacks on seemingly reasonable and appropriate employer handbooks and rules continued in 2016, yielding more and more absurd results." In April, in *T-Mobile USA, Inc.*, the Board found an employer's rule requiring employees to "maintain a positive work environment" and "communicate in a manner conducive to effective working relationships" to be unlawful, he noted. Similarly, in April the Board struck down a rule that prohibited conduct in a hospital that impedes harmonious interactions and relationships in *William Beaumont Hospital*. "In both cases, the NLRB 'reasoned' that these rules would potentially 'chill' employees' right to engage in protected/concerted activity," Scully said.

## Expanding jurisdiction

The Board was also expansive in the area of jurisdiction. "In 2016, the NLRB moved to expand upon the traditional notions of its jurisdiction by primarily urging a more expansive definition of who is considered an 'employee,'" Scully observed. In its *Columbia University* decision in August, the NLRB determined that it would effectuate U.S. labor policy to find graduate teaching assistants at the university to be employees, he said. "The NLRB noted that the NLRA is designed to cover 'economic relationships,' evoking arguments articulated by the union advocates in *Northwestern University*," Scully, explained, noting that there the Board dismissed the petition to represent Northwestern's football players.

> *"In other words, the [NLRB] General Counsel has taken the position that it is unlawful for an employer to be incorrect about the legal status of individuals with whom it does business."*
>
> *—Sherman & Howard attorney Patrick Scully*

"The NLRB has also continued to assert jurisdiction over private not-for-profit charter schools, finding them to be similar to federal government contractors, rather than political subdivisions of the states where they operated," Scully pointed out.

## "Misclassification"

"The NLRB was not content to simply expand the definition of "employee" in 2016, it also initiated attempts to punish employers that allegedly 'misclassify' people the NLRB contends are employees," according to Scully. He pointed to cases such as *Intermodal Bridge Transport*, brought in April and now pending before an Administrative Law Judge, and *Pacific 9 Transportation, Inc.*, where in a Division of Advice Memorandum (December 18, 2015), the General Counsel argued that an employer's alleged "misclassification" of an employee (as an independent contractor) was an unfair labor practice. "In other words, the General Counsel has taken the position that it is

unlawful for an employer to be incorrect about the legal status of individuals with whom it does business," Scully said. "There appears to be no direct legal support for this theory, which may or may not make its way to the NLRB in 2017," he added.

## Notions of successorship

"The NLRB has also recently attempted to expand the 'successor' doctrine to find acquiring employers more likely to be bound to a predecessor's collective bargaining agreement," Scully continued. Although companies that purchase the assets of another company have historically been free to set initial terms and conditions of employment, the Sherman & Howard attorney pointed to the Board's July decision in *Nexeo Solutions, LLC*, which found the acquiring employer to be bound to the predecessor's CBA as a "perfectly clear" successor. "The NLRB made this finding, not because of the new company's conduct," Scully noted, "but largely because the acquired company had made certain representations to employees about their continuing status." Thus, under the Board's new theory, a purchaser of a business may have its labor relations dictated by the seller of the business, he suggested. "Needless to say, sellers frequently tend to try to assuage the concerns of employees by assuring them of future employment," he said, adding that "such reassurances may now have real legal consequences."

## Mass campaign meetings

Bloom and Rosen found the NLRB's *Guardsmark, LLC*, decision in January important because there the Board "significantly changed its rule governing when mass campaign meetings' with employees by the parties (employer or union) to an NLRB-conducted mail-ballot election may be held." Mass campaign meetings are planned or unplanned "captive-audience" meetings or discussions about unionization involving two or more employees at a time. "The new rule provides that a captive-audience employee meeting by either of the parties to the mail-ballot election ending less than 24 hours prior to the ballot mailing by an NLRB's Regional Office is unlawful," the Jackson Lewis attorneys explained.

**Difference in election rules resolved.** Bloom and Rosen noted that in 1953, in *Peerless Plywood Co*., the NLRB, in the context of a manual (in-person) election, ruled that mass captive-audience speeches by either party to the election ending within the 24-hour period prior to the start of such an election violated the NLRA. In 1959, in *Oregon Washington Telephone Co*., involving a mail-ballot election, the Board decided that its captive-audience meeting prohibition did not begin until the time and date the ballots are mailed to voters. "In *Guardsmark, LLC*, the Board decided that because the *Oregon Washington Telephone* mail-ballot election rule did not contain a 24-hour component, there was a 'counter-intuitive difference' between the rules in manual and mail-ballot elections that 'invited confusion,'" Bloom and Rosen said. "Therefore, the Board overruled *Oregon Washington Telephone*, adding a 24-hour requirement in mail-ballot elections "to align the mail-ballot rule more closely with the manual-ballot rule."

## Mixed-guard unions

Another important development in the eyes of Bloom and Rosen was the Board's decision in June in *Loomis Armored US, Inc.* There, a divided NLRB overturned its 30-year-old rule that an employer may withdraw recognition, even without a showing of a loss of majority status, from a voluntarily recognized union that represents both guards and non-guards (mixed-guard union) with respect to a unit of guard. "Adopting a new rule proposed by the NLRB General Counsel and the six Teamsters-affiliated unions that represented Loomis employees at various California locations, the Board held that an employer of security guards, like other employers, remained bound by a collective-bargaining relationship into which it voluntarily entered unless and until the union is shown to have actually lost majority support among unit employees," the two attorneys explained.

## And there's more...

Bloom and Rosen identified several more developments at the Labor Board in 2016 that they deemed significant:

- As of April 15, 2016, the new NLRB representation case rules—the "quickie election" rules—celebrated their one-year anniversary. Statistics show that the rule has reduced drastically the median amount of time (in a stipulated election situation) between the date of the union's filing of a representation petition with the NLRB and the date of the election conducted by the NLRB, from 38 days to 23 days. Although this presumably made it easier for unions to organize, in 2016, the expected uptick in the union's win rate in NLRB elections did not occur.
- In August, in *Total Security Management Illinois 1, LLC*, the Board ruled that prior to entering into a first contract, an employer has a statutory obligation

## Revisiting pro-labor actions

The election of Donald Trump carries with it the possibility of major changes in the field of labor law, according to Jackson Lewis attorneys Howard Bloom and Philip Rosen. Currently, the five-member NLRB has a 2 to 1 Democratic (and pro-labor) majority, with two vacant seats. "Since, by custom, the president has the opportunity to appoint a majority (but no more than three members) of the Board, it is likely that the two vacancies will be filled by President Trump appointees," they predicted.

"No doubt, this will result in a more business-friendly NLRB majority," Bloom and Rosen said. They suggested that the new Board, once appointed and confirmed and given a case raising the issue, is likely to revisit several pro-labor NLRB decisions issued during the past few years, including those:

- making most class action waivers illegal,
- broadening the "test" for finding two unrelated employers to be "joint employers,"
- allowing inclusion of temporary workers in bargaining units with an employer's regular workers,
- expanding the NLRA's coverage of protected concerted activity (its impact on workplace rules and policies, as well as employee conduct),
- making it difficult for an employer to alter a bargaining unit requested by a union in connection with the union's seeking to represent that bargaining unit,
- dealing with the status of college/university adjunct faculty, graduate assistants, and student athletes, and
- permitting employees to picket and protest on employer property.

A business-oriented NLRB also likely will stay the course in areas where the current Board is primed to make additional pro-labor changes, such as extending *Weingarten* rights to non-union workplaces, making misclassification of employees as independent contractors a separate violation of the NLRA, and extending the application of *Purple Communications* to electronic systems other than email, according to Bloom and Rosen.

to bargain with the union that newly represents its employees before imposing discretionary "serious discipline" (such as suspension, demotion, or discharge) on any of those employees. Discretionary discipline, like pay rates and benefits, is a term and condition of employment, the NLRB explained, and thus, a mandatory subject of bargaining. The Board also held bargaining is required about less serious degrees of discipline, such as oral or written warnings, but may occur after the discipline is imposed.

- In August, in *Capital Medical Center*, in what Bloom and Rosen called "a groundbreaking expansion of union rights," the Board ruled that off-duty employees have the right to picket on an employer's premises, unless the employer can prove under the NLRA that a ban on picketing was necessary to prevent a disruption of health care operations. While this decision arose with a unionized health care institution, the Board may apply it under similar facts to any employer, unionized or non-union.
- In November, in *Manhattan Beer Distributors LLC v. National Labor Relations Board*, the Second Circuit upheld the 2015 NLRB ruling that an employer violated Section 8(a)(1) by denying an employee the right to the physical presence of a union representative before consenting to take a drug test and by discharging him for refusing to take the test without a union representative present. The employer wanted to send the employee for "reasonable suspicion" drug testing because he "reeked of the smell of marijuana." The employee requested the presence of his union steward, but it was the union steward's day off. The employee spoke with the union steward on the telephone and then stated that he would not consent to the drug test without union representation. The employer discharged him for refusing to take the drug test. The NLRB's award of reinstatement and back pay also was upheld.
- The Board *petitioned* the Supreme Court to grant certiorari in *NLRB v. Murphy Oil USA, Inc.*, which raises the question whether a requirement that employees sign waivers that prohibit them from pursuing work-related claims on a class or collective action basis as a condition of hire or continued employment violates the NLRA. (Murphy Oil prevailed against the NLRB in the *Fifth Circuit*.) On January 13, 2017, the Supreme Court *agreed to hear the case* and two others raising the same issue. (The appointment of a business-oriented ninth Justice to fill the Scalia vacancy will increase the likelihood that such waivers will be found by the Court to be legal.)

## Impact on employers

What do these 2016 developments at the Labor Board mean for employers? Each of these developments creates additional burdens on employers … or is simply labor-friendly," according to Bloom and Rosen.

"The decisions that the NLRB has issued in the past year and the General Counsel's prosecutions are all designed to expand the regulatory reach of the agency, arguably well beyond the statutory mandate," according to Scully. "Conduct and business arrangements that have been lawful for decades have been routinely attacked by the NLRB as alleged unfair labor practices. Employers have been left to guess which mildly worded policy or lawful business arrangement is next on the NLRB's 'hit list.' It has been an uncertain and unworkable regulatory environment that has surprised even some of the most seasoned labor commentators."

## Effect on employees

Turning to the other side of the equation, Bloom and Rosen said, "Employees have more rights and protections under the NLRA today than they ever have. While many may view this as a positive development, in at least some instances the pro-labor actions of the Obama NLRB have de-motivated employers from investing in their operations."

"Strangely, the NLRB's expansion has not noticeably improved the lot of any group of American workers," Scully surmised. "Moreover, unions have not expanded their membership notwithstanding the NLRB's aggressive regulation. In some cases, employees have faced harm as a result of the NLRB's apparent efforts to 'protect' them." Scully pointed to the *Wal-Mart* decision, "where the Board found the protestors to be like 'strikers' without apparently considering the consequence that employers have the right to permanently replace economic strikers under settled law." Similarly, independent contractors "frequently" enjoy the freedom of that business relationship, he added, and are "disappointed" to be forced into the strictures of "employment."

## Best practices

In light of the 2017 transition, what are the best practices for employers? "Unless an employer consciously decides that it wants its case to be the vehicle by which the Trump-NLRB overrules an Obama-NLRB precedent, employers should continue to follow current NLRB decisions," Bloom and Rosen recommended. "However, an employer should consider the likely changes to come as it determines future strategy."

## 2017 forecast

**What can we expect at the NLRB in 2017?** "2017 promises the beginning of a slow reversal of the expansive trends of the last eight years," according to Scully. "It is largely expected that a Trump NLRB will reverse many of the decisions of the Obama NLRB." However, the NLRB cannot simply revisit decisions it has previously issued, he noted. The Board must await cases that reach the NLRB through the regular administrative process. "Thus, it may be many years before some of the NLRB's recent expansions are reversed," he explained. "While there has been some rumor of attempts to cut the funding of the NLRB, the Board is currently operating under a continuing resolution until April and no cuts appear imminent."

Scully also said that while the NLRB may soon have a Republican majority, the General Counsel will remain in office until fall 2017. It is reasonable to expect that General Counsel Griffin will attempt to rush consideration of pending cases, such as *McDonalds* and *Murphy Oil,* in an attempt to get decisions before the agency "turns over." "Thereafter, the slow unraveling of the Obama NLRB decisions will likely begin," Scully predicted.

Bourgeacq suggested that once the Board is back to five members with a Trump-appointed majority, we will see numerous decisions incrementally overturning the current Board's actions, particularly in the areas of union organizing, perhaps revisiting the "quickie election" rules, as well as joint employment, bargaining unit composition, strikes, union dues, and make-whole remedies. He also predicted there will be a pullback in the areas of social media and employee handbook decisions, which he described as "at best a solution searching for a nonexistent problem." Given the time it takes for decisions to wind up at the Board, however, Bourgeacq did not expect to see major reversals for a couple years. "The new general counsel, though, should be able to throttle…back on enforcement activity, providing some additional regulatory relief to employers," he said.

**Flip from pro-labor?** The answer to the 2017 question depends upon how quickly President Trump can nominate pro-business NLRB members and how quickly they can be confirmed and seated, according to Bloom and Rosen. "Until such time as that occurs, the NLRB, given its 2-1 pro-labor makeup, will continue to issue pro-labor decisions," they predicted. "Further, as

the chief prosecutor for the NLRB, the General Counsel decides which cases advance to be decided by the NLRB. The current General Counsel, Richard Griffin, is seen as pro-labor. His term does not expire until close to the end of 2017—in November. Thus, even if new Board members are confirmed before the end of his term, he will be able to control which cases they decide."

The Jackson Lewis attorneys also suggested that a fully constituted business-oriented NLRB may change the rules dealing with the conduct of representation elections—the "quickie election" rules—to make them less burdensome on employers. "We do not anticipate wholesale changes to the rules, particularly because the process is time-consuming and cumbersome, but it is reasonable to believe the NLRB may try to lighten the load on employers by giving them more time to file the required Statement of Position or eliminating the requirement altogether," Bloom and Rosen said. The NLRB also may take steps to lengthen the amount of time available to employers to communicate with their employees prior to a union election. "The NLRB may be able to accomplish this without amending the rules at all, but rather, by simply stepping back from its enforcement of them," the attorneys observed.

## About the Editor

Pamela Wolf is an attorney and legal analyst who tracks and analyzes labor and employment law issues, court decisions, legislation, and trends for *Employment Law Daily*. As a practicing attorney for 12 years, Wolf's experience includes litigation of employment and civil rights matters.