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# How the Trump Presidency May Impact Your Business

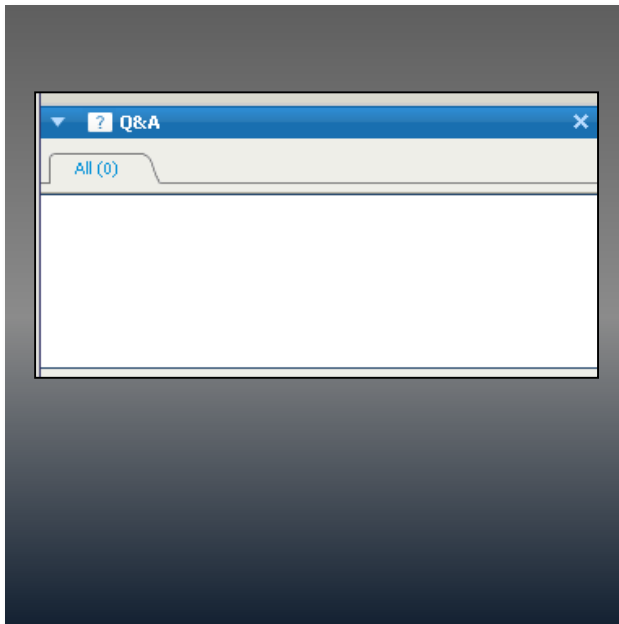
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# Webinar Logistics



- 45 minute presentation, followed by a 15 minute Q&A
- Attendees will remain muted during webinar
- Feel free to ask questions via the Q&A box at the right of the WebEx panel

# Wendy J. Mellk

## Jackson Lewis



- Wendy J. Mellk is a Principal in the New York City, New York, office of Jackson Lewis P.C. Since joining the firm in October 1996
- She has concentrated her practice in employment litigation and counseling employers on a full range of workplace issues including wage and hour compliance.
- Ms. Mellk's litigation practice includes the defense of employers in single and multi-plaintiff actions before state and federal courts, the American Arbitration Association and administrative agencies such as the EEOC and the New York State Division of Human Rights on claims of discrimination, sexual harassment, breach of contract, retaliation, violation of whistleblower protections and wage/hour laws, and wrongful discharge and related tort claims.
- Ms. Mellk advises employers on issues such as wage and hour, disability management, reductions in force, privacy in the workplace, terminations without litigation, restrictive covenants, best practice employment policies, hiring and separations, and performance management.
- She also conducts management training for employers on a wide variety of employment law topics. Ms. Mellk regularly is invited to lecture on the FLSA, ADA, FMLA, and Title VII and other employment-related issues.

# Laurian C. Rutterbush, Esq.

ePlace Solutions, Inc.



- EPL Practice Manager for ePlace Solutions, Inc., a risk management company currently providing HR services to over 30,000 companies throughout the USA
- As an attorney since 2005, Ms. Rutterbush has focused on labor and employment law
- Prior to joining ePlace in Solutions, Ms. Rutterbush was engaged in the practice of law with a large law firm with offices throughout California
- Ms. Rutterbush has litigated all types of employment claims and regularly provided counseling and advice regarding a wide array of employment issues including wage/hour problems, harassment and discrimination claims, and handling employee leaves of absence
- Active member of the bar in California

# Background

- On January 20, 2017, the U.S. will have a new President, and both houses of Congress will be led by Republican majorities.
- President-Elect Donald Trump has stated an intention to reverse or eliminate many of the Obama Administration's employee-friendly enforcement positions and rules.
- Some of these changes may be delayed while the new administration focuses on larger initiatives, such as trade, immigration and the ACA.

# Background (cont.)

- Mr. Trump has shown more populist tendencies than traditional Republican candidates. He already has expressed unexpected support for some worker-friendly ideas, such as paid maternity leave.
- Mr. Trump may be unlikely to forget the significant support he received from working class Americans, and may be inclined to reward these voters.
- But Mr. Trump's appointees so far hold traditionally conservative views on business, economic and workplace law issues.

# Background (cont.)

- This program provides a broad overview of the anticipated impact of Mr. Trump's presidency on labor and employment laws and rules in a multitude of areas.
- However, Mr. Trump's statements are not always consistent, and his plans are a moving target. New developments occur daily. The information presented here may change in the coming weeks and months.

# Introduction: Procedural Considerations

What steps are needed to change existing labor & employment laws, rules and guidance?

- **Executive Orders and Actions:** Can be rescinded immediately once Mr. Trump takes office
- **Agency Guidance and Opinion Letters:** Mr. Trump's political appointees, once in place, will direct staff priorities and enforcement positions. However, it takes time to get appointees in place, and OMB clearance is required for major guidance documents.
- **Regulations:** Rescission, modification or amendment requires notice and comment period



# Executive Orders and Actions

- Mr. Trump has announced an intention to rescind President Obama's Executive Orders and Actions.
- Many of these impose significant restrictions and reporting requirements on government contractors.
- For example, the Fair Pay and Safe Workplaces Executive Order, most of which was recently enjoined nationwide by a Texas District Court, is expected to disappear under President Trump if not invalidated permanently in litigation.

# Executive Orders and Actions (cont.)

- Experts disagree as to whether Mr. Trump will rescind President Obama's Executive Order requiring government contractors to provide seven days of paid sick leave per year to employees who work on or support government contracts.
- Given the electorate that supported him, Mr. Trump may look more kindly on initiatives that provide benefits to workers, even if they impose some burdens on businesses.

# Supreme Court Nominee

- Justice Antonin Scalia's seat remains open.
- Two more Justices – Ginsberg and Kennedy – are age 80 or older.
- Mr. Trump nominee can be expected to be conservative on business issues as well as individual rights.
- Nominee may be identified as early as January 11.
- Senate Minority Leader Schumer has indicated he will block President-elect Trump's nominee if he or she is not in the “mainstream.”

# Government Agencies - In General

- Under President Trump, agencies such as the DOL, EEOC, OFCCP, OSHA, and NLRB are expected to focus more on achieving employer compliance and less on novel and expansive theories of enforcement.
- Ongoing court challenges to some rules may be disposed of via settlements, or the government may decide not to continue to pursue appeals.

# Equal Employment Opportunity Commission

- Under President Obama, the EEOC utilized fairly aggressive local district office field staff to pursue large systemic cases.
- It fully deployed the disparate impact and accommodation doctrines to challenge otherwise neutral business practices.
- The EEOC's litigation efforts focused in some areas on expanding the letter of the law (e.g., LGBT issues, criminal background checks) and EEOC process issues (conciliation, subpoenas).
- As a result, litigation recoveries under President Obama dropped almost \$300 million compared to President George W. Bush's recoveries.

# Historically, Few Wide Swings at EEOC

- Well-entrenched field office staff with a dedicated passion for civil rights
- Backbone legal doctrines well accepted by courts
- Major changes risk being labeled “anti-civil rights”
- Republican Presidents signed laws expanding the EEOC’s power: Older Workers Benefit Protection Act, ADA, Civil Rights Act of 1991, ADA Amendments Act
- President George W. Bush EEOC began agency’s systemic initiative

# Timing and “Look” of New EEOC Leadership

- President Trump can nominate a new General Counsel and designate a Chair from among existing Commissioners on day 1.
- General Counsel appointment requires Senate hearing and approval.
- Commission is now 3 Democrats and 1 Republican.
- It will be several months before Republicans have majority.
- Possible page from Reagan EEOC playbook: focus on merits of each charge, not expanding investigation and close monitoring of field offices
- May not feel like a different EEOC until 2018

# EEOC Will Likely Still Pursue

- **Hostile Work Environment**
- **Religious Accommodation**
- **ADA Accommodation (especially if the employer did not engage in interactive process)**
- **Pregnancy discrimination and accommodation**
- **Large and small disparate treatment cases where statistical and anecdotal evidence support finding of discrimination.**



# Look for Possible Retrenchment

- Disparate impact claims challenging facially neutral business practices (e.g., criminal, credit background)
- Aggressive ADA and pregnancy accommodation theories that challenge common business practices (e.g., telecommuting)
- Pushing the law on LGBT issues
- Targeting perceived demons, e.g., release and arbitration agreements, employer vigilance on controlled substances, English only rules, wellness

# EEOC: EEO-1 Pay Data Reporting

- Final rules issued on September 29, 2016 revise the EEO-1 report to include W-2 earnings and work hours for some employers.
- These rules, which are scheduled to take effect in March, 2018, are intended to assist the EEOC in investigating compliance with equal pay laws.
- Employer groups raised serious concerns about the burdens associated with the new reporting.
- The new administration is likely to rescind the changes before first reporting is due in 2018, or may revise the reporting requirements to ease the burden on employers.

# National Labor Relations Board

- **The NLRB is on Mr. Trump's radar.**
- **Mr. Trump's businesses have historically been subject to NLRB litigation on both the representative side and the unfair labor practice side.**
- **The NLRB recently issued a ruling against the Trump International Hotel in Las Vegas, requiring it to recognize and bargain with a newly-elected union.**
- **Many business groups also want to see quick appointments to the NLRB because of recent perceived anti-business initiatives and expansion of worker's rights.**

# National Labor Relations Board (cont.)

- The NLRB is a five-member board. The members are appointed by the President for five-year terms and confirmed by the Senate. The Chairman of the NLRB is selected by the President, from the same political party.
- Under President Obama, the NLRB drastically changed existing policies and legal precedents for both unionized and non-union employers.
- There are two open seats on the Board right now, with a third scheduled to open next year.
- These open seats will be filled by Mr. Trump appointees, resulting instantly in a more business-oriented NLRB.

# National Labor Relations Board (cont.)

- Working with a Republican Senate, we expect Mr. Trump to have a Republican-controlled Board as soon as his appointees are confirmed by the Senate.
  - Philip A. Miscimarra, as the most senior Republican, will become Chairman.
  - No Democratic seats will open until August 2018; a Republican Senate would likely confirm more conservative-leaning Democrats.
  - However, the term of Richard Griffin, the current General Counsel, does not expire until November, 2017. Mr. Griffin intends to stay on through end of his term, and may continue to take more anti-business enforcement actions for the remainder of his term.

# National Labor Relations Board (cont.)

- This new board with a Republican majority will likely revisit numerous recent NLRB rules and decisions, including those involving:
  - Class action waivers (an issue on which the Supreme Court granted cert last week)
  - Joint employers
  - Inclusion of temporary workers in bargaining units with an employer's regular workers; and
  - Quickie election rule

# Murphy Oil, Ernst & Young, Epic Systems Cases: The Future of Class Action Waivers

- On January 13, 2017, the United States Supreme Court granted review to address the legality of class action waivers in arbitration agreements among employers and employees.
- Split in the Circuits regarding enforceability of class action waivers and whether they impermissibly infringe upon “protected concerted activity”
- Will the case be heard by a full 9 member Supreme Court? Will the NLRB abandon its position before a decision is rendered?

# National Labor Relations Board

- **This new board with a Republican majority will likely:**
  - **Stop expansion of protected concerted activity in areas such as social media, confidentiality and handbook policies;**
  - **Narrow the definition of appropriate bargaining units (NLRB now permits multiple, smaller units within a single facility); and**
  - **Limit college/university adjunct faculty, graduate students, and student athletes from being able to organize.**



# National Labor Relations Board (cont.)

- The new Board also is not likely to make additional changes the current Board would make, such as:
  - Extending Weingarten rights to non-union workplaces, and
  - Making misclassification of employees as independent contractors a separate violation of the National Labor Relations Act.
- Reversing Board decisions:
  - It will take time for cases to filter through the appeals process and be heard by the more conservative Trump board
  - Mr. Trump also may work with Congress to pass legislation to reverse several NLRB decisions from recent years to expedite this change in the law, such as joint employment

# Department of Labor

- Under Mr. Trump, the DOL is expected to be more business-friendly, and to shift its focus to achieving compliance rather than aggressive enforcement.
- The DOL is expected to permit employers greater flexibility in using independent contractors, for example, and provide businesses with more certainty in expanding through use of franchises.

# Department of Labor: Labor Secretary

- Mr. Trump has selected Andrew Puzder, CEO of CKE Restaurants (Carl's Jr., Hardees) as his nominee.
  - Critic of \$15/hour minimum wage
  - Has voiced opposition to new overtime rule
  - Praised by supporters as a job creator
- Senate confirmation hearing tentatively was set for January 12<sup>th</sup>, then 17<sup>th</sup>; now is likely to be postponed until February.

# Department of Labor: Overtime

- A Texas District Court issued a nationwide preliminary injunction enjoining the DOL from implementing and enforcing its final overtime rule.
- The rule, which was scheduled to take effect on December 1, 2016, would have increased minimum salary levels required for an employee to achieve exempt status under the FLSA, with automatic increases thereafter.
- The decision has been appealed to the Fifth Circuit Court of Appeals.

# Department of Labor: Overtime (cont.)

- Since the DOL first announced its proposed rule, various bills have been introduced in Congress to block, delay, or slow the salary level increases in the Rule.
- While President Obama would have vetoed these bills if passed, President Trump might sign such a law. Such legislation might moot the Texas lawsuit.
- In addition, once he takes office, Mr. Trump could direct the DOL to abandon its appeal.
- Third, under a Trump Administration, the DOL might rescind the Final Rule, but would need to follow the Administrative Procedure Act, which will take time.

# DOL Opinion Letters

- Under President Obama, the DOL discontinued its longstanding practice of issuing opinion letters signed by the Administrator of the Wage and Hour Division, choosing instead to issue less frequent “Administrator Interpretations” with wider applicability and scope, but less specificity.
- Once Mr. Trump takes office, the practice of issuing official opinion letters regarding application of the FLSA and FMLA may be restored.
- Under a Trump Administration, new opinion letters may scale back or reverse Administrator Interpretations under President Obama.

# DOL Opinion Letters (cont.)

- Two significant Administrator Interpretations have been issued in the past two years – one concerning “joint employment” and the other addressing independent contractor status under the FLSA.
- Both have been viewed by business as clear efforts to expand the rights of workers under the law and place additional burdens on employers.

# Pay Equity

- Mr. Trump has said he supports equal pay for women, and Mr. Trump's daughter Ivanka is a big equal pay advocate
- Greater momentum at state/local level to enact new/expanded equal pay laws
  - California Fair Pay Act – amended in 2016 to include race and ethnicity; cannot use salary history alone to justify pay differences
- Multi-state employers face challenge of operating under patchwork of differing sets of laws
- Growing international obligations
  - UK – compulsory gender pay reporting by April 2018



# DOL Fiduciary Rule

- The DOL's fiduciary rule concerning the expanded definition of who is considered a fiduciary under ERISA and the Internal Revenue Code has an effective date of April 10, 2017. The rule also addresses certain exemptions for conflicts of interest.
- The new administration will likely scale back the increased scrutiny with its financial initiatives and, more generally, “unnecessary” regulations.

# ACA and Health Care

- We do not know how quickly the new administration might dismantle or replace the Affordable Care Act (ACA).
- On January 3, 2017, a concurrent budget resolution was introduced in the Senate to begin the process of repealing the ACA. The resolution establishes a “reserve fund for health legislation.”
- It remains unclear what the repeal will look like – will certain aspects of the law remain, will the repeal have a delayed effective date? A two- to four-year delay has been suggested to allow for a transition.

# ACA and Health Care (cont.)

- President Obama is currently lobbying Congress and Democrats to save the ACA.
- Repeal has raised concerns about disruptions in coverage for many Americans and destabilization of the insurance market.
- It is predicted that legislation will leave the most popular provisions of the ACA in place, including prohibitions on pre-existing conditions, and coverage of adult children to age 26.

# ACA and Health Care (cont.)

- It is expected that the legislation will eliminate the individual and employer mandate (and associated tax penalties), repeal subsidies for Marketplace coverage and many other taxes and penalties provided for under the ACA.
- Immediate executive actions on health care are expected to undo administrative policies and stabilize insurance markets. Some predict financial assistance will be provided in some form to insurance companies to protect individuals from escalating premiums.

# ACA and Health Care (cont.)

- Even less clear is what a replacement will look like as there are many competing ideas within the Republican party.
- Replacement legislation may include incentives for greater use of personal health savings accounts, association health plans, consumer tax credits and encouragement for insurance carriers to sell insurance across state lines.

# ACA and Health Care (cont.)

- For now, employers should continue to comply with the ACA and delay changing any of their group health plans until more guidance is provided.
- The House of Representatives has asked the D.C. Circuit to stay the Obama Administration's appeal of a ruling by District Court Judge Rosemary Collyer last May invalidating portions of the ACA until February 21, 2017, because actions by the Trump Administration to amend, repeal or replace the ACA may moot the case.

# Sarbanes-Oxley Act and Dodd-Frank Act

- During the campaign, Mr. Trump criticized the Dodd-Frank Act as making it more difficult for banks to lend money to businesses, thereby hampering job creation.
- A repeal of the DFA might encourage Congress and the SEC to rely more heavily on the Sarbanes-Oxley Act whistleblower provisions.
- This may require corporate compliance programs, as developed by publicly traded companies, to be increasingly robust, providing for greater “self-regulation.”
- SEC enforcement actions regarding confidentiality agreements likely will decrease.

# Post-Employment Restrictions

- The new administration is unlikely to continue recent White House initiatives to prohibit non-compete agreements, arising from an April, 2016 executive order directing agencies to increase competition for consumers and workers.
- The “Antitrust Guidance for Human Resource Professionals” issued by the Department of Justice and Federal Trade Commission is not likely to continue as a priority for the new administration. This guidance threatened criminal prosecution of human resource professionals who enter into “naked” no-poach agreements.
- White House “Call to Action” suggesting that states enact legislative reforms to reduce the use of non-compete agreements is unlikely to garner support in a Trump Administration.



# Response by States and Localities

- Some states and localities may “step up” to increase worker protections if the Trump Administration is, or is perceived to be, insufficiently worker-friendly.
- Areas of possible state and local activity include:
  - Minimum wage and overtime
  - Paid sick leave and other paid leaves
  - LBGT rights; and
  - Criminal background checks and credit checks

# Response by States and Localities (cont.)

- **Non-competes:** State legislatures still may respond to the Obama Administration’s “Call to Action” regarding post-employment restrictive covenants, and introduce measures to curb the use of non-compete agreements.
- **“Sanctuary Cities”** may proliferate in order to provide protection to individuals who have entered or remain in the U.S. illegally.
- **Federal legislation** may ultimately supersede state and local laws in some of these areas.

# Questions & Answers

Call us at 800-387-4468



# Thank You for Attending!

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