

# Changes and Challenges for Employers in the Trump Era

**SC Bar CLE**

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NEXT CHALLENGE. NEXT LEVEL.

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# Overview

- **New personnel**
- **New priorities**
- **New policies**
- **DOL**
- **WHD**
- **OSHA**
- **NLRB**
- **EEOC**

# Secretary of Labor



- **Alexander Acosta confirmed April 27, 2017**
- **Son of Cuban immigrants**
- **Graduated from Harvard College and Law School**
- **Clerked for then-Third Circuit Judge Samuel Alito**

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# Secretary of Labor

- **Practiced ELL in Washington office of Kirkland & Ellis**
- **Public service:**
  - **NLRB member**
  - **Assistant AG for DOJ's Civil Rights Division**
  - **U.S. Attorney for Southern District of Florida**
- **Dean of Florida International University's law school**

# Secretary of Labor

- **Getting ready to name deputies**
  - Administrator of Wage and Hour Division, Assistant Secretary for OSHA, Deputy Secretary, Solicitor of Labor, etc.
- **Will decide whether to continue Fifth Circuit appeal in *Nevada v. DOL***
  - Granted preliminary injunction blocking 2016 OT rule
  - Rule would double salary threshold for white-collar exemptions and automatically update amount every three years

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# *Nevada v. DOL*

***Nevada v. DOL*, E.D. Tex., No. 4:16-cv-00731-ALM**

- **Assigned to District Judge Amos Mazzant, Obama appointee**
- **Consolidated with case filed by U.S. Chamber of Commerce and other business groups**
- **Plaintiffs' arguments:**
  - **New rule departs from Congressional intent in FLSA to establish duties test**
  - **FLSA does not allow DOL to automatically update salary threshold**
- **DOL arguments:**
  - **Salary basis test has been part of FLSA OT rules since 1940**
  - **New rules were result of comprehensive rule-making process that complied with law**

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# *Nevada v. DOL*

- **Granted nationwide preliminary injunction on November 22, 2016**
  - “Congress intended the EAP exemption to depend on an employee’s duties rather than an employee’s salary.”
  - Footnote: Ruling “is not making a general statement of the lawfulness of the salary-level test for the EAP exemption.”
  - Left open possibility that salary at lower level may be factor in determining whether employee is exempt
- **Two pending motions**
  - Plaintiffs’ motion for SJ
  - Texas AFL-CIO has moved to intervene

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# *Nevada v. DOL*

***Nevada v. DOL*, 5th Cir., No. 16-41606**

- **Appeal filed on December 1, 2016**
- **Obama DOL's motion to expedite granted**
- **Trump DOL's motions for additional time to file reply brief granted until June 30, 2017**
- **Oral argument to follow**



# Options on New OT Rule

## Options for administration on new OT rule

- **Continue fight for new regulations in court**
- **Withdraw appeal and let old rules remain in place**
  - **But AFL-CIO will try to continue appeal**
- **Go back to drawing board and issue revised rule**
  - **Increase salary level, but by lower amount**
    - **Would satisfy administration's desire to be pro-business and promote worker rights at same time**
  - **Would involve going through rule-making process again**

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# Administrator Interpretations

**New WHD Administrator may withdraw Obama-era Administrator Interpretations**

- **Sought to narrow when workers may be treated as independent contractors (No. 2015-1)**
- **And expand when businesses may be held liable as joint employers (No. 2016-1)**

**But employers still have to worry about**

- **More stringent standards from courts and states**
- **Plaintiff's bar will keep filing cases**

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# Did Fourth Circuit Go Beyond AI on FLSA Joint Employment?

*Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017)

- Set out new broad joint employment test
- Courts must determine whether alleged joint employers are not “completely disassociated” with respect to employment of particular employee
- If they’re not, they’re joint employers
- Set out six factors to consider
- Bad facts

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# Employers' W&H Wish List

**Wish list for Congress and/or administration to reform wage and hour law**

- **Allow “comp time” in private sector**
  - Working Families Flexibility Act passed House 229-197 on May 3, 2017
  - Would enable nonunionized private employers to offer option of accruing up to 160 hours of comp time
  - Does not appear to have filibuster-proof support in Senate
- **Establish clearer rules for de minimis time**
- **Clarify donning and doffing rules**
- **Reform how travel time is counted**
- **Make fluctuating workweek method easier to apply**
- **Allow class/collective action waivers**
- **Limit attorney’s fees**

# OSHA

**Likely reversal of Obama-era priorities, including:**

- **Expanded joint employer doctrine**
- **Relaxed standard of proof in whistleblower cases**
- **Treating restroom access for transgender employees as safety issue**

**Likely reversal of Obama-era tactics, including:**

- **“Name and shame” initiative**

# Electronic Recordkeeping Rule

**Revised 29 C.F.R. Part 1904 on recordkeeping for injuries and illnesses**

- **Requirements**
  - **Annual submission of injury and illness data to OSHA through new website to be made public (but new website hasn't been finished yet)**
    - **Sites with 250+ employees:**
      - **Form 300A as of July 1, 2017**
      - **Forms 300, 300A, and 301 starting in 2018**
    - **Sites with 20-249 employees in “high hazard” industries:**
      - **Form 300A as of July 1, 2017 and annually thereafter**

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# Electronic Recordkeeping Rule

- **“Reasonable procedure” for reporting work-related injuries and illnesses that is not retaliatory**
  - **Preamble:**
    - **No blanket post-accident drug testing—only if:**
      - » **Drugs/alcohol were likely contributor**
      - » **Test can identify impairment at time of accident**
      - » **Isn’t perceived as punitive or embarrassing**
    - **No incentive plan where bonus is based on low number of incidents as opposed to leading indicators like breach of policy**

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# Electronic Recordkeeping Rule

- **Status**
  - **Recordkeeping requirement went into effect January 1, 2017 and anti-retaliation requirement went into effect December 1, 2016**
    - **But not in SC and some other states with state OSHA plans**
  - **Likely to be cut back by new administration**
    - **Getting rid of rule would require OSHA to reopen rulemaking record**
    - **In meantime, may not fund technology needed for recordkeeping requirement or may issue different guidance on anti-retaliation**

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# Electronic Recordkeeping Rule

- **Anti-retaliation provisions being challenged in court**
  - ***Texo ABC/AGC, Inc. v. Perez*, N.D. Tex., No. 3:16-cv-01998-D**
  - **On November 28, 2016, court denied preliminary injunction, but litigation on merits continues**
  - **On February 27, 2017, AFL-CIO and others moved to intervene in case Trump Administration abandons defense of these provisions**

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# New Penalty Structure

**Recent increase in penalties for citations may be rolled back**

- **In 2015 Congress passed legislation requiring federal agencies to adjust civil penalties for inflation**
  - **But did not amend OSH Act, which specifies maximum fines for OSHA violations**
- **In 2016 and 2017 federal OSHA hiked fines for other-than-serious and serious citations to \$12,471, and for willful or repeat citations to over \$124,709 per citation**
- **SC and some other states with state plans have not yet increased penalties**

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# NLRB Chair



- **Acting Chair Philip Miscimarra named Chair on April 24, 2017**
- **First sworn in as Member on August 7, 2013 for term that expires on December 16, 2017**
- **Earned joint JD/MBA from University of Pennsylvania Law School and Wharton Business School**
- **Practiced ELL with Chicago offices of Morgan Lewis and Seyfarth Shaw**
- **Also taught at Wharton and co-authored three books**

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# NLRB



## Current composition

- Philip Miscimarra (R)
- Mark Gaston Pearce (D)
- Lauren McFeeran (D)
- Vacant
- Vacant

**Term of General Counsel Richard Griffin expires in November 2017**

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# Expected Nominees

Daily Labor Report®

May 10, 2017

Bloomberg  
BNA

NLRB

## Trump to Nominate Kaplan, Emanuel for Key Labor Board Spots

By [Josh Eidelson](#), [Chris Opfer](#) and [Ben Penn](#)

The Trump Administration has submitted attorneys Marvin Kaplan and William Emanuel for FBI background checks and plans to nominate them by June to fill the two vacant slots on the National Labor Relations Board, sources briefed on White House plans told Bloomberg May 10.

The administration hopes to have the new members confirmed by the Senate before the August recess, the sources said. Business lobbyists and other stakeholders have been prodding the White House to fill the seats, a move they say will help to peel back various Obama administration labor initiatives.

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# New Approach Coming



## Acting Chair Wants NLRB Handbook Rule Standard Eliminated

By [Vin Gurrieri](#)

Law360, New York (February 27, 2017, 5:26 PM EST) -- The National Labor Relations Board ruled Friday that [Verizon Wireless Inc.](#) maintained numerous handbook rules that were too restrictive on employee communications and behavior, over a dissent from acting chair Philip Miscimarra that said the standard used by the board to evaluate handbook rules should be scrapped.

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# Controversial Decisions

**Expect recent controversial decisions to be re-examined and hopefully reversed**

- ***Browning-Ferris*, 362 NLRB No. 186 (2015), broadened joint employer standard**
- ***Specialty Healthcare*, 357 NLRB No. 83 (2011), opened door for “micro-unions”**
- **Many decisions struck down handbook policies, social media rules, and confidentiality agreement provisions that allegedly “chilled” protected activity**

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# Will Take Time

## But it will take time

- **Vacant seats on Board need to be filled and GC needs to be replaced when term expires**
- **Cases need to work way through NLRB procedures**
- **Regional Directors and other personnel likely to remain union-friendly**

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# Will Take Time

**Also, revising controversial rules adopted under Board's rulemaking authority will take time**

- **Revisions must be made through same process**
- **For example, Amended Representation Election Rules, a/k/a “ambush” or “quickie” election rules, that took effect in May 2015**

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# New EEOC Acting Chair



- **Victoria Lipnic named Acting Chair on January 25, 2017**
- **Has served on Commission since 2010**
- **Was previously Assistant Secretary in DOL for Employment Standards, overseeing WHD and OFCCP, among other government jobs**
- **Before that was in private practice with Seyfarth Shaw in Washington**

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# EEOC



## Current composition

- **Victoria Lipnic (R)**
- **Chai Feldblum (D)**
- **Jenny Yang (D)**
- **Charlotte Burrows (D)**
- **Vacant**

**General Counsel position is vacant**

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# New Priorities



April 3, 2017

## EEOC Acting Chair Lipnic Skeptical About Pay Data Plan

*By Kevin McGowan*

EEOC Acting Chair Victoria Lipnic (R) supports the agency's systemic case approach and won't change its advocacy for federal protections for LGBT workers. But she remains skeptical about the agency's plan to require employers to submit their summary pay data.

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# EEO-1 Report

- **Supposed to be used for 2017 reports, which must be filed by March 31, 2018**
- **Adds “W-2 earnings” and “work hours” for all employees**
- **Reported by race and gender in 12 pay bands in 10 categories**
- **Would make it easier for EEOC to investigate pay discrimination cases**

# Federal Contractors

**On March 27, 2017 President Trump signed bill blocking enforcement of Executive Order 13673 on “Fair Pay and Safe Workplaces,” a/k/a blacklisting rule**

- Required government contractors to disclose alleged violations of 14 federal laws, including ULP charges**
- Had previously been temporarily blocked by court order**

# Federal Contractors

**President Trump has said will continue to enforce President Obama's Executive Order 13672 on "Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government ...," a/k/a LGBT order**

- **Prohibits sexual orientation and gender identity discrimination**

# State and Local Governments

**Some state and local governments may react to federal developments by passing laws and ordinances that increase employee protections, for example:**

- **Criminal background checks**
- **Minimum wage**
- **Paid sick leave**
- **Paid parental/family leave**
- **Pay equity**



# Questions or Comments

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