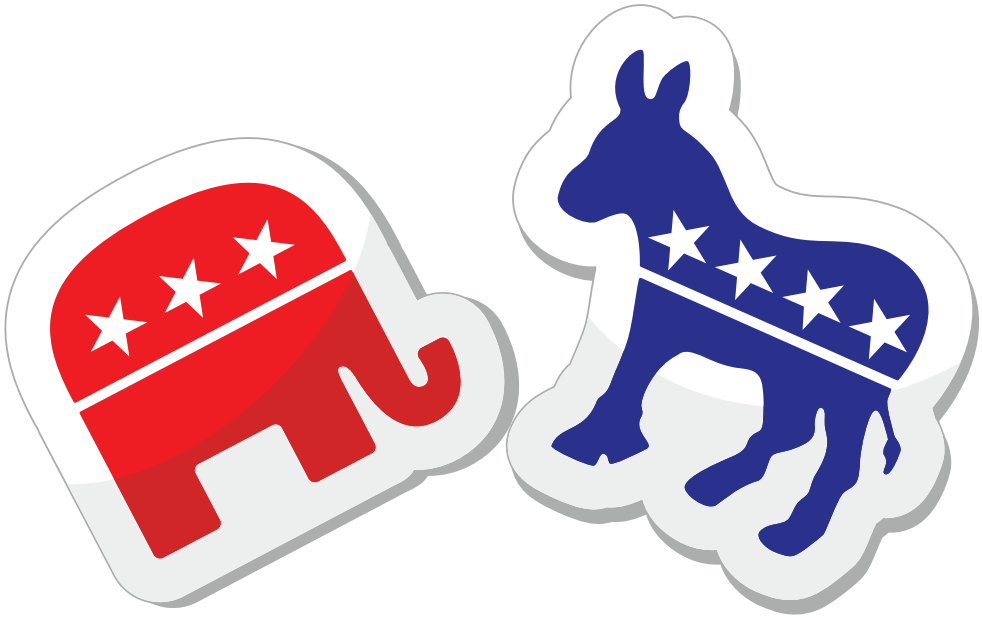

RED OR BLUE

WHAT THE PRESIDENTIAL ELECTION COULD MEAN FOR DEVELOPING EMPLOYMENT AND LABOR LAW ISSUES

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As we head into the presidential election season, our thoughts turn to what a Republican or Democrat in the White House might mean for employers. On issues from the federal minimum wage to overtime eligibility and paid family leave, the two parties' differing stances could have broad implications for business owners and human resources professionals.

The following is an examination of how employment law may be affected by either a Donald J. Trump or Hillary Rodham Clinton presidency.

MINIMUM WAGE AND OVERTIME ELIGIBILITY

Since 2009, the federal statutory minimum wage, as set by the Fair Labor Standards Act ("FLSA"), has been $7.25 for covered non-exempt employees. With wages stagnating in many sectors, the minimum wage has taken on a prominent role this election year.

The official campaign website for Secretary Clinton states that "[s]he has supported raising the federal minimum wage to $12, and believes that we should go further than the federal minimum through state and local efforts, and workers organizing and bargaining for higher wages, such as the Fight for $15 and recent efforts in Los Angeles and New York to raise their minimum wage to $15."

During a November 2015 debate, Mr. Trump voiced opposition to raising the minimum wage, "Taxes too high, wages too high, we're not going to be able to compete against the world. I hate to say it, but we have to leave it the way it is. People have to go out, they have to work really hard and they have to get into that upper stratum. But we cannot do this if we are going to compete with the rest of the world." However, in a May 2016 interview, Mr. Trump told the host of NBC's "Meet the Press," Chuck Todd, "I don't know how people make it on $7.25 an hour," but "with that being said, I would like to see an increase of some magnitude. But I'd rather leave it to the states. Let the states decide."

Increases in the federal minimum wage have historically occurred in small increments, most recently to $5.85 in July 2007, $6.55 in July 2008 and to the present rate of $7.25 in July 2009. Thus, an increase in the federal minimum wage to $15 per hour would vastly expand the scope of potential liability for employers.

Similarly, the presidential election is likely to have a significant impact on overtime eligibility. On May 18, the Department of Labor ("DOL") announced the publication of its much-anticipated new overtime regulations. The new rule, which goes into effect December 1, substantially increases the minimum salary threshold above which covered employers may classify certain "white collar" workers as exempt from overtime pay requirements. This change raises the salary level from its previous amount of $455 per week (the equivalent of $23,660 per year) to a new level of $913 per week (or $47,476 per year).

Salaried white-collar employees paid below the new salary level will generally be entitled to overtime pay, while employees paid at or above the new level may be exempt from overtime pay if they primarily perform certain duties. As more employees are no longer exempt from overtime pay, the new overtime rule is likely to impose significant

regulatory compliance costs on employers.

On the same day the new overtime regulations were announced, Secretary Clinton released a statement in part: "I applaud President Obama and Secretary of Labor Perez for these final overtime rules, which will lift up workers nationwide and help get incomes rising again for working families. Within the first year these rules are in effect, millions more workers will be eligible for overtime, finally getting paid in full for the hours they are putting in on the job."

While Mr. Trump has not taken a position on the new overtime regulations, congressional Republicans have introduced legislation to nullify the new regulations. However, because any legislative measure would be subject to a presidential veto process, whether the next administration is led by a Republican or Democrat may determine the continued viability of the new overtime regulations (separate and apart from any legal challenges). Further, because the new overtime rules were enacted by an executive agency rather than through congressional action, a Republican administration could propose a rule eliminating the new overtime regulations, though it is more likely that a Republican administration would propose a rule eliminating only the provision which automatically updates the salary and compensation levels every three years.

PAID FAMILY LEAVE

Secretary Clinton has made the guarantee of paid family and medical leave a cornerstone of her campaign. While the Family and Medical Leave Act requires covered employers to provide employees job-protected and unpaid leave for qualified medical and family reasons, there is no federal law mandating paid leave. Secretary Clinton supports legislation guaranteeing up to 12 weeks of paid family leave and an additional 12 weeks of paid medical leave.

Mr. Trump has remained vague regarding paid family leave, stating in an interview on October 2015: "Well it's something being discussed. I think we have to keep our country very competitive, so you have to be careful of it. But certainly there are a lot of people discussing it."

Because there is no federal mandate for paid family leave, states will likely serve as laboratories for such legislation. Earlier this year, New York became the fourth state to pass legislation that provides partial pay to employees on family or medical leave, joining California, Rhode Island and New Jersey. In each of these four states, the paid family leave program is financed through payroll taxes that support existing temporary disability programs. Neither the California nor New Jersey law provides job protection for workers who take advantage of the program, but the Rhode Island law and the recently passed New York version do protect workers who take time off under the law from job loss or retaliation.

EEOC ENFORCEMENT

During President Obama's second term, the Equal Employment Opportunity Commission ("EEOC") has aggressively pursued alleged discriminatory employment practices on multiple fronts, including LGBT and transgender protections, criminal background checks and wellness programs. This EEOC activity has been in part a response to the Supreme Court's 2011 decision, *Wal-Mart v. Dukes*, which clarified the standards for class-action certification under Federal Rule of Civil Procedure 23. EEOC actions which seek class-wide remedies are not subject to Rule 23.

The EEOC enforcement priorities have met with some resistance by the courts. On May 19, the Supreme Court issued a decision in *CRST Van Expedited, Inc. v. EEOC*, which expanded when employers may recoup attorneys' fees in litigation against the EEOC. In 2015, in *EEOC v. Freeman*, the Fourth Circuit Court of Appeals, questioning the EEOC's expert testimony, affirmed the dismissal of a nationwide pattern or practice lawsuit alleging that an employer's reliance on credit and criminal background checks posed an unlawful disparate impact on minorities.

While Mr. Trump has not taken a position on EEOC enforcement priorities, a future Republican administration would likely initiate a rollback of President Obama's initiatives. By contrast, Secretary Clinton will also likely continue to rely on the EEOC as a governmental mechanism to combat alleged discrimination in the workplace.

THE FISSURED WORKPLACE: JOINT EMPLOYMENT AND INDEPENDENT CONTRACTORS

A topic gaining less attention, but which could have a significant impact on businesses going forward, is the federal government's response to continued changes in many industries to the traditional single employer-employee relationship.

For most of the 20th century, in the typical scenario, a single employer directly employed the people responsible for its products and thus the identity of the employer for regulatory purposes was relatively simple. Under the long-established "joint employer" doctrine, if two or more employers exercised control over an employee, they were considered joint employers under the FLSA and therefore could be held jointly and severally liable for unpaid wages and penalties.

In recent years, however, more and more businesses are experimenting with varying organizational and staffing models such as spinning off functions that were once managed internally to third-party subcontractors, vendors and franchises. David Weil, the current administrator of the Wage and Hour Division ("WHD") of the DOL, has been a vocal critic of the so-called "fissured workplace," which he has claimed makes enforcement of the FLSA more difficult.

On January 20, the WHD issued nonbinding guidance that aims to dramatically expand the scope of the "joint employer" doctrine to focus on the "economic realities" and interdependence of the alleged joint employers, rather than the degree of control the entities exercise over the relevant workers. The new guidance coincides with a decision by the National Labor Relations Board which took an expansive view of the joint employment and the NLRB's efforts to hold franchisors liable for the alleged unfair labor practices of its franchisees.

These are indeed uncertain times for employers. However, given the rapidly changing legal landscape in recent years, what is certain is that the outcome of this year's presidential election will mark an inflection point for how employers and businesses adapt going forward.

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