



What's Next:
*Potential Wage and Hour Changes
Under a Trump Presidency*

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**WHAT'S NEXT:
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By: Brian E. McMath

I. INTRODUCTION

While various media outlets and Facebook friends may disagree, Donald Trump will, in all likelihood, be sworn in as the 45th president of the United States in January 2017. Mr. Trump has stated publicly that he plans to make sweeping changes to a number of executive agencies, including the Department of Labor (“DOL”). This article will attempt to prognosticate as to what those changes will likely be as they relate to current wage and hour laws. Please note that very little is known about Mr. Trump’s actual plans as they pertain to the DOL or its Wage and Hour Division (“WHD”), so this information represents nothing more than a best guess.

Outgoing Secretary of Labor Tom Perez is likely best-known for spearheading efforts to pass far-reaching regulatory changes during his tenure and championing state-level increases in minimum wage. The best-known of these efforts is the new overtime rule, which was recently put on hold by a federal judge (see below). According to Mr. Perez, these efforts were a response to what he considered a non-functional Congress. According to several federal courts, some of those efforts amounted to overreaching by the executive branch of the government (i.e. the recent nationwide injunction preventing implementation of the overtime rule issued by a federal court in Texas).

As of the date of this writing, Mr. Trump has yet to formally nominate a Secretary of Labor. However, according to Lou Barletta (R-Pa.), he and Mr. Trump have discussed the possibility of Mr. Barletta serving as Secretary of Labor. Mr. Barletta, a congressman and former mayor, has been a vocal opponent of the Obama administration’s new overtime rule and backed efforts to both repeal the rule and to delay its implementation.

II. OVERVIEW OF POSSIBLE CHANGES

a. The New Overtime Rule and the *Nevada* case

On November 22, 2016, a federal judge in Texas issued a nationwide injunction preventing the DOL's new overtime rule from taking effect while the rule's validity is being challenged in that court. *See State of Nevada et al. v. United States Department of Labor et al.*, No. 4:16-CV-00731-ALM, Doc. 60 (E.D. Tex. 2016) (mem. op.). Thus, the new rule will not take effect on December 1, 2016, and employers nationwide are under no legal obligation to comply with the new rule which would have doubled the minimum salary level for exempt employees from \$455 per week to \$913 per week and put in place an automatic adjustment to that salary level every three years. On Thursday December 2, the DOL informed the *Nevada* court that it will appeal the court's injunction to the Fifth Circuit, however that appeal will likely not be decided before Mr. Trump takes office. Once Mr. Trump is sworn in, he need only instruct his new Secretary of Labor to drop the appeal, and the injunction will remain in place. Since the new administration will likely not continue to defend the rule in court, the rule is likely dead for the foreseeable future. The current overtime salary rule, which will continue to remain in place for the time being, is located at 29 CFR § 541.600.

Once in office, the new administration may seek to initiate a rulemaking to replace the now-defunct overtime rule with something else entirely. Mr. Trump has indicated that he would support the idea of including a "small business exception" to prevent businesses below a certain size from having to comply with the overtime rule. Moreover, Mr. Trump has not yet stated explicitly that he would abandon the new overtime rule when he takes office in January. Various opponents of the new overtime rule have criticized the rule's drastic increase in the salary threshold, meaning that a rule with a smaller increase might be met with less resistance. Of

course, the new administration may also simply leave the old rule in place and abandon the effort entirely.

b. Federal Minimum Wage

The current federal minimum wage, in place since July 2009, is \$7.25. While Mr. Trump has expressed opposition to the idea of a federal minimum wage in general, his chances of repealing it are slim. The more likely scenario is that the federal minimum wage will remain unchanged for the duration of his presidency.

This will not affect state and municipal efforts to raise minimum wages locally, however. In 2016 alone, California, Arizona, Oregon, Colorado, Maine, Washington, New York City, and Washington, D.C. all passed laws increasing their minimum wage. Albuquerque is scheduled to increase its minimum wage to \$8.80 beginning January 2017 (or \$7.80 if the employer provides healthcare and/or childcare benefits which cost the employer more than \$2,500 annually). Santa Fe's minimum wage was increased in March of this year to \$10.91. Such local efforts will likely continue, and may in fact accelerate in the face of limited support at the federal level.

c. Administrator's Interpretation – Independent Contractors

On July 15, 2015, current Wage and Hour Division (“WHD”) Administrator David Weil issued Administrator's Interpretation No. 2015-1. The Interpretation lays out WHD's position that the so-called “economic realities test”¹ should be applied when determining if a worker is properly classified as an independent contractor under the Fair Labor Standards Act (“FLSA”), the Family and Medical Leave Act (“FMLA”), and the Migrant and Seasonal Agricultural

¹ The factors included in this test are (1) is the work an integral part of the employer's business, (2) does the worker's managerial skill affect the worker's opportunity for profit or loss, (3) how does the worker's relative investment compare to the employer's investment, (4) does the work performed require special skill and initiative; (5) is the relationship between the worker and the employer permanent or indefinite, and (6) what is the nature and degree of the employer's control.

Worker Protection Act (“MSPA”).² The Interpretation stresses that if a worker is economically dependent upon an employer, the worker will typically be regarded as an employee and thus will be entitled to the protections of those federal laws. However, as an Administrator’s Interpretation, this guidance document can be amended, modified, repudiated, or replaced by the incoming WHD Administrator. While the incoming WHD Administrator may not unilaterally change the statutory language of the FLSA, he or she has latitude in determining how WHD will interpret that language.

d. DOL Enforcement Actions

Under Secretary Perez’s leadership, the DOL has become much more active in investigating, auditing, and bringing enforcement actions against employers in recent years. If the new administration takes a more “hands-off” approach (which seems likely), employers will likely see a drop in enforcement actions brought by DOL. While the number of complaints the DOL receives probably will not change significantly, the DOL has latitude in deciding whether to bring an action against an employer based on those complaints. If the incoming administration dictates a more stringent standard for bringing enforcement actions, fewer complaints will trigger corresponding actions. The DOL also has a finite budget allocated for enforcement; a budget set by Congress. If the Republican-dominated Congress strips DOL of its enforcement budget with the president’s blessing, the reduction in such enforcement actions may be precipitous.

Please note, however, that employees still have the statutory ability to sue employers for wage violations privately, so employees will continue to have that avenue available to them.

² New Mexico state law applies a different three-factor test, which asks (1) if the individual has been and will continue to be free from control or direction over the performance of the services both under the individual’s contract of service and in fact, (2) if the service is either outside the usual course of business for which the service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed, and (3) if the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the contract of service. *See* NMSA 1978 § 51-1-42(F)(5)(a)-(c).

e. State-Level Laws and Regulations

In general, it seems likely that the incoming administration will attempt to rein in the DOL, resulting in fewer audits, fewer rulemakings, fewer guidance documents, and a lower budget. However, these changes will have little effect on existing New Mexico employment laws and regulations, except for those tied to federal laws and regulations. *See, e.g.* NMSA 1978 § 50-4-22(D) (citing FLSA and federal minimum wage requirements).

III. CONCLUSION

If Mr. Trump adheres to his campaign rhetoric as president, employers can expect fewer regulations, fewer federal wage enforcement actions, and less involvement by the DOL. The new overtime rule is likely dead, and the new WHD Administrator may alter that division's interpretation of what it means to be an independent contractor under federal law. However, employers are still bound by applicable state wage and hour laws, which are unlikely to change simply as a result of Mr. Trump taking office.

