

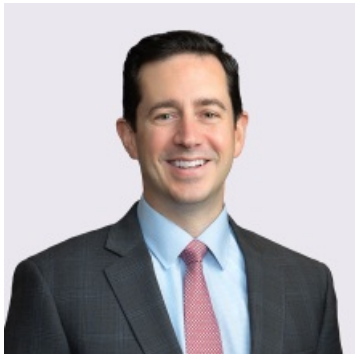
Podcast

Post-Election Insights: What the Second Trump Administration Means for Your Business

By Christopher M. Valentino & Ana C. Shields

November 13, 2024

Meet the Authors

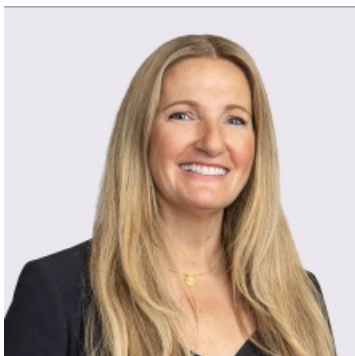


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Details

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Transcript

INTRO

As a second Trump administration prepares to take office in January 2025, Washington, D.C., is again at the epicenter of significant political shifts that will impact workplace law and likely impact your organization.

On this episode of We get work™, we discuss what employers can expect at the federal and state level. From immediate adjustments to long-term strategies, we cover nine key considerations, including the new administration's regulatory approaches, labor law and the makeup of the NLRB, DEI initiatives, EEOC guidelines, immigration programs, pay equity claims, paid leave policies, restrictive covenants agreements, and wage and hour regulations.

Our hosts today are Ana Shields, office managing principal, and Chris Valentino, principal, resident in the Long Island office of Jackson Lewis.

Ana and Chris, the question on everyone's mind today is, given Donald J. Trump's election to become the 47th U.S. president, what changes in workplace law should employers anticipate—and prepare for—and how does that impact my business?[]

CONTENT

Christopher M. Valentino

Principal

Ana, it is really great to be with you and talk about this topic.

Ana C. Shields

Office Managing Principal, Long Island; Financial Services Leader

Likewise.

Valentino

We are in that traditional every-four-years upheaval in the world of labor and employment law. I don't know about you, but I sort of always think about the change in Washington as like that pendulum, right?

Shields

Yes.

Valentino

But, the pendulum is absolutely swinging again. And over the next couple of weeks, people who have been practicing labor and employment law — like you — are going to be looking into a crystal ball to try and figure out what that Trump 2 administration is really going to look like. There's certainly a lot to talk about.

I almost feel that this is maybe a little bit easier because we did have the first Trump administration and we sort of do have a little bit of a roadmap on trying to anticipate what's coming down the pike starting January 20, 2025. Do you agree?

Shields

I think that's right; with the caveat that you've got an administration that is not going to be necessarily tethered by concerns around reelection. So, it might even be a more aggressive version of what we saw in the first term.

Valentino

That's a really good point. My anticipation, and you'll tell me if you disagree, is there are a lot of different areas of our world in labor and employment law that will be affected by the administration change. Some more immediate, some it'll be down the road. But I don't think that there is an area that will experience a bigger change than labor law and the National Labor Relations Board.

Shields

I think that's right.

Valentino

It almost is you're going to have changes at the Labor Board with regard to the makeup of the board. That is both immediate and also down the road. Synonymous with those changes, what we're going to be dealing with is changes in rulemaking, changes with regard to the general counsel's agenda. And also, as the Labor Board transitions from the Biden board to a Trump board, you're going to get, probably, the swing of that pendulum and a movement in a lot of the cases that the Biden board had issued.

Just in terms of the makeup of the board, what we saw when President Biden took office was something we had never seen before. Almost immediately upon inauguration, he terminated the employment of the general counsel of the Labor Board. That was met with a lot of litigation. Ultimately, that decision was upheld. So, I anticipate that President-elect Trump is going to sort of do the same thing with, I think, the most controversial general counsel that we've had, at least in my 25 years of practice, Jennifer Abruzzo. I think that will probably wind up being fairly immediate. And with that change, you are going to get a pretty drastic change in the direction of the Labor Board.

Now, in terms of the makeup of the board, that's a little bit more up in the air. As it sits right now, there are three Democrats, or Democratic seats filled. There is one Republican seat filled with one open Republican seat. And I put those "Republican" and "Democrat" seats in quotes. With the chair of the board, Laura McFerrin's, term ending in mid-December 2024, that makes it really, really interesting.

What happened earlier this year was President Biden proposed to the Senate a package where McFerrin was being renominated along with a candidate for the Republican seat. As best as I'm aware, that is not scheduled to be heard and confirmed by the Senate. So, it's anybody's guess. If that ultimately does move forward, and these nominations are confirmed by the Senate, the next opportunity President-elect Trump will have to really reconfigure the board and have it move that pendulum swing from very labor-friendly to more employer-friendly wouldn't be until 2026. So, there is a fairly long time period to wait. It's anybody's guess. The makeup of the board — we're going to have to watch and see what happens between now and January 20 [2025].

Shields

It sounds like if I'm an employer, I need to be doing a "wait and see" approach until some of the appointments shake out before I rush and start making any amendments to my policies based on anticipated, perhaps, relaxed rulings from the board.

Valentino

Yes, that's a great question. The answer is right. You're probably not going to be getting any changes in the way that the board has been looking at policies in the workplace, which under the Biden board, it has become very, very difficult to sort of even speculate as to what type of policies are going to pass muster under Section 7. It's a real challenge for employers. You're not going to see a wholesale change in the way that those are being analyzed by the board unless you get a change in the board members.

What I think will happen almost immediately is you will have a general counsel who is less focused on having cases that are focused on handbook policies proceed to the board. You won't get many decisions coming out. Ultimately, I think it's possible that if there is no seat to fill by President-elect Trump, that you will get a real slowdown in the number of cases like this that are going to the board.

In addition, with the new general counsel, what we anticipate you will see is a change in the direction of the general counsel's memos. Under Jennifer Abruzzo, we saw some really interesting, and some may say aggressive, memos that came out of the board involving things like consequential damages, the remedies that may ultimately be sought in settlement agreements, memos that focused on restrictive covenants, non-compete agreements, challenges to language in agreements that employers have been using for a very long time. So, I think that in fairly short order after January 20 [2025], we may see some action in the area of general counsel memos that may change the landscape for employers.

One final point on the board: Ultimately, when there is a shift in the board seats, we can anticipate pretty quickly some changes in the board decisions that came out and a reversing of some Biden board decisions such as:

- Union recognition decisions that have made it easier for unions to sort of circumvent the election process.
- And, as we talked about earlier, changes in the way that the Labor Board is approaching work rules and handbook issues and some pretty significant cases that came out regarding the way that severance agreements, confidentiality agreements, and the like are being analyzed from a Section 7 standpoint.

There is a ton to anticipate coming out of the Labor Board over the next one, two and four years.

Shields

Yes. It sounds like, from that description, this is going to be one of the largest areas of change that we're going to see in the landscape of labor and employment law for sure.

Valentino

I think that's absolutely right. Another area that is going to be significantly affected — and it's been such a huge issue for employers over the last several years — is when we talk about DEI. You are focused on this. It's a major issue. I know that you've been following it. What do you anticipate with regard to DEI?

Shields

It is. And it helps sometimes to look at the practical impacts of how this is going to be implemented or felt by employers. Let's take training for example. Training is often a very important part of many organizations' DEI strategic plans. Some might recall that during the first Trump administration, there was an executive order restricting the federal government and its contractors from offering certain diversity training on so-called "divisive" concepts — and I put that in quotes — which the executive order at the time was defining as race or sex stereotyping, race or sex scapegoating.

Agencies, like the OFCCP in this instance, were tasked with really

investigating complaints related to that training, enforcing that executive order. It was the subject of a number of legal challenges. Ultimately, the Biden administration repealed it. But I think we can expect during this next term that DEI-related training programs, particularly unconscious bias-focused trainings, will be the subject of many challenges and potentially a similar order.

But just to take a step back and look at the bigger picture with DEI: The narrative around DEI has been shifting. Many large companies already have been walking back what were once seen as very robust DEI programs, dismantling them in a few highly publicized instances. We've seen from the legal landscape a lot more litigation or legal challenges to DEI initiatives and programs in the wake of the Supreme Court decision addressing affirmative action last year.

I think what you might start to see more of is really a change in the vernacular; not necessarily the substance but the narrative around this within organizations may change. You saw SHRM recently, for example, remove the E for equity in what was seen as a controversial move. So, there's going to be a lot of push-pull with organizations either potentially doubling down on their DEI initiatives or walking them back. And I think changing the narrative around how best to implement inclusion in the workplace is certainly going to be a focus.

Relatedly, an EEOC under Trump's administration is likely going to take a narrower view of what is and what is not going to be permissible under these DEI initiatives. That might be a good segue, Chris, to talk about the potential impact at the EEOC under the Trump administration.

Valentino

DEI really does go hand in hand with our traditional understandings of EEO law. That's where a lot of the challenges will come. Similar to the Labor Board, do you anticipate that there's going to be changes in the EEOC leadership?

Shields

Yes, we do. We do. It is likely that under the Trump administration, you're going to see the appointment of a new commissioner, such as, for example, Andrea Lucas, who's the only current Republican commissioner at this time. You may recall Andrea Lucas, who spoke at the Jackson Lewis Workplace Horizon Conference earlier this year [2024], as someone who voted against the EEOC's final rule earlier this year on the Pregnant Worker Fairness Act. She had published her opposition to those final rules, taking issue, for example, with the broad range of conditions that the current EEOC administration had said were going to be covered by the law.

So, I think you're right. Much like with the National Labor Relations Board, this starts with who we are appointing as chair. It starts with who's at the EEOC. There's still going to be a Democratic majority probably until 2026. But certainly, having a chair Republican at the helm, what you may then see,

given the Democratic majority, is probably a lot of stasis over the next couple of years. Not much will change.

I think to your earlier point, these issues do really go hand-in-hand with DEI. The EEOC no doubt will continue to enforce laws, but I do think there may be a reprioritization at the EEOC towards their conciliation and mediation programs rather than a litigation-centric approach. Again, much like the National Labor Relations Board, the general counsel likely would be replaced. Obviously, that could impact the strategic approach to EEOC litigation, focused probably more on that conciliation process if the first term was any indication.

Valentino

On that first term, Ana, I don't know if you feel the same way, but the EEOC under the first Trump administration moved, I think, further away from really being litigious and enforcement centric. And they moved more in the direction of being much more educational and more advisory for employers. Do you anticipate that will be what we see over the next four years from the EEOC?

Shields

I do. I think that's exactly right. And often that becomes part of that conciliation process. Proactively, probably putting more resources towards giving some guidance to employers, more trainings, more programs intended for employers to apply existing laws rather than what some might view as attempted expansion of legislation through, for example, rulemaking or guidance.

Much like with the NLRB, I think it's a "wait and see" approach for employers. It doesn't change in my view, as a litigator, anything that I would do as an employer. We have federal laws designed to protect equal opportunity. Those are the law. Those will be enforced both by the EEOC and by plaintiff's attorneys. A really robust program at any employer to prevent claims is still your number one way to mitigate risk, and nothing that is going to occur under the next administration should really change that focus.

Valentino

Spot-on advice. I will tell you that one area that's probably not "wait and see" is an area of employment law that was central to the campaign: Dealing with immigration. The extent to which the immigration regulation in the United States changes is still anybody's guess. But we know it's going to change and we know it's going to be aggressive.

Similar to the comments I made earlier about the National Labor Relations Board, if the first Trump administration is any indication of what we're going to see this time around, here's what we know: For employers and individuals, it's going to be much more difficult to go through the visa approval process and the green card process.

We expect that there will be a similar clamping down on certain categories of

visas like the H-1B visa program, consistent with what we saw during the first Trump administration. Corresponding with that clamping down, employers are going to inevitably see an increase in the likelihood of getting a request for information to support a visa request.

Over time, this may be one governmental agency that sees an increase in funding, which ultimately may mean you're going to see an increase in the number of sort of raids or audits of employers' workplaces. There is going to be that opportunity to really fulfill the promises that were made during the campaign. Similar to what we saw last time, we may see increased penalties for employers who are utilizing undocumented workers. It'll be aggressive. Just like it was last time. And that may be more immediate than the changes that we might see at the EEOC level.

Shields

Right. So, certainly an area where I think employers should shift their priorities in terms of trying to button-up their practices, perhaps in a privileged audit, just to make sure that they're very comfortable with their documentation for all of their workers. In light of all that, I think that's really sound advice.

Valentino

Great advice with regard to some preventive strategies right now is to get that privileged I-9 audit and similar audits done sooner rather than later.

Shields

It just brings me back to the EEOC, again. Right? It's *such* an important agency, obviously, with respect to all things that we do related to employment law. But as we talk about privileged audits, my mind goes to pay equity. Certainly many employers, as a risk-mitigation tool, are performing privileged pay equity audits — always a really good strategy; certainly can help for a lot of reasons to reduce the risk of litigation and as an opportunity to correct what might be disparate pay within the workforce, even without intention.

As I think about pay equity and the changes we've seen over the last several years and what I think is coming down the pike, I'm brought back to the EEOC. Many of us might recall that the EEOC had previously required component-to-pay-data collection as part of the EEO-1 submission that would require employers to turn over to the government [data] about the wages they pay their workers, the number of hours worked, which the EEOC and others would in turn purportedly use to identify pay gaps, to target larger employers, to investigate alleged pay discrimination practices.

In 2017, first term, you may recall President Trump dropped the very same revised EEO-1 reporting requirement. It was not yet brought back and implemented, despite a Democratic majority on the EEOC. Now you're still going to have that Democratic majority on the EEOC, but most likely a Republican chair, so we don't think that that component-to-reporting is going to come back. Rather, what you're going to see is more activity at the state and

city levels. We've seen these broad sweeping changes, patchwork of legislation across the US now with pay transparency designed to really impact pay equity across the board. Pay equity is one of those areas where we're going to continue to watch it at the state and local levels and not much is expected to change at the federal level at this stage.

Valentino

That may be a recurring theme for a lot of these areas where you see the federal government moving away from the more Democrat-focused workplace law agenda. You may see more of those blue state governments moving further in the direction just to fill that void and pay equity is one of them.

While talking about pay, one of the areas that we probably should touch on in this podcast is what's going to happen with the DOL. This one's really, really fascinating because we do, on January 1 [2025], have the DOL's final rule, at least the second part of the DOL's final rule, scheduled to go into effect. It would raise, on a federal level, the salary basis threshold up to about \$59,000 a year — which, based on projections that the DOL issued, would make four-million-plus employees eligible for overtime.

We're all familiar with the fact that this DOL final rule has been met with significant litigation. That litigation is still pending. In the event that there is an injunction that is placed on the DOL final rule, not just in one specific state like we saw in Texas earlier this year, but nationwide, then there is probably a really good chance that this rule never sees the light of day.

However, in the event that you don't get sort of that judicial intervention and this moves forward and is implemented on January 1 [2025], it'd be really interesting to see what a new Trump DOL does with this. It's going to be very difficult to walk it back, once the bell is rung, so to speak, on a \$59,000 salary basis threshold on a federal level.

To the point you made earlier, for anybody who's listening to this podcast, it is critical that you are watching what happens on a state level as well. So, we shall see.

The other thing I wanted to mention, which was really, really fascinating during the campaign, and one of the areas where there was sort of agreement between the candidates, was taxes on overtime and tips. That was sort of common ground for both Vice President Harris and President-elect Trump. It'll be interesting. Not quite sure that can happen without legislative intervention, but it might be something that we see over the next year or two in an effort to sort of send a nod to working-class America.

Shields

Yes, definitely another area to watch. As is always the case with employment law, I just think about the impact on multistate employers trying to navigate these changes and have them mesh with whatever state and locality they're operating in.

Restrictive covenants are another example of an area we should touch upon. This was a big part of the news this year. We all watched the FTC proposed rule, what happened with that, with the courts striking it down. It encouraged a lot of employers to really look critically at their policies, at their agreements, to think about what they could really do to do better, to protect their confidential information, to protect their customers, to protect their trade secrets, and to really start to get strategic.

And here we are, in thinking about, “All right, based on this incoming administration,” what are we going to see on the restrictive covenant space? This is another area where probably not a whole lot at the federal level, probably replacement of the FTC commissioner. What you'll instead need to do is really watch those state and even local city changes. We saw bans in the last couple of years. That's been the trend in some of the bluer states, some banning non-competes entirely. That patchwork of legislation is going to be very challenging for employers to navigate, particularly knowing the way of lot of employers operate. If you've got sales territories, for example, that include multiple states, more than one city, more than one location, remote employees — not an easy thing to navigate. An area of opportunity for employers is to revisit agreements that they've had in place and think through whether it is an effective way of protecting their confidential information.

Valentino

Along those lines, and before we wrap up: Talking about the state patchwork and the local patchwork, we've been inundated in the HR community over the last couple of years with paid leave laws. And it was really interesting in 2017, then-President Trump seemed to be a proponent of adding some sort of a paid component to FMLA. That really didn't go far. He did implement or sign into law paid leave for federal employees during his first administration. But it'll be interesting to see what happens. I'm not quite sure that paid leave is something that we will see over the next four years on a federal level.

But to your really good point, Ana. Keeping an eye on state and local [law is important]. Just most recently, in the last election cycle, we had three more states jump into paid leave law legislation. So, we need to keep an eye on this and make sure you're on top of things if you're a multistate employer.

But this is good. It was a pleasure presenting with you at Workplace Horizons, both in New York and Las Vegas, on the lead-up to the election. And to have the election come and now dealing with the issues after the election has been a lot of fun. So certainly, thanks for joining me.

Shields

Likewise. It's a really good conversation to be having. I hope people are thinking critically about the opportunity that this presents for them as an employer to really go back to their playbooks and think through what they need to be anticipating in the next four years.

Valentino

Yes. There's one thing for certain. The next four years will be exciting in the world of labor and employment law.

Shields

As always. Thank you.

Valentino

All right. Thank you.

OUTRO

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