– No Longer Gazing Through The Crystal Ball –
President Trump & The American Labor & Employment Agenda

by Margaret "Peggy" Hewitt
Partner at Jones, Hurley & Hand
and Burton D. Garland, Jr.
Shareholder at Ogletree Deakins

On January 20, 2017, U.S. Supreme Court Chief Justice John Roberts swore in Donald Trump as our nation's 45th president. As expected, we have seen sweeping reversals of the changes in labor and employment law initiated under the Obama administration.

Love him or hate him, President Obama's labor and employment agenda was nothing if not transformative and fast-paced. During his eight years as POTUS, the federal labor and employment administrative agencies (DOL, NLRB, EEOC, OSHA, ICE, etc.) aggressively pushed what the past administration touted as an employee-friendly agenda and what most in the business community considered a decidedly anti-employer agenda. These agencies pushed the envelope like never before from rule-making and enforcement standpoints.

One of candidate Trump's central campaign themes was that a Trump Administration would get the government out of the way of business to spur economic growth. Trump pointed out the statistics put forth by the current administration did not accurately reflect the state of the American work force. Instead, Trump said many people had not seen any significant improvement in their own financial situations during the Obama administration and that many are either working fewer hours than they want, are working more than one job just to make ends

meet, or have simply dropped out of the workforce. Meanwhile, Trump argued, business has been paralyzed from investing and expanding given the over-regulation and uncertainty created by the Obama administration.

As of the writing of this article, President Trump's administration has made substantial strides in his labor and employment agenda, and major changes have taken place.

- Fair Labor Standards Act & the DOL - A District Court in Texas heard oral argument on November 14, 2016 on the issue whether to enjoin the U.S. Department of Labor's ("DOL") December 1, 2016 modifications to the Fair Labor Standards Act Regulation. The new regulations were intended to raise the salary threshold for the white-collar exemption from $455/week or $23,660 annually to $913 per week or $47,476 annually, raise the salary threshold for highly compensated employees from $100,000 to $134,004 per year, and create future automatic updates to those thresholds occurring every three years, beginning on January 1, 2020. The Court issued a lengthy decision on November 21, 2016 enjoining the new regulations. Obama's DOL appealed the District Court's decision on December 1, 2016, and the DOL asked for an expedited decision from the Court of Appeals. Trump was anticipated to drop the appeal, and the Department of Justice did just that in a short unopposed Motion for Voluntary Dismissal of the Interlocutory Appeal as moot, leaving the Appeals Court Order final. According to Alexander Acosta, the Trump Administration's Secretary of the Department of Labor, 2016 rule expanding the number of workers who qualify for overtime pay should be updated to match inflation. During his March 22 confirmation hearing before the Senate Health, Education, Labor and Pensions Committee, Secretary nominee Acosta stated: "I believe the salary threshold figure would be somewhere around $33,000" after figuring for inflation to the cost-of-living since 2004—the last time the regulation was adjusted.

- Labor Relations/Persuader Regulations & the DOL - On November 16, 2016, the U.S. District Court for the Northern District of Texas (Lubbock Division) converted its injunction preventing implementation of the DOL revised persuader rule on a national basis from preliminary to permanent. According to Judge Sam R. Cummings's order, Judge Cummings found the DOL's revised persuader rule to be "not merely fuzzy around the edges. Rather the New Rule is defective to its core." Ogletree Deakins represented the Plaintiffs in the case who obtained the permanent injunction. It is doubtful the DOL under President Trump will appeal this decision (or continue with the appeal if the Obama DOL appeals the decision). Even though there is a permanent nationwide injunction, there are pending matters in two other courts (which are likely to be withdrawn) and the Trump Administration ultimately will need to go through "reverse rulemaking" to absolutely kill it.

- Labor Relations & the NLRB - No agency has been more active and created more uncertainty for business as the National Labor Relations Board ("NLRB"). The NLRB has five Members and primarily acts as an enforcement and quasi-judicial body with respect to employees' rights to engage in protected, concerted activities. The Obama Board waded into areas of the law it has historically not touched; it used to be that primarily unionized employers had to deal with the Board. On a never before seen level,

the NLRB attacked everything from the joint-employer standard; the union representation process; employee handbooks and employer policies including, but not limited to, at-will statements, social media/disparagement, use of electronic communications/privacy concerns, confidentiality of investigations, disclosing confidential information, no solicitation/no distribution rules, use of bulletin board, access to premise, off premises conduct, fraternization restrictions, and employee use of company e-mail systems. Throughout almost the entire Obama administration, several Board seats remained unfilled and the majority of the seats have been severally skewed against the Republican Party. That changed with President Trump; he filled all the seats on the Board with the appointment of Philip Miscamarra, a Republican Obama appointee who had initially declined to serve another term, as NLRB Chairman, and Marvin E. Kaplan and William Emanuel. The Republicans now hold three seats to the Democrats two. Miscamarra had been one of the Board's biggest critics, dissenting in several of the NLRB's most notable rulings, including Browning Ferris. The case involved one business became a "joint employer" of another company's workers and therefore legally responsible for any violations of workplace laws despite the historical requirement a business had to have "direct control" over the workers to be considered a joint employer. The labor board expanded that definition to the much vaguer "indirect control." Overturning the joint employer ruling became a priority of management. Of note, on June 7, 2017, Labor Secretary Alexander Acosta announced that the U.S. Department of Labor (DOL) had withdrawn two informal guidance documents on independent contractor misclassification and joint employment, both issued during the Obama administration.

Prior to his confirmation, Kaplan was chief counsel of the Occupational Safety and Health Review Commission. Until 2015, he was as a Republican staffer for the House Education and the Workforce Committee, where he assisted Republicans heavily critical of the NLRB's actions under former President Barack Obama. With the confirmation of William Emanuel, a pro-business attorney, the President has made the Board, the nation's top labor law enforcement agency, under the control of Republican picks for the first time since President George W. Bush's administration. Business groups close to our hearts applauded the vote. "William Emanuel's confirmation will allow for the full consideration of issues directly impacting small businesses, like restaurants, while restoring fairness and balance to the NLRB. We look forward to working closely with Mr. Emanuel and the NLRB," said Cicely Simpson, executive vice president of the National Restaurant Association, as quoted in the Washington Examiner.

Peter B. Robb was sworn in as General Counsel November 8, 2017. General Counsel is the most influential role at the NLRB, deciding if and when the agency will pursue a case, and the legal theories it will advance in doing so, having a great impact on the regulated community. Robb, a former NLRB field attorney and chief counsel to former Republican Board member Robert Hunter from 1981 to 1985, has been a critic of the Obama NLRB and the Board's "ambush" election rule. His history as counsel for trade associations and corporations will likely play a role in the restoration of balance at the agency.

We can expect to see a return to the legal precedent upon which employers had relied prior to the Obama administration. We can also expect President Trump to make good on

his campaign promise to repeal President Obama's executive orders which were decidedly pro union, including the "blacklisting" order and other provisions that impose contractual obligations on successor employers doing business with the federal government. While citizen Trump had historically gotten along with unions and candidate Trump was swept into office on the backs of many union members, President Donald Trump did what many federal unions thought was inevitable: he disbanded the National Council on Federal Labor-Management Relations, a formal advisory panel designed to create and foster partnerships between labor and agency management.

- Healthcare - Candidate Trump campaigned on the promise of repealing Obamacare, and his Presidential efforts to repeal the legislation as a whole has been thwarted for a full eleven months. Trump has indicated a willingness to keep some of the better and less controversial protections of Obamacare, including allowing children to remain on their parents' health plans until age 26 and prohibiting insurance companies from denying coverage based on pre-existing conditions, but experts have predicted the changes that are likely to be made will result in dramatically higher premiums for the young, those 26 and under. Trumpcare's attempts to control costs of medical care – something that was almost entirely absent from Obamacare, have been thwarted as well.

- Immigration - Candidate Trump promised dramatic changes in U.S. Immigration policy. His policies are based heavily on enforcement and better securing of the U.S. Borders, often calling for the Mexican government to pay for his WALL. Trump believes excessive and illegal immigration directly impairs the ability of American citizens to get and keep jobs, and has recently turned to enforcement not through the worker, but through the enforcement of the employer's obligations to electronically verify (E-Verify) a worker's eligibility to legally work in the U.S. Enforcement of E-Verify should actually expand the temporary work visa programs such as the H1-B program which allow employers to sponsor and hire highly skilled foreign workers.

- Supreme Court ("SCOTUS") - The Senate confirmed Neil Gorsuch, a Federal District Court Judge who had not been bashful about his views on the limits of agency authority, including the authority of the National Labor Relations Board. His dissent in ***NLRB v. Community Health Services Inc.,*** 812 F.3d 768 (10th Cir. 2016), leaves little to the imagination about his judicial philosophy in this respect. In that case, the panel majority ruled that the board had provided reasonable justifications for declining to deduct interim earnings in a case where there was no cessation of employment, thereby deferring to the board's rationale for that decision. Judge Gorsuch pointedly disagreed, writing that "in our legal order federal agencies must take care to respect the boundaries of their congressional charters." Further, "they may not depart from their own existing rules and precedents without a persuasive explanation." He concluded that the NLRB's new rule on the deduction of interim earnings - which although departing from prior precedent was affirmed by the majority - "fail[ed] to abide each of these settled legal principles and, in that way, [sought] to make new law unlawfully." Justice Gorsuch is a strict constructionist, reminiscent of Justice Antonin Scalia, right in line with the new head of the NLRB, Phillip Miscamarra.