HUNTON& WILLIAMS

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Top Issues Facing Retailers in the Trump Administration

After a long and unconventional campaign, we finally know the election results: early next year, businessman Donald Trump will be sworn in as the 45th president of the United States, supported by a Republican Congress. What the election results mean for the nation's retailers, however, remains an open question. Trump the candidate staked out bold policy positions on issues with potentially significant effects on retailers. Both positive and negative developments on a wide range of issues are possible over the next four years. Once sworn in, Trump will have considerable latitude to implement his policies through executive branch agencies and their enforcement priorities. In other instances, however, he will require support from the 115th Congress, and in some instances his actions could be constrained by the effect of appointments and policy choices made by the Obama administration and the 114th Congress.

Below, we discuss eight areas of interest to retailers, the positions that President-elect Trump took on them as a candidate and the ways in which those positions could translate into law and policy in the Trump administration.

Trade Policy: The Trans-Pacific Partnership Is Now DOA, NAFTA May Be Next and New Tariffs Are Possible

During the presidential campaign, Donald Trump stated that his vision for trade policy is to negotiate trade deals that create American jobs, increase American wages and reduce America's trade deficit. Trump has advocated a protectionist approach to trade policies. Only some of these policies have been articulated. While additional policies will likely be announced before Inauguration Day and during the early days of his administration, his policies are certain to affect the retail industry.

During the campaign, one of candidate Trump's most vocal (and repeated) assertions was that the United States is currently on the losing side of an ongoing trade war. https://donaldjtrump.com/issues. He outlined a seven-point plan to reduce America's trade deficit. https://donaldjtrump.com/policies/trade. Point one of his seven-point plan regarding trade is to withdraw from the proposed Trans-Pacific Partnership (TPP). He also said that he wants to aggressively negotiate and renegotiate trade agreements, including the North American Free Trade Agreement (NAFTA). https://assets.donaldjtrump.com/DJT_DeclaringAmericanEconomicIndependence.pdf.

TPP is a trade agreement that was signed on February 4, 2016, by the following 12 countries: United States, Japan, Malaysia, Vietnam, Singapore, Brunei, Australia, New Zealand, Canada, Mexico, Chile and Peru. Collectively, these countries account for approximately 40 percent of the world's gross domestic product (GDP). TPP will take effect 60 days after the final country ratifies the agreement if all of the countries ratify the agreement within two years of its signing or, if that condition is not met, 60 days later if at least six countries—which must account for 85 percent of the total GDP of the original 12 countries—ratify the trade agreement by the two-year deadline or at a future date.

TPP is intended to promote free trade among the member countries through the elimination of trade barriers and the imposition of new rules. Key provisions of TPP include the following: (1) elimination of all tariffs—both immediately and gradually over time—on industrial products and most tariffs and quotas on agricultural goods; (2) imposition and enforcement of minimum labor and environmental protection

standards; (3) supervision of intellectual property rights and protections in patents, copyrights, trademarks, and trade secrets; (4) promotion of the free flow of data internationally, including through a ban on "forced localization" by which some countries require businesses to locate their servers in a country to access that market; (5) implementation of disciplines on state-owned enterprises to foster fair competition; (6) elimination of restrictions on the provision of services across borders; and (7) a commitment to avoid currency manipulation.

As drafted, TPP would have benefited retailers in the United States and is supported by retail trade associations such as the National Retail Federation and the Retail Industry Leaders Association. Before Tuesday's election, there was talk about President Obama's trying to push the TPP through a lame-duck session of Congress by meeting Republican concerns. That ended this past Friday, November 11, when the office of the US Trade Representative announced it was largely suspending its effort to pass TPP before President-elect Trump takes office, saying that it will be up to Republican leaders in Congress to decide on a vote. But any such effort in the waning days of the 114th Congress, or in the upcoming 115th Congress, is viewed as a non-starter.

During the campaign, Trump also vociferously attacked NAFTA, 32 I.L.M. 289 (1993). Trump could withdraw the United States from NAFTA with six months' written notice, as permitted by NAFTA's Article 2205. There is no requirement to obtain congressional approval to withdraw. The consequences of withdrawal on retailers who import are unclear, since the United States has not withdrawn from a trade agreement since 1866. Tariffs imposed by the United States on imports depend on the product and country of origin. Setting aside countries that are denied normal trade relations status (Cuba and North Korea), other countries are categorized as either having normal trade relations ("most favored nation" status) or are subject to free trade agreements (which applies to Mexico and Canada under NAFTA). Some experts say that a withdrawal from NAFTA would make those two countries subject to normal trade relations status, which would subject imports from there to US tariffs. If President Trump withdraws from NAFTA, however, importers would likely file litigation challenging the impact.

To encourage companies to keep manufacturing jobs in the United States, Trump has suggested imposing a 35 percent tariff on imports from companies that move operations overseas. https://www.donaldjtrump.com/issues (video titled "Trade War"). He also has suggested tariffs as high as 45 percent on imports from China. If a Trump administration manages to increase tariffs, it could have a substantial effect on retailers who generally would pass on most or all of the increased costs of goods to their customers. In addition, it could also cause delays in the supply chain. On the other hand, if the purpose of threatening the tariffs is, as some economists suspect, designed to secure trade concessions from other countries and thus lower trade barriers, it may increase the outbound sales of US-based companies. The benefit from that, however, assumes that other countries do not impose countervailing tariffs of their own that put downward pressure on US exports.

Outsourcing, Offshoring and Tech Worker Immigration: Threats to Retailers Still Unclear

For retailers who rely on offshore IT service providers, Trump's campaign statements on technology workers and offshoring might be confusing.

Many of these IT providers – mostly Indian companies like Tata Consultancy Services, Infosys, Wipro and HCL, but also US-based companies like Cognizant, Accenture and IBM – rely on the H-1B visa program to bring hard-to-find knowledge workers to the United States. The IT companies argue that these workers have skills that they cannot find in the United States, but others claim that they actually depress wages and cost US jobs. *The New York Times* examined this phenomenon in detail in 2015 (http://nyti.ms/1WQRsGr). While one of Trump's core issues is immigration, his focus has been on illegal immigration. He has been softer on legal immigration, but his position on the H-1B program has shifted wildly (http://wapo.st/1T3URDU) and has attracted significant media attention. As recently as September, his campaign website included proposals to increase the prevailing wage for the H-1B program and tighten the requirement to hire American workers first (http://bit.ly/2g1mmln). But those positions have disappeared. Now, there are general statements promising to "prioritize the jobs, wages and security of the American people," while selecting "immigrants based on their likelihood of success in the US and their

ability to be financially self-sufficient." But those two thoughts conflict when applied to high-skill technology workers.

There's little additional clarity in Trump's October 26 "Contract with the American Voter" (http://bit.ly/2fG4Gr5), which prioritizes actions for his first 100 days. The contract does not mention the H-1B program, but does say that he will "direct the Secretary of Commerce and US Trade Representative to identify all foreign trading abuses that unfairly impact American workers and direct them to use every tool under American and international law to end those abuses immediately." The general direction of these statements, the "America First" nature of the campaign and the fact that there has been some bipartisan congressional support (e.g., Senators Grassley (R-IA), Durbin (D-IL) and Brown (D-OH)) for H-1B program reform, suggests that this is an issue he might take on – but maybe not right away or in a way that would affect retailers and their ITO and BPO transactions. If Trump moves to restrict legal immigration paths for high-tech workers, retailers might find their costs rising as staffing shifts to higher-wage US-based workers. However, we think it is more likely that providers will simply sidestep any impact by shifting delivery resources offshore (which is how they planned to respond to previous threats like this) and increasing the application of robotic process automation. We have begun to see automation deployed in an increasing number of transaction-processing deals and the effect will only accelerate as the machines become more capable. As a result, a tightening could result in an ironic double-whammy for IT services jobs – encouraging more offshore migration and accelerating the embrace of the robots. This may not be the case in Silicon Valley, which also depends heavily on foreign talent, but needs workers on the ground.

Trump's "Contract with the American Voter" also says that he'll work with Congress to introduce the "End the Offshoring Act," which would "establish tariffs to discourage companies from laying off their workers in order to relocate in other countries and ship their products back to the US tax-free." The campaign has not provided any further details, but Trump's Gettysburg speech targeted firms that move production facilities offshore and it is not clear that the act would apply to the services procured in outsourcing transactions or what sort of tariff might be imposed. As described, the act resembles Sen. Sherrod Brown's "Outsourcing Accountability Act of 2012," which we reviewed here (http://bit.ly/2eWzuE0r). Sen. Brown's bill had 27 Democratic co-sponsors, but made no progress.

Finally, Trump also has proposed various restrictions on certain individuals seeking to enter the United States. He originally proposed temporarily banning all Muslims from entering the country. He then softened his position by suggesting that persons from certain high-risk regions could be barred entry, or that some applicants would be subject to "extreme vetting." Presidents may impose such restrictions at will for national security purposes. Therefore, Trump could impose such restrictions immediately upon taking office. If he does so, retailers working with service providers who have significant Muslim employee populations, like many Indian firms, could experience some disruption.

Our Immigration and Nationality Law Blog will continue to follow these issues here: https://www.huntonimmigrationlawblog.com/

Online Sales Taxes: Three Approaches to eFairness Legislation

In both the 113th and 114th Congresses (2013-2014 and 2015-2016), there have been various bills to address what is considered to be disparity in sales tax obligations between Main Street retailers and online retailers. The impetus for such legislation is a Supreme Court decision, *Quill Corp. v. North Dakota,* 504 U.S. 298 (1992), that predates the e-commerce era. In that case, the court held that sellers must have a physical presence in a buyer's state in order to have the "substantial nexus" required by the Commerce Clause to force a seller to collect the latter state's sales tax. The majority opinion in *Quill* concluded by noting that "the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve." *Id.* at 318.

While on the campaign trail, Trump's position was that online retailers should be required to collect sales tax as a matter of fairness to brick-and-mortar stores. All of his public statements on the issue were directed at Amazon, even though it collects sales tax in 28 US states, accounting for approximately 85

percent of the population. *See* http://www.mediapost.com/publications/article/275825/trump-brings-amazon-internet-tax-issues-back-into.html.

Main Street retailers tend to favor such legislation because they feel competitively disadvantaged by online-only retailers who do not need to collect and remit sales taxes in the range of 6-10 percent. Large online retailers also tend to favor this position since they have the size and systems in place to deal with the sales tax requirements of 45 states and the District of Columbia, and approximately 10,000 local tax jurisdictions. Small Internet retailers oppose this requirement because of the burden of compliance and other special costs (shipping and handling) that their customers already incur.

While Trump's position on forcing online retailers to collect sales taxes is not clear, it appears that he may be in favor of the kind of approaches floated in Congress that are "destination-based" because they are based on collecting taxes from where the buyers live. If so, his position would parallel that of the Marketplace Fairness Act (MFA) of 2015 (S. 698), sponsored by Sen. Michael Enzi (R-WY). It would allow the states (currently 23) that are members of the 2002 Streamlined Sales and Use Tax Agreement (SSUTA) to require all sellers with annual "remote sales" over $1 million to collect sales/use taxes on remote sales. States that are not members of SSUTA could also collect such taxes if they adopt certain minimum provisions to simplify tax collection and filing. Some are wary that this would allow states with simplified tax codes to give special preference to their local businesses over out-of-state businesses that have no representation in the taxing state.

On the House side, the Remote Transactions Parity Act of 2015 (H.R. 2775) was introduced by Rep. Jason Chaffetz (R-UT), Chairman of the House Committee on Oversight and Government Reform. Like the MFA, it is another "destination-based" approach. But it entirely exempts businesses under $5 million in gross sales from remote state audits, phases in collection requirements over time and requires states to provide remote sellers with tax-collection/remittance software and pay for setup, installation and maintenance of the software. It is supported by retail organizations such as the National Retail Federation.

A different approach is the Online Sales Simplification Act, a draft bill floated in August 2016 by House Judiciary Committee Chairman Bob Goodlatte (R-VA). It would let businesses collect and file sales taxes based on the rates and rules of the "origin State" where they have a physical presence, instead of where the customer lives. The states would participate in a reimbursement fund that sends collected taxes back to the buyer's home taxing jurisdiction. The idea is to keep the cost of compliance low, keep taxing authorities accountable to businesses that are their own constituents and level the playing field. The Retail Industry Leaders Association states that it has worked with Chairman Goodlatte on this issue and generally supports this approach.

The 115th Congress may end up addressing these competing proposals since the lame-duck Congress is unlikely to enact online sales tax legislation. There are also legislative changes afoot at the state level. And the Supreme Court itself may eventually reconsider its holding in *Quill* imposing the physical-presence requirement. Last year, Justice Kennedy observed that, given technological changes and the harm caused to the states, "it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*." *See Direct Marketing Ass'n v. Brohl*, 135 S. Ct. 1124, 1135 (2015).

Privacy and Cybersecurity: Balancing Consumer Privacy and Innovation

In late 2013, retail giant Target suffered a data breach affecting as many as 70 million customers. In recent years, companies of all stripes have suffered from data breaches, and thus privacy and cybersecurity concerns have been a hot topic in the boardroom and in the presidential campaign.

President Trump will likely focus on several key issues that could affect retailers. First, he has indicated that cybersecurity would be a priority for his administration. His cybersecurity plan includes four major action items: (1) forming a Cyber Review Team to evaluate and improve the country's cybersecurity defense and infrastructure; (2) directing the Department of Justice to coordinate federal, state, and local law enforcement efforts through cybersecurity task forces; (3) developing counter-measure capabilities;

and (4) prosecuting government employees and officials who violate classification rules. *See* https://www.donaldjtrump.com/policies/cyber-security.

With respect to the federal government's ability to obtain personal data, candidate Trump had supported requiring companies to provide such data as needed for national security and law enforcement purposes. During the campaign, Trump went so far as to call for a boycott of Apple for its stance on encryption as it pledged to fight a court's ruling to help the FBI unlock the iPhone used by the shooter in the San Bernardino terror attack. *See* http://www.csmonitor.com/World/Passcode/2016/1109/What-Trump-s-victory-means-for-cybersecurity.

President Trump may have to evaluate congressional efforts to pass a national data breach notification bill. Currently, there are such requirements for the financial and healthcare sectors. A broader data breach law could streamline breach notification requirements for retailers, which must currently comply with over 50 breach notification laws at the state and territory levels. In January 2015, Sen. Bill Nelson (D-FL) introduced a national breach notification law (S. 177), but there was considerable controversy over whether to couple breach notification with data security measures that require companies to implement and maintain safeguards to protect personal data. In May 2015, Rep. Randy Neugebauer (R-TX) and 41 cosponsors introduced a House version of a data breach bill (H.R. 2205). Consumer groups oppose the legislation, and the 115th Congress will likely need to tackle the issue afresh.

Finally, the Trump administration will likely continue to collaborate with Europe to ensure the success of the new EU-US Privacy Shield program. *See* https://www.privacyshield.gov/Program-Overview. The Privacy Shield, designed jointly by the US Department of Commerce and European Commission, provides companies on both sides of the Atlantic with a mechanism to comply with EU data protection requirements when transferring personal data (e.g., Facebook data) from the European Union to the United States. The Privacy Shield replaces the US-EU Safe Harbor Framework (Safe Harbor), which was invalidated in October 2015 by the Court of Justice of the European Union (CJEU) primarily because of concerns that Safe Harbor did not protect against US law and policy on government surveillance that allowed US agencies to obtain the data of EU individuals.

"GMO" and "Natural" Food Labeling: A Chance to Shape The Law Through Regulation

The debate over whether to require labeling of bioengineered and genetically modified foods ("GMOs") has raged for some time in the trade press, public forums, state legislatures, and Congress. During the presidential primary campaign, Trump stated his support for GMOs and opposition to mandatory labeling in response to a questionnaire from the Iowa Farm Bureau. Around the same time, the Food and Drug Administration issued in November 2015 its nonbinding "Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have or Have Not Been Derived from Genetically Engineered Plants." http://bit.ly/2frGqtg. The guidance makes clear that "labeling provided by manufacturers on a wholly voluntary basis regarding whether a food was or was not bioengineered as described in this guidance" is acceptable to FDA, "provided that such labeling is truthful and not misleading."

In March 2016, Secretary of Agriculture Tom Vilsack changed his position on voluntary GMO labeling and advocated for mandatory GMO labeling. Later that month Republican-sponsored legislation providing for voluntary GMO labeling and preemption of state GMO labeling laws failed to pass the Senate. Shortly after Vermont's controversial mandatory GMO labeling law became effective on July 1, Congress revisited the issue of GMO labeling and passed a bipartisan bill signed by President Obama on July 29, 2016, requiring a "National Bioengineered Food Disclosure Standard." Pub. L. No. 114–216, 134 Stat. 834. *See* http://bit.ly/2g30PZx. Under that statute, the Secretary of Agriculture has two years to issue regulations establishing the mandatory national disclosure standard, along with enforcement requirements and procedures.

The new law directs the Secretary to determine the amount of bioengineered substance that may be present for the food to be a bioengineered food and to establish a process for requesting and granting a determination by the Secretary regarding all the factors and conditions under which a food is considered

bioengineered. The regulations will require that the form of food disclosure be through "text, symbol, or electronic or digital link," such as scannable QR codes.

Supporters of the new law argue that the labeling will allow consumers who wish to do so to make their purchase decisions based on GMOs in their food products. Some consumer advocates have complained that the law does not grant the Department of Agriculture authority to require recalls of noncompliant products or impose federal penalties for violations. Because the statute expressly provides for federal preemption of state or local government labeling requirements applicable to any genetically engineered food, food manufacturers involved in interstate commerce will avoid problems associated with inconsistent state labeling requirements. The food industry and other interest groups will undoubtedly be closely involved in monitoring and commenting on the USDA rulemaking in the months to come and the new administration will have a significant impact on that process.

Contemporaneous with the debate over the labeling of GMO ingredients in food, the food industry continues to be targeted with class-action litigation challenging as misleading the use of the terms "natural," "all-natural" and "100 percent natural" in labeling of food products. Despite having declined in a letter issued in January 2014 to define "natural" or weigh in on whether bioengineered foods could be labeled as natural, the FDA decided to revisit the issue in response to additional pressure. In November 2015, the FDA issued a request for comment on the use of the term "natural" in the labeling of human food products, including foods that are genetically engineered or contain genetically engineered ingredients. http://bit.ly/2frG9a6. This action resulted from requests by various federal courts for FDA guidance on the labeling of food products as natural, as well as Citizen Petitions from the Grocery Manufacturers Association and others. The comment period closed on May 10, 2016, following a three-month extension. The FDA has yet to take action, but its next steps (which may well fall to the Trump administration) are likely to be coordinated with the rulemaking mandated under the new GMO labeling law. http://bit.ly/1MpSowq. However, based on his stated opposition to mandatory food labeling, Trump may oppose additional regulations concerning natural food labeling and promise to reduce government regulations.

Consumer Product Safety Commission: Civil Penalties on the Rise

Despite candidate Trump's campaign talk about reducing regulations, makers and retailers of products that come under the purview of the Consumer Product Safety Commission (CPSC) should not expect material changes in policy or enforcement approach as a result of a Trump presidency. Product liability and consumer product safety issues did not make either of the top two presidential candidates' lists for talking points or even policy development or posts. While the topic of guns generated the kind of political debate and advertisements that typically accompany political campaigns, the "gun debate" focuses more on the question of gun control rather than the product safety or liability perspective, and guns are outside CPSC jurisdiction in any event.

All five CPSC commissioners are Obama appointees, four of whom have terms that will expire before the end of Trump's four years, allowing him to make those appointments for seven-year terms on a staggered basis. Rather than from the incoming president, the CPSC priorities for the near future can be better gleaned from what Chairman Elliot F. Kaye identifies as three major areas for CPSC focus under his leadership:

- Harnessing the private sector to achieve more safety advancements;
- Prioritizing brain safety in youth sports; and
- Strengthening defense at US ports to block dangerous imports.

See https://www.cpsc.gov/About-CPSC/Chairman/Kaye-Biography.

In addition to Chairman Kaye's stated priorities, CPSC's approach of providing incentives for self-policing behavior can be expected to continue in its effort to leverage its resources. According to the CPSC website, the agency has not brought legal action to force a mandatory recall since 2012. *See* https://www.cpsc.gov/Recalls/Recall-Lawsuits/Adjudicative-Proceedings. However, CPSC data reveals the issuance in 2016 (through August) of 764 "Letters of Advice" (LOA) for violation of a mandatory standard. *See* http://bit.ly/2fXvhVv. These LOAs represent circumstances in which the company confirmed the violation and the CPSC decided that the company "voluntarily" completed corrective action to remedy the hazard. Of these 764 LOAs, 514 identified the country of origin for the product at issue as China, with the United States identified as the country of origin in a distant second with 44 instances on the list. Toys, children's clothing and baby gear are the most frequent LOA subjects.

Civil penalties are the trend to watch. CPSC's data shows a hefty increase in the amount of civil penalties extracted, ranging from a low of $700,000 to a high of $4.3 million in fiscal year 2015, and a low of $2 million to a whopping high of $15.45 million in fiscal year 2016. Virtually all of those instances involved a "failure to report" or delay in reporting. *See* https://www.cpsc.gov/business--manufacturing/civil-and-criminal-penalties.

The CPSC likewise relies on the public. While the CPSC may announce priorities for its enforcement dollars, consumers can join the ranks of those who can force a company onto the CPSC's radar. The CPSC's website, www.SaferProducts.gov, invites consumer reporting of harm or risks of harm and research of safety information on products they own or may be considering buying. Questions about what the CPSC may do in response to such consumer reports add to the incentives already inherent in the regulatory structure that encourage self-policing and self-corrective action while penalizing failures to do so.

It seems fair to expect a Trump presidency to approve of CPSC's lean and mean operations, including its close scrutiny of product imports. Since the CPSC has a history already of leveraging industry standards, this is probably not the agency that will top the list for the new administration's promised regulatory reform. Perhaps it will instead become an example of how an agency can get the most bang for its regulatory buck.

Joint Employer Liability: What Happens to the Obama Administration's Recent Expansions?

Since August 2015, the National Labor Relations Board's (NLRB) definition of "joint employer" has expanded beyond decades of legal precedent. The joint employer concept arises when separate entities are deemed to be so interconnected that they should be treated as one for purposes of labor relations activity and unfair labor practice liability. In its *Browning-Ferris Industries* decision, 362 NLRB No. 186 (Aug. 27, 2015), the Board established a broad new test that dramatically expanded the definition of "joint employer." Now the Board will find an employer to be a joint employer if it exercises only indirect control over the employment terms and conditions of another company's employees. Under the Board's new standard, joint employer status can be established if a company simply possesses, but never exercises, the ability to control such terms.

More recently, in *Miller & Anderson, Inc.*, 364 NLRB No. 39 (July 11, 2016), the Board overturned Bush-era precedent and held that a union seeking to represent employees in bargaining units that combine both solely and jointly employed employees is no longer required to obtain the consent of the employers, provided the proposed bargaining unit is appropriate under "traditional" Board precedent. The "traditional" Board precedent used to decide whether a proposed bargaining unit is appropriate is the "overwhelming community of interest standard" articulated in *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB No. 83 (Aug. 26, 2011), which overturned 20 years of Board precedent and made it far more likely that a multi-employer unit proposed by a union for collective bargaining purposes will be found appropriate.

The US Department of Labor (DOL) also recently expanded its interpretation of the joint employer concept as applied to the Fair Labor Standards Act (FLSA). In its Administrator's Interpretation No. 2016-01 (Jan. 20, 2016), the DOL stated:

> When two or more employers jointly employ an employee, the employee's hours worked for all of the joint employers during the workweek are aggregated and considered as one employment, including for purposes of calculating whether overtime pay is due. Additionally, when joint employment exists, all of the joint employers are jointly and severally liable for compliance with the FLSA…

The DOL explained the purpose of its January 2016 broadened interpretation: to expand statutory coverage of the FLSA to small businesses and collect wage penalties from larger businesses:

> Where joint employment exists, one employer may also be larger and more established, with a greater ability to implement policy or systemic changes to ensure compliance. Thus, WHD may consider joint employment to achieve statutory coverage, financial recovery, and future compliance, and to hold all responsible parties accountable for their legal obligations.

Although the DOL's Administrator's Interpretation is not binding authority, it will almost certainly serve as a guidepost for future administrative action when considering the issue of joint employment.

Exactly where President Donald Trump stands on issues related to the NLRB and DOL is difficult to discern, as he did not speak to those matters with much specificity during his campaign. Trump has dealt with the NLRB in the past through his various businesses, including in the collective bargaining and union organizing arenas and can be expected to reverse some of the current initiatives and regulations of the Obama administration's NLRB and DOL.

In August 2016, one of Trump's companies, Trump Miami Resort Management, which operates the Trump National Doral golf resort in South Florida, entered into a settlement with a group of catering workers who claimed they were not paid for working an event at the golf resort. Prior to the settlement, a judge determined that Trump's Miami Resort Management company could potentially have been liable as a joint employer, even though the caterers were hired by a staffing agency, were not direct employees of the management company and another company organized the event for which the caterers allegedly did not receive payment. *See Aarras v. Doral*, 169 F. Supp. 3d 1337 (S.D. Fla. 2016).

In addition, deregulation is a stated priority for Trump's administration. According to his campaign website, when he takes office Trump plans to "[i]ssue a temporary moratorium on new agency regulations that are not compelled by Congress or public safety…[and e]liminate [the] most intrusive regulations." *See* https://www.donaldjtrump.com/policies/regulations. Although Trump's website does not specifically identify any NLRB or DOL regulations that will be addressed, both agencies' regulations are likely targets.

The NLRB is currently composed of two Democrats, one Republican, and two vacant seats. Board members are appointed by the president to five-year terms, with Senate approval, the term of one member expiring each year. Therefore, President Trump will have the opportunity to make multiple appointments to the Board. Trump also has the authority, with Senate approval, to appoint the Secretary of Labor. Given Trump's antiregulation campaign rhetoric, his Labor appointee might attempt to roll back some of the DOL's current initiatives, possibly including the recent expansion of the new joint employer standard.

In the short term, Trump's election could affect current union efforts and other issues pending before the NLRB and the DOL. For example, organized labor, needing an NLRB ruling that franchisees and franchisors are joint employers to boost its industry organizing efforts in retail and fast food, may turn to increased sponsorship of wage-and-hour suits targeting the franchise relationship to offset their likely perception that recent efforts to organize on this basis would fail before a future Republican board. In the meantime, however, Trump's election poses more questions than it answers on the labor and employment front. Companies will be able to better predict future administrative trends after Trump makes clear his position on the relevant issues and makes his appointments to the various administrative bodies.

Pay Policy: What Happens to Equal Pay Initiatives?

At the Republican National Convention, Trump's eldest daughter Ivanka asserted that women are paid equally at her father's company, that he employs more female than male executives and that "women who become mothers are supported, not shut out." https://www.shrm.org/hr-today/news/hr-news/pages/clinton-vs-trump-equal-pay-for-equal-work.aspx. Donald Trump himself has stated that he is in favor of equal pay for equal work regardless of gender. However, like the Republican National Committee, he said in 2014 that he opposes equal pay legislation as unworkable in practice, rendering it nearly impossible for employers to "tie compensation to work quality, productivity and experience." *See* https://action.donaldjtrump.com/misleading-paycheck-fairness-act/. Thus, retailers should not expect action on equal pay issues in the Trump administration.

Contacts

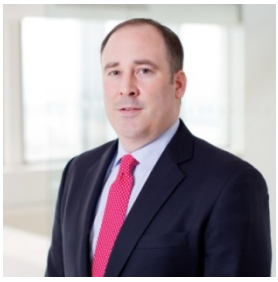
Michael J. Mueller
mmueller@hunton.com

Matthew J. Calvert
mcalvert@hunton.com

Kelly L. Faglioni
kfaglioni@hunton.com

Christy E. Kiely
ckiely@hunton.com

Andrew S. Koelz
akoelz@hunton.com



Ryan P. Logan
rlogan@hunton.com

Randall S. Parks
rparks@hunton.com

Michael Reed
mreed@hunton.com

About our Retail Industry Practice Group

The retail industry practice group at Hunton & Williams delivers objective-driven counsel in the areas of labor and employment, commercial litigation, e-commerce, privacy and data security, advertising and marketing, M&A, outsourcing, intellectual property, real estate, international trade, antitrust, employee benefits and corporate governance. Our team is composed of more than 100 attorneys who represent retailers in the Fortune 500® and virtually every retail sector.

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