

## EMPLOYEES IN THE WORKPLACE

## Expert Analysis

# Will Trump Companies' Employment Lawsuits Be Barometer for Presidency?

- A 51-year-old man believed that although he had the “book smarts and street smarts” that Donald J. Trump and his businesses looked for in contestants on the TV show “The Apprentice,” he and the overwhelming majority of applicants over the age of 40 had been passed over because of their age.<sup>1</sup>

- A woman who supervised the Trump Kids Club at the billionaire’s golf resort in Jupiter, Fla., sued her employer saying she was fired after reporting to her supervisors that one of her managers was making unwanted jokes and suggesting that he perform oral sex on her.<sup>2</sup>

- A former employee of the Trump National Golf Club in New Jersey alleges that when he came out as gay to his co-workers they reacted by calling him derogatory names and throwing golf balls at his head, and has sued the company in state court.<sup>3</sup>

**W**hile none of these claims are easy to bring to court now, there is plenty the Trump administration could do to make them even more difficult. On the campaign

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trail, President-elect Donald J. Trump sold himself as a political outsider. While it is true that he has never held elected office, he has had a lot of experience with lobbyists, as an employer and a prodigious litigant. According to a

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recent analysis from USA Today, Trump has been a party in 3,500 lawsuits,<sup>4</sup> and in 118 of them he was defending labor and employment claims related to his businesses. Trump has said he will be stepping back from managing his business empire, but will not be divesting his interests.

Moreover, the Trump Organization will employ lawyers and lobbyists to

defend his businesses against plaintiff employees who depend on Title VII, the Fair Labor Standards Act, and the National Labor Relations Act to protect their rights in the workplace. So, will Trump the president stack the deck for Trump the employer? Apparently so, if you look at his cabinet choices to date. But to what extent and how soon will this happen? Below is a look into the administrative agencies the president-elect will substantially affect and in many respects, has already done so by his choices.

### The EEOC

The U.S. Equal Employment Opportunity Commission (EEOC) enforces federal laws that make it illegal to discriminate against a job applicant or an employee because of the person’s race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age disability or genetic information. Trump will be able to re-make the EEOC’s leadership and put in people whose priorities are dramatically different from the status quo. The EEOC’s current chair—Jennifer Yang—has focused on equal pay violations and attacking discrimination based on gender identity and sexual orientation. Trump will

be naming her replacement, as well as the replacement for the EEOC's outgoing General Counsel David Lopez.<sup>5</sup>

Both Yang and Lopez have made strides to include anti-gay discrimination in the definition of sex discrimination that is already prohibited under Title VII, but the new appointees could decline to make the same push with similar impact litigation. Although private citizens can sue to enforce the rights that the EEOC protects too, they must go through the agency's process before they can file in federal court. Former President George W. Bush cut funding for the EEOC's operations by 30 percent.<sup>6</sup>

Although President Barack Obama increased EEOC funding, another major funding hit under Trump would cripple the EEOC's ability to process and investigate discrimination and retaliation claims. Trump could roll back workplace protections for LGBTQ employees more directly by repealing Obama's executive orders which currently include sexual orientation and gender identity in the list of protected categories covering federal contractors.<sup>7</sup>

One potential bright spot could be if Vicki Lipnic, one of two current commissioners at the EEOC becomes chair. While a Republican appointee, Lipnic garnered the respect of both the plaintiff and management bar, and her work with Commissioner Chai Feldblum has been commendable most recently in the year long project of the Sexual Harassment Taskforce.<sup>8</sup> Also, Lipnic was considered for Andrew Pudzer's spot running the Department of Labor. Another potential positive action for employee rights would be if Trump fulfills his campaign promise to create a federally mandated paid maternity leave for new parents—although no

details on how the plan would work have yet been offered.

### The Department of Labor

The Fair Labor Standards Act governs what employers are required to compensate employees, including minimum wage and overtime requirements, and the Department of Labor manages a vast array of regulations that control related pay rules. President Obama's administration has cracked down on wage theft like the kind Trump employees have accused him of engaging in and have moved the department to become an aggressive and effective enforcement agency under Patricia Smith. Since 2009,

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Trump's nominee to head the department, Andrew Pudzer, seems unlikely to follow suit. Pudzer, CEO of the company that owns Hardee's and Carl's Junior, could do a lot to help Trump's interest as an employer who would like to minimize his exposure to wage claims. Pudzer could quickly take steps to reduce the

number of investigations and enforcement actions, and try to obtain smaller settlements on those claims he does prosecute.

Trump has also been on the defense side of a number of wage-and-hour actions. In February 2015, the catering staff at the Trump SoHo Hotel filed a wage claim against the president-elect in state court for charging customers a mandatory 22 percent "service fee," but never passing that money along to the staff.<sup>9</sup> Waiters and servers who worked at a Passover holiday tour held at Trump's National Doral Hotel, a Miami golf resort, sued for unpaid overtime wages after working up to 20 hours a day during a special event.<sup>10</sup>

Pudzer could also reverse efforts the Obama administration has made to bring more workers under protections offered to "employees" by expanding the definition of who is an employee and who is an employer. In recent years, the Department of Labor has issued more expansive guidance on who qualifies as an employee rather than an independent contractor—and is therefore entitled to wage and hour protections. It has also enlarged the definition of "joint employment" so that people who work for a temporary placement agency are protected against violations committed by the company they are sent to work for, and not just the staffing agency that typically has little visibility into the conditions at the actual workplace.

### NLRB and Other Union Issues

Trump and his businesses have also done a fair amount of tangling with labor unions. One Trump hotel recently settled a case over actions against union supporters such as terminating one worker's employment,

denying a full-time job transfer to another, and promising more job opportunities to workers if they abandoned their support for the union.<sup>11</sup> A charge currently pending before the National Labor Relations Board alleges that a nondisclosure clause in a labor contract Trump issued is unlawfully broad because it prohibits employees, independent contractors and even volunteers from ever disclosing any information that Trump deems confidential about his personal, business or political life.<sup>12</sup> Shortly before the election, the NLRB ordered Trump Ruffin Commercial to recognize and bargain with a newly formed union of kitchen workers at the Trump International Hotel Las Vegas.<sup>13</sup> The next day, Trump appealed the NLRB's decision to the U.S. Court of Appeals for the D.C. Circuit.<sup>14</sup>

This last case illustrates how Trump's immediate impact on labor relations will likely come and how closely they may track his personal interests. First, the NLRB has two vacancies now, with additional seats opening in 2017, 2018, and 2019, which Trump will fill. He will also be able to appoint a new general counsel in October 2017.

These are sensitive appointments given that Trump is currently appealing the NLRB's ruling ordering him to negotiate with the newly unionized workers at his Las Vegas hotel—while simultaneously remaking the agency whose decision he disputes. Trump may get to appoint judges to the D.C. Circuit, and he likely will also get to make at least one Supreme Court nomination to fill the seat left vacant by the death of Justice Antonin Scalia.

When Scalia died, a case was pending before the court that could potentially gut public sector's ability to collect dues from its members. Without Scalia, the court was locked in a 4-4 standoff, and the appellate court's decision dismissing the case was allowed to stand. With a new, conservative justice on the court, the next challenge to union funding seems destined to survive, and could fundamentally cripple organized labor in this country.

### Conclusion

With less than a month away from the inauguration of Trump, the signs do not look promising for employees and their hard-fought civil rights. In countries, much like corporations, the principles of fairness, respect and equality are dictated by leadership and accountability at the top—the ability to set the right tone and behaviors for those who supervise and manage below. While it is too early to rush to judgment, the allegations reported above, if true, are examples of a workplace where equality may not have been valued and certainly appears not to have been a priority.

While Trump's expansive appointment powers conflated with his remaining interests in his empire may forecast a negative outcome for employee rights across the agencies, as advocates we must be prepared to hold every administration accountable to uphold the Constitution and protect workers' rights. We are all privileged to live and work in a state such as New York, where our state and city laws, like the New York State Human Rights Law, New York Labor Law, and New York City Human Rights Act provide robust protections that Trump cannot directly curtail. These laws may provide

the safest path forward for employees during the next four years.



1. *R. Joseph Hewett v. Trump Organization*, 07 Civ. 10007 (D. Mass. 2007) (settled and withdrawn).

2. *Breen v. Jupiter Gold Club D/B/A Trump National Golf Club Jupiter*, 16 Civ. 81334 (S.D. FL 2016).

3. *Eleazar Andres v. TNGC Pine Hill*, L1733-15 (N.J. Sup. Ct. 2015).

4. "Exclusive: Trump's 3,500 lawsuits unprecedented for a presidential nominee," USA Today, <http://www.usatoday.com/story/news/politics/elections/2016/06/01/donald-trump-lawsuits-legal-battles/84995854/>.

5. David Lopez will be joining Outten & Golden in its Washington, D.C. office.

6. Law 360, "Obama Vs. Romney: How The Elections Will Affect Employers," Oct. 29, 2012, <http://www.law360.com/articles/388939/obama-vs-romney-how-the-elections-will-affect-employers>.

7. On July 21, 2014, President Obama signed Executive Order 13672, amending Executive Order 11246, to prohibit federal contractors and subcontractors from discriminating on the basis of sexual orientation or gender identity. See <https://www.dol.gov/ofccp/lgbt.html>.

8. Select Task Force on the Study of Harassment in the Workplace Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic, EEOC, [https://www.eeoc.gov/eeoc/task\\_force/harassment/report.cfm](https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm).

9. *Garcia v. Bayrock/Sapir Organization LLC*, Index No. 601495/2015 (Suffolk Cty. Sup. Ct. Feb. 13, 2015).

10. *Aarras v. Trump Miami Resort Management*, Case No. 15 Civ. 20258 (S.D. Fla. Jan. 22, 2015).

11. <http://www.culinaryunion226.org/news/press/trump-hotel-las-vegas-agrees-to-11200-settlement-after-treating-employees-unfairly>.

12. <http://www.reuters.com/article/us-usa-trump-confidentiality-idUSKBN13D03D>

13. *Trump Ruffin Commercial d/b/a Trump International Hotel Las Vegas and Local Joint Executive Board of Las Vegas, affiliated with Unite Here International Union*, Case 28-CA-181475 (Nov. 3, 2016).

14. *Trump Ruffin Commercial v. National Labor Relations Board*, No. 16 Civ. 1386 (D.C. Cir. Nov. 4, 2016).