

# LOOKING AHEAD

- > Ben Ebbink – Fisher Phillips, Sacramento
- > Rick Grimaldi – Fisher Phillips, Philadelphia
- > Honorable John Albers – Georgia State Senator (District 56)



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## State Level Advocacy In The Trump Era *Crucial To Employment Growth*

# Honorable John Albers

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- > Represents the 56th Senate District of Georgia.
- > Chairman of the Senate Public Safety Committee. Vice Chairman of the Senate Finance Committee. Member of Senate Regulated Industries and Utilities and Senate Appropriations Committees.
- > Executive, business owner and entrepreneur.
- > Fourth-generation firefighter.
- > B.S. in Organizational Leadership from University of Louisville.
- > Graduate programs from University of Georgia and Harvard University.



# What Does a Divided Congress Mean for Employers?

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- > A fractured Congress means a tug-of-war at the federal level.
- > Lots of talk and not a lot of action
- > “All politics is local.” (Tip O’Neil)
- > **BOTTOM LINE:** States and local jurisdictions will continue to be the primary focus for labor and employment policy.



# House Bills Will Showcase Democrat Agenda and Presidential Ambitions

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- > Symbolic “kitchen table” measures that rally the base and middle-class voters:
  - > \$15 minimum wage.
  - > Card-check and union organizing.
  - > Prohibition on mandatory arbitration agreements in employment.
  - > Joint employer and independent contractor standards (ABC test).
  - > Limitations on state “right to work” laws.
  - > Health care.
- > But most of those bills will not pass the Senate.



# A Few Areas of Potential Compromise

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- > Paid Family Leave/ Paid Sick Leave
  - > Lots of talk from both sides of the aisle.
  - > Key sticking point could be how it is funded?
- > Immigration Reform
  - > The “hottest” of the hot button issues.
  - > As we approach 2020, if GOP and Trump feel they are in trouble, could we see efforts at compromise?

# Democrats May Slow Down Regulatory Change

- > Oversight, investigation, Russian collusion, and impeachment.
- > Democrats have vowed to exert oversight over federal labor -related agencies.
- > Could slow down regulatory efforts :
  - > DOL Overtime Rule (BREAKING NEWS!)
  - > NLRB Joint Employer Standard
  - > OSHA Electronic Reporting



- > In light of the above, employment policy will continue to be driven at the state and local levels.
- > This is especially true in “blue states” that want to **RESIST** the Trump Administration.
- > We are likely to see new and renewed efforts in the following areas.



# Labor Standards

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- > **Minimum Wage**
- > Expansion of Overtime Eligibility
- > Paid Sick Leave/ Paid Family Leave
- > Predictable or “Fair” Scheduling



# Minimum Wage

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- > Arizona, Arkansas, Colorado, Maine, Missouri and Washington have all enacted state minimum wages in recent years – by ballot measures.
- > Pay attention to 2016 midterm successful ballot measures in red states of **Arkansas** and **Missouri**.
- > Many also enacted at the local level.
- > Many include “indexing” to ultimately reach \$15/ hour.



# Expansion of Overtime Eligibility

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- > ***BREAKING NEWS!***
- > DOL Proposal Released YESTERDAY.
  - > Increases salary basis from \$455/week to **\$679/week** (from \$23,660 to **\$35,308**).
  - > Allows 90/10 nondiscretionary payment concept.
  - > Increases highly compensated test to \$147,414.
  - > Requests comments on increasing salary test every four years.
  - > No automatic indexing, no regional approach.
- > Obama proposal increased salary test to **\$47,476**.
- > Likely to be litigation from both sides on this one.

# Expansion of Overtime Eligibility

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## > *Timing?*

- > 60-day public comment period from date of publication.
  - > DOL will likely push to publish final rule effective 1/ 2020 (before 2020 election)..but could be tied up in court.
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- > States will not wait and have been introducing state legislation to raise “salary basis” under state laws to equal the Obama proposal.
  - > Beware of states like California that tie their overtime salary requirement to “two times the state minimum wage” (already exceeds the Obama proposal).

# Paid Sick Leave/ Paid Family Leave

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- > Currently 11 states and D.C. and numerous local jurisdictions require some form of paid sick leave.
- > See recent enactments in New Jersey, Michigan, Washington.
- > Some **red states** have been successful in arguing/ enacting **“preemption”** laws to have state law preempt local paid sick leave laws.
- > See recent case in Austin, Texas.



# Predictable or “Fair” Scheduling

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- > Aimed primarily at retail and food service industries.
- > Generally require written work schedules in advance, and require “predictability pay” if the employer changes work schedules.
- > Sometimes also address “part -timers” and work scheduling.
- > Recent examples in San Francisco, Emeryville (CA) and Seattle.
- > **Oregon** was the first to enact a statewide law in 2017.
- > **This will be a very “hot issue” for state and local legislation in the near future.**



# Continued *#MeToo* Movement Fallout

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- > The “Weinstein effect” is the gift that keeps on giving.
- > The *#MeToo* movement has led to an increase in sexual harassment claims, how much it takes to settle them, and has spurred significant state legislative activity:
  - > Increased employer liability.
  - > Bans on non-disclosure agreements and confidentiality clauses in sex harassment cases.
  - > Bans on arbitration agreements.
  - > Broad employer training requirements.
- > The *#MeToo* movement was not merely a 2018 phenomenon and is not going away any time soon. State legislative activity will continue into the foreseeable future.

# Contracting/ Subcontracting/ Gig Economy

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- > Independent Contractors and the “ABC Test”
- > Joint Liability
- > Temporary Staffing Laws

# Independent Contractors and the “ABC Test”

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- > California Supreme Court ( *Dynamex* ) threw out 30 years of case law and adopted the very stringent “ABC test” for determining employee/ independent contractor status.
- > This is the number one issue employers in California are dealing with right now.
- > Already has led to federal proposed legislation (Bernie Sanders) and proposed legislation in other states.



# Independent Contractors and the “ABC Test”

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- > Under the new “ABC test,” a worker is considered an employee unless the hiring entity establishes all three of these prongs:
  - A. The worker is **free from the control and direction** of the entity in connection with the performance of the work, both under the contract for the performance of the such work and in fact; AND
  - B. The worker performs work that is **outside the usual course** of the hiring entity’s business; AND
  - C. The worker is **customarily engaged on an independently established trade, occupation, or business** of the same nature as the work performed for the hiring entity.

# Joint Liability

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- > Significant federal activity:
  - > Trump DOL rescission of Obama DOL “joint employer” guidance.
  - > New NLRB rule.
- > **But state activity remains a threat.**
- > For example, recent California legislation:
  - > Makes “client employers” jointly liable with “labor contractors” (staffing agencies, others) for payment of wages and workers’ compensation.
  - > Makes general contractors jointly liable with subcontractors (at any tier) for payment of wages and benefits.



# Temporary Staffing Laws

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- > The temporary staffing industry continues to be a target for labor and worker advocates.
- > **California:**
  - > Repeated proposals to regulate industry.
  - > Special pay statement requirements for temporary staffing agencies.
- > **Illinois:**
  - > Adopted “model” temp worker legislation in 2017.
  - > Notice and reporting requirements, prohibition on charging for certain things, make effort to place temps in permanent jobs when they become available.

# Collective Bargaining Issues

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- > Labor responses to minimize impact of *Janus v. AFSCME*
  - > Shortened revocation windows.
  - > Mandatory “orientation” sessions.
  - > Elimination of duty to provide services to non-members.
- > Attempted repeal of right-to-work laws (see Missouri).
- > Expansion of state collective bargaining rights for employees excluded from the NLRA (public employees, agricultural employees).



# Government Contracting as “Leverage”

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- > Using the “power of the purse” to influence social policy and employment standards.
- > Obama “Fair Pay and Safe Workplaces” Executive Order:
  - > Disclosure of labor law violations.
  - > No mandatory arbitration of employment discrimination and sexual harassment claims.
- > Be on the lookout for state law versions of similar executive activity.
- > Be on the lookout for “creative” hooks:
  - > CA example on electric vehicles and “fair treatment of workers.”

# Continued Assault on Arbitration Agreements

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- > Ongoing state efforts to ban the use of mandatory arbitration agreements in employment.
  - > FAA preemption?
- > Linking the issue to the *#MeToo* movement:
  - > Ban on pre-dispute arbitration agreements involving sexual harassment claims (New York).
- > Beware of executive orders or activity.
- > California's Private Attorney General Act (PAGA):
  - > May be an end-run around arbitration (so far).
  - > Look out for other states adopting their own PAGA laws.

# Hiring & Discrimination Issues

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- > “Ban the box” laws.
- > Gender pay equity.
- > Bans on use of “prior salary history.”
- > Cannabis: the next “frontier” in employment discrimination law:
  - > Reasonable accommodation?
  - > Medical use?
  - > Drug testing policies?
  - > State “lawful, off -duty conduct” statutes?



# Workplace Safety Issues

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- > Anticipate **“blue state”** responses to each and every action of Trump Administration on OSHA issues.
- > Twenty-two states have their own “state plans” that must be “as effective” as federal OSHA (but can go further).
- > Recent areas of state activity include:
  - > Penalty amounts.
  - > Electronic reporting.
  - > Recordkeeping violations and the “Volks” rule.
  - > Specific safety standards on issues not successful at the federal level.

# Non-Competes and Restrictive Covenants

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- > Federal efforts for the Mobility and Opportunity for Vulnerable Employees (MOVE) Act.
- > 2016 Obama Administration “Call to Action” to state legislators has led to a flurry of state activity:
  - > Restrictive covenant and non -competition reform in **Massachusetts, Colorado, Idaho, Illinois, Nevada, New Mexico, Oregon and Utah** .
  - > Increasing state scrutiny (state Ags) on “no-poach,” “no solicitation,” and “no-hire” agreements.
- > **BOTTOM LINE – This is likely to continue to be a hot area of state activity.**

# Why Do I Care What Happens in California?

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- > **“What Happens in California Does Not Stay in California.”**
- > California is the “laboratory” where many progressive employment policies are tried first.
- > Many policy proposals were tried first in San Francisco, then California, and then are tried in other states.
- > **BOTTOM LINE – The problems that California employers face today may be your problems tomorrow!**

# Federal ♦ State ♦ Local

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- > Government closest to the people generally has the most impact
- > States are leading the way
- > Local cities and counties are active (state oversight)
- > Direct coordinate between each level of government
- > Protecting Georgia Small Businesses Act: SB 277 - 2016
- > Era of transparency and misrepresentation

# Advocacy

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- > Marathon Plan (GDA example)
- > Lobbying
- > Direct and channel relationships
- > Champions
- > Winning the PR battle



# Advocacy Strategy

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- > Playbook for each state, county, city
- > Investment of time and money
- > Leveraging partners (Job Creators Network, NFIB, Chambers, etc.)
- > Grass roots to the Governors office
- > It's about policy and not politics
- > Currency traded is truth

# Summary

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- > Ongoing efforts
- > Dedicated resources
- > Change happens in small increments
- > You can help steer the ship

## Some Final Thoughts:

- > Employers should pay close attention to legislative developments at the state (and increasingly, the local) level.
- > Employers across the country should monitor developments in other jurisdictions.
- > Employers should consider investing in political advocacy to impact or lessen the burden of such policy proposals.
- > Employers that ignore the public policy debate on labor and employment matters at the state and local level do so at their own peril.

# FINAL QUESTIONS

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# THANK YOU

FOR JOINING US

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