



# President Trump? President Clinton? A Workplace Law Preview

Insights

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Either Republican Donald Trump or Democrat Hillary Clinton will almost certainly be inaugurated as our nation's 45th president on January 20, 2017. In the four years (or more) that follow, one of these two candidates will be in charge of the executive branch, will have an opportunity to select judges to serve in the federal courts, and could wield significant influence over Congress.

Whoever is elected, the impact on workplace law will be significant. Each candidate has made numerous policy statements relating to labor and employment law issues, each signaling some massive potential changes. While campaign promises are not always kept and each candidate reserves the right to alter course once in office, we can offer some general ideas about what the next four years could look like under President Trump or President Clinton.

## Immigration

Perhaps the cornerstone of the Trump campaign is his position on immigration. Although "building a wall" has received the most attention, for workplace law purposes, the most significant changes that could come about under a Trump administration would be seeking to deport some segment of undocumented workers from the labor force (although he recently indicated a possible "softening" on this position), mandating E-Verify to check the employment eligibility of all workers in the country, and altering the temporary work visa programs (such as H1-Bs) which allow employers to bring on highly skilled foreign workers (either by significantly decreasing the number of visas issued or increasing prevailing wages for such workers and otherwise encouraging the hiring of Americans).

Clinton supports a plan creating a simple path to citizenship for undocumented workers with no criminal record, and does not advocate wholesale deportations. She would also attempt to restore President Obama's Executive Action on immigration reform, specifically aiming to restore Deferred Action for Parents of Americans (DAPA) and Deferred Action for Childhood Arrivals (DACA) (which were put on hold by the Supreme Court).

Further contrasting Trump, Clinton would increase the amount of temporary work visas given to highly skilled foreign workers, believing that the program allows businesses to hire the best workers at the lowest cost.

## Employment Discrimination

Clinton has made gender discrimination one of the centerpieces of her campaign, and has supported the Equal Rights Amendment to the Constitution to secure equal pay for women. Trump has not gone that far, but he has stated in media interviews that he supports the concept of equal pay for equal work.

The Human Rights Campaign stated that Clinton promised to make it “her highest priority” to enact a law that would expand Title VII to include sexual orientation and gender identity as protected categories. Trump has not taken a public position on that matter.

### **Employment Leave**

If elected, Clinton will attempt to expand the Family and Medical Leave Act (FMLA) to include up to 12 weeks of paid family and medical leave for parental leave purposes or to care for a seriously ill family member, financed by increasing taxes on the wealthiest Americans. It also appears that she will seek to expand FMLA to cover all workers in the nation, not just those who work for employers of a certain size. The Democratic platform also advocates for seven days of paid sick leave for all workers.

Although Trump has not taken a public position on this issue, and the GOP platform includes no discussion of family leave, his daughter Ivanka gave a convention speech generally touting the role of working mothers and leading some to speculate that a President Trump could be open to expanding family leave laws.

### **Minimum Wage**

Clinton has promised to lead the fight to raise the nation’s minimum wage to \$12 per hour, and supports the “Fight for \$15” in states and local jurisdictions where appropriate (her party’s platform pushes for \$15 per hour across the board).

The Republican platform simply states that “minimum wage is an issue that should be handled at the state and local level.” Meanwhile, Trump himself most recently said he backs a federal minimum wage increase to \$10 per hour (a change from his position in a November 2015 primary debate). This is just one example where candidate Trump differs from the traditional GOP orthodoxy.

### **Other Wage And Hour Issues**

The Republican platform takes the position that the “1930s-era” Fair Labor Standards Act (FLSA) is being used to deny flexibility to both employees and employers and is in need of modernization. It also bemoans the fact that the U.S. Department of Labor (USDOL) has scrapped decades of good law to implement the agenda of “big labor,” no doubt referring to the impending overtime rules changes taking effect this December. Although Trump has not taken a public position on the USDOL’s changes, he has sent at least one tweet complaining that American workers’ wages are “too low.”

Clinton has indicated support for the impending changes to the FLSA overtime rules. She also stated that she will protect workers from both independent contractor misclassification and wage theft.

## **Labor Unions**

The Republican platform spends a great deal of time criticizing the role that labor unions currently occupy in the economy, and the proposals put forth seek to minimize their influence. It promises to bring labor law into the 21st century by requiring transparency so that union members know how their dues are being used, limiting veto power of union officials, and supporting right-to-work laws permitting workers to opt-out of forced membership. Trump himself has signaled his agreement with these concepts, specifically stating that the country needs to be “very careful” with public sector unions, especially when they force unwilling workers to join.

Clinton takes the polar opposite approach. “When unions are strong,” she recently said, “America is strong,” reflecting the position of a candidate who earned a 94% lifetime voting record score from the AFL-CIO when she was a U.S. Senator. If elected, she would aim to restore collective bargaining rights for unions and defend against “partisan attacks” on workers’ rights.

The Democratic platform says that it will fight to pass laws that direct the National Labor Relations Board to certify a union if only a simple majority of eligible workers sign valid authorization cards (also known as “card check”), and supports binding arbitration to help workers who have voted to join a union reach a first contract. The Democratic platform vigorously opposes right-to-work laws.

## **Affordable Care Act (ACA)**

Clinton has stated that she will defend and seek to expand the ACA, while Trump has promised to dismantle the law and lead a Congressional effort to repeal the ACA altogether. If Trump has his way, according to the party platform, the ACA would be replaced with a “simplified” system that reduces mandates while permitting individuals and small businesses to form purchasing pools to expand coverage.

## **Other Benefits Issues**

Whereas Clinton has professed her support for the LGBT community and supports same-sex marriage, Trump has gone on record indicating that he does not support same-sex marriage and believes marriage should be defined as between a man and a woman. This falls in line with the GOP platform condemning the recent Supreme Court decisions permitting same-sex marriages (*Windsor*) and requiring states to recognize them (*Obergefell*).

## **Religious Freedom**

Last year, Clinton came out against the state action taken in Indiana which permitted businesses to discontinue services based on religious belief, and this year she has indicated her opposition to North Carolina’s so-called “bathroom law.” She states that she supports courts that protect people from discrimination on the basis of gender identity and sexual orientation in all aspects of public life.

Trump has indicated states should have the right to make decisions on issues involving gender identity. Moreover, the Republican platform endorses the First Amendment Defense Act, which would bar government discrimination against businesses acting on the belief that marriage is the union of one man and one woman.

## **Other Issues**

The Republican platform indicates several times that regulatory reform is key to its agenda: “Unelected bureaucrats in the executive branch now write countless rules with the force of law and arbitrarily punish [those] who disobey those rules.” The GOP states that it would require major new regulations be approved by Congress before they take effect, which could impact wage and hour matters, labor law, workplace safety, and many other workplace issues.

The Democratic platform says that it would limit the use of forced arbitration clauses in employment situations, which it says “unfairly strip...workers...of their right to their day in court.” As for Clinton herself, she recently expressed opposition to arbitration agreements in certain consumer settings, but has not publicly taken a position on the use of mandatory agreements in employment relationships.

## **Supreme Court (SCOTUS)**

At a minimum, the next president should have an opportunity to fill one vacancy on the SCOTUS (the seat previously held by deceased Justice Antonin Scalia). If Trump is elected, it is fair to assume that the conservative status quo will be restored to the Supreme Court, especially if he nominates one of the individuals he has already touted as Scalia’s possible replacement. This would move somewhat reliably conservative Justice Anthony Kennedy back to his familiar role as serving as the fifth swing vote in tight cases.

However, a Clinton election will most likely lead to a left-leaning justice replacing Justice Scalia (perhaps Judge Merrick Garland), moving either that justice or fairly reliably liberal Justice Stephen Breyer into swing vote status. In other words, the Court seems poised to quickly tilt either left or right come early 2017.

Future vacancies cannot be predicted, but it is worth noting that the three oldest justices – Ruth Bader Ginsburg (83), Kennedy (80), and Breyer (78) – are liberal or moderate. Statistical models suggest a 40% chance that there will be one additional vacancy before 2020 and a 20% chance that the next president will be able to appoint two additional Justices. Therefore, the next President could have an opportunity to shape the Court for years to come.

This becomes important when you consider the innumerable workplace law issues that could come before the Court. Arbitration provisions, class action litigation (including class waivers), union agency shop fees, the reach of Title VII, immigration programs, wage and hour law, and administrative agency powers are just some of the issues likely to confront the SCOTUS in the next four years.

## **Conclusion**

And now, a caveat: the ambitious agendas outlined by both candidates could face resistance in Congress. For example, although the Senate could swing to the left this November, even the most optimistic forecasts do not predict the Democrats will secure a 60-seat filibuster-proof majority. Moreover, the Republicans are still expected to hold the House majority after Election Day. Add them

Moreover, the Republicans are not expected to hold the House majority, after Election Day. Had they... together, and it means that Clinton would probably face an uphill battle to pass legislation implementing her proposals, or Trump could face difficulty dealing with a fractured Congress.

Therefore, it is likely that whichever candidate is elected will use executive orders to accomplish some portion of his or her agenda. The limits of this presidential power continue to be tested in the courts (with the SCOTUS ruling on immigration action the latest battle on that score), and no doubt that will continue in 2017.

The bottom line is that whether we have President Trump or President Clinton, you can be sure that workplace law will see some substantial changes over the next four years. Fisher Phillips will be there to keep you up to speed no matter who is elected.

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