



# What Employers Need To Know About Puzder's Selection As Labor Secretary

Insights

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President-elect Donald Trump has announced that he would nominate Andrew Puzder to be the next Secretary of Labor. This Cabinet-level position heads the U.S. Department of Labor (USDOL), one of the federal agencies that has the widest and deepest impact on employers across the country. Assuming that Puzder's selection is confirmed by the Senate, what should employers know about him in order to predict what life will be like under his tenure as part of the Trump administration?

We've assembled the opinions of some of our firm's foremost thought leaders when it comes to this question, offering you a glimpse into what to expect for the next several years.

## Puzder's Background

Puzder is the CEO of CKE Restaurants, the parent company of Carl's, Jr., Hardee's and Green Burrito quick-service restaurant brands. He was an early supporter of the president-elect and served as a senior policy advisor to the Trump campaign. He has been a frequent media commentator on the state of the American workforce, and therefore we can glean much about how he is expected to run the Labor Department. In most instances, he can be counted on to favor management over labor, although he often takes pragmatic positions when it comes to balancing the interests of workers and employers.

## USDOL's Role Over Employers

The USDOL impacts the inner workings of the American workplace on a daily basis. The department enforces laws involving employers and unions, and more importantly, develops binding regulations and directives for a variety of workplace laws. It encompasses over 30 agencies, boards, offices, and programs that each have a specialized role when it comes to labor and employment law.

The three most commonly known agencies and offices within the USDOL are the Wage and Hour Division (WHD), the Occupational Safety and Health Administration (OSHA), and the Office of Federal Contract Compliance Programs (OFFCP). However, the USDOL also has a role to play with respect to immigration law, and with the selection of Puzder, employers may also be interested to follow the goings-on which will take place at the Office of Labor-Management Standards (OLMS) – an office that could play a vital role over unionized workplaces in the coming years.

## Wage And Hour Division

Most employers are sitting in limbo at the moment, wondering whether an appeals court will resurrect the USDOL overtime rule that was recently blocked by a federal court judge. But taking a longer-term view, many also wonder about the future of the rule once January 20, 2017 arrives, with President-elect Trump occupying the Oval Office and Secretary Puzder heading the Labor Department.

While it is difficult to gauge how Trump feels about the overtime rule, Puzder's feelings on the matter are very clear. "He is not a fan," says Lori Armstrong Halber, a leader in the Fisher Phillips Wage and Hour Law Practice Group. She points to the fact that Puzder wrote an op-ed in Forbes magazine earlier this year where he broadcasted his opposition to the rule. He predicted that it would "not deliver as promised," and was an ill-conceived effort by the government to regulate its way to economic prosperity. "Puzder said that he did not believe it would be helpful to turn management positions into hourly jobs where employees are compensated for 'time spent rather than time well spent,' which is a pretty good indication that he will want to scrap or substantially rework the rule once in charge," said Armstrong Halber.

Another area where Puzder has signaled his position is with respect to federal minimum wage. Armstrong Halber points to an interview he gave to Fox Business in May where he plainly stated that "raising the minimum wage is not the best solution" to solving economic woes of the middle class. If Trump cedes decision-making power to Puzder with respect to this issue, employers can expect that any increase to the federal minimum wage of \$7.25 will be slow, measured, and cautious. In that same interview, Puzder advocated for a tiered system that retained a lower minimum wage for entry-level workers, while raising the standard federal minimum wage to about \$9 per hour.

"His selection to the top post in the Labor Department can't be seen as a positive to those in the 'Fight for \$15' movement and others who want to see a quick and dramatic increase to the minimum wage," says Armstrong Halber.

"Overall, you can expect decreased wage and hour enforcement from the Department of Labor under Puzder," concludes Armstrong Halber. His appointment seems to be in line with President-elect Trump's promises to promote a less burdensome environment at the federal government for employers.

### **Occupational Safety And Health Administration (OSHA)**

The stated purpose of OSHA is to assure safe and healthy working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance. Under the Occupational Safety and Health Act (OSH Act), OSHA is required to promulgate safety and health standards designed to protect employees from safety and health hazards in the workplace.

The agency is required to go through an extensive rulemaking process in order to promulgate a new standard. During the Obama Administration, OSHA has set a number of safety and health standards which have been a concern to the business community and employers.

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In addition to complying with OSHA's safety health standards, the OSH Act requires employers to follow or comply with Section 5(a)(1) of the OSH Act, known as the "General Duty Clause." This clause requires employers to keep their workplaces free from serious recognized hazards and is cited when no specific OSHA standard applies to this hazard. In addition to promulgating safety and health standards, OSHA is required to conduct inspections of worksites throughout the country, which can lead to citations and fines for businesses found to be out of compliance.

Starting on January 20, 2017, Secretary of Labor Puzder will be charged with reviewing a number of OSHA standards and directives that had been issued over the last eight years of the Obama Administration. According to Edwin Foulke, Jr., co-chair of the Fisher Phillips Workplace Safety and Catastrophe Management Practice Group and a former head of OSHA, these standards and regulations have been the subject of a number of criticisms from employers, many believing that they are overly broad and unduly burdensome. "We anticipate that there will be a number of standards and regulations that will be reviewed within the first six months of the Trump administration," says Foulke. According to Foulke, there are quite a few that could be under Puzder's microscope.

First and foremost, the agency's Recordkeeping and Reporting of Occupational Injuries and Illnesses rule could be rolled back by Puzder. OSHA's new recordkeeping standard was revised in 2016 and went into effect on December 1. In those changes, OSHA required that employers provide a reasonable reporting policy for employees to report injuries and illnesses, as well as revising the recordkeeping retaliation provisions directly impacting safety incentives and drug testing. "There has been a lot of concern raised by employers about these changes," says Foulke, which require employers covered by the standard to electronically file injury and illness information to the government.

Another recent change impacting employers has been the increase in OSHA penalties. In 2016, the agency increased their fines by approximately 78%. There is a continuing provision in the budget bill which allows OSHA to update or increase the penalty amounts each year based on the cost of living. "We anticipate that the Trump administration will look to Congress to revoke that provision and perhaps reduce the current penalties," says Foulke.

Another area that Puzder might focus on is the standard by which OSHA enforces the collection of more than 22 whistleblower statutes enforced by the agency's whistleblower protection program. Employees are protected from retaliation if they face adverse action as a result of participating in safety and health activities or reporting work-related injuries, illnesses, or fatalities. In the past several years, OSHA revised the whistleblower investigation manual by lowering the employee's burden of proof necessary to prove retaliation. Puzder could ratchet that standard back up to a level more acceptable to employers.

Other areas that are likely to be addressed by Puzder include:

- The respirable silica standard has drawn criticism from a number of industry and business groups who claim that key components of the standard – particularly ones that relate to exposure assessments, monitoring of respiratory silica levels by a competent person, and medical examination for employees – are burdensome. “Some employers believe that compliance is nearly impossible,” says Foulke, which is why this standard is likely to be scrapped or radically revised under Puzder.
- In 2012, OSHA issued an interpretive letter which stated that the OSHA Compliance Officer could allow non-company personnel, such as union representatives, plaintiffs’ lawyers, or community activists, to participate in the walk-around inspection of a non-union facility during an inspection. According to Foulke, the Trump administration will look closely at this policy and most likely reverse it, especially because it is not supported by the OSH Act itself.
- Foulke believes that OSHA will move away from the sole focus of enforcement to more of an “enforcement and compliance assistant” mode that was prevalent in not only the Reagan administration but also both Bush administrations and the Clinton administration. “I believe that Secretary of Labor Puzder will look at the use of the joint employer doctrine in the OSHA setting, scaling back some of the aggressive positions taken by the Obama administration.”
- Finally, the Occupational Safety and Health Review Commission currently has a vacancy and is operating with only two members. Foulke anticipates that the Trump Administration will move to appoint the current Republican Commissioner, Heather McDougal, as Chair, and move to fill the other remaining position with a like-minded individual in order to ensure a Republican majority at the Commission.

### **Office Of Federal Contract Compliance Programs**

The OFCCP is the office that ensures employers doing business with the federal government (federal contractors and subcontractors) comply with certain nondiscrimination laws. The most common example of OFCCP’s power includes affirmative action requirements, but the office’s reach goes much further than that.

The executive branch has wide latitude when it comes to creating law governing the actions of federal contractors and subcontractors, often pursuing certain goals without having to work through Congress. According to Tom Rebel, co-chair of the Fisher Phillips Affirmative Action and Federal Contract Compliance Practice Group, the Obama administration made multiple changes to affirmative-action-related requirements via Executive Orders and Presidential Memos, bypassing Congressional or rules-making processes in many instances.

The agency also expanded regulatory requirements for affirmative action programs under the Vietnam Era Veteran’s Readjustment Assistance Act and Section 503 of the Rehabilitation Act. “We do not expect any reversion of the affirmative action regulations under Secretary Puzder,” says Rebel, “but we will likely see some efforts to negate some of the more onerous Executive Orders.”

Among the Obama-era initiatives that Rebel believes could be rolled back in the Puzder Labor Department are:

- The 2009 Executive Order that requires employers to post notice of employees' right to organize into unions (E.O. 13496);
- The so-called "blacklisting" Executive Order, formally known as Fair Pay and Safe Workplaces, that requires disclosure of certain workplace law violations during the previous three years, prohibits arbitration agreements relating to Title VII or sexual assault, and requires certain pay information be given to employees and independent contractors (E.O. 13673) (NOTE: most of these requirements have been blocked by a federal judge and seem likely to never go into effect); and
- The 2015 Executive Order that requires federal contractors to provide paid sick leave accrual for employees working on or in connection with some government contracts (E.O. 13706).

There are numerous other Executive Orders that Rebel believes might face scrutiny by Puzder, including ones that require successors to service contracts to offer jobs to predecessor employees, add sexual orientation and gender identity as categories protected under law, and establish a minimum wage much higher than federal levels (currently \$10.15 per hour and \$10.20 per hour as of January 1, 2017). "I wouldn't be surprised if his opposition to a quick and dramatic rise to the federal minimum wage also translates to his opposing a higher minimum wage for federal contractors," says Rebel.

And finally, the big news from 2016 involved the expansion of EEO-1 reports to require all businesses with over 100 workers – and not just federal contractors – to provide detailed information about their pay practices in an effort to address gender discrimination. While this initiative is actually within the purview of the Equal Employment Opportunity Commission (EEOC) and not OFCCP, it was spurred in part by a presidential memorandum directing the USDOL to increase data collection related to wages and gender. Although OFCCP's activities in this area were shelved when the EEOC took the lead on developing the proposed changes to the EEO-1, both agencies will have access to the compensation data, and OFCCP will use the information when it schedules contractors for review.

Although the first mandated report is not currently due until March 2018, the information collected on that form includes 2017 compensation data. "I believe it is quite possible that the Trump administration will withdraw this expanded EEO-1 requirement in the new year," says Rebel. "We're advising employers to review their compensation plans immediately with the expectation that they will soon come under federal scrutiny, but don't be surprised if this change never takes effect."

### **Office of Labor-Management Standards**

While most employers are familiar with OSHA and the Wage and Hour Division, and federal contractors are intimately familiar with OFCCP, you could be forgiven if the Office of Labor-

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Management Standards (OLMS) sounds foreign to you. This office is charged with the mundane-sounding task of managing the receipt of funds by labor unions, and has the power to investigate in order to ensure union payments are legitimate. Under the Obama administration, this office steered clear of controversy and could generally be counted on to respond favorably to the concerns of labor.

But things under Puzder could be different – radically different. “The appointment of Puzder to head the Labor Department could very well awaken a sleeping giant in OLMS,” says Todd Lyon, a partner who practices in the Fisher Phillips Labor Relations Practice Group. Under President Obama, OLMS contains 44% fewer full-time employees than it had under the Bush administration, but Trump could ratchet that number up again under Puzder’s leadership. That might spell trouble for unions and provide another weapon in employers’ arsenals when it comes to keeping their workplaces union-free.

“OLMS has the power to ensure that working men and women have a transparent view of where their hard-earned money given to unions is spent,” says Lyon. Unions have long been required to provide a full accounting of their finances through reports such as the LM-2 form, allowing the public to view union officers’ salaries and benefits, as well as gaining a window into union expenditures on service providers and vendors. “But these forms are only as valuable as the agency charged with policing them,” says Lyon. And Puzder might just usher in a new era that could see heightened scrutiny and rules enforcement when it comes to this information.

If Puzder turns out to be as pro-management as many hope, he could hold unions accountable to ensure that union dues are spent on activities that serve the needs of bargaining unit members, and not union executives. Simply by holding labor’s feet to the fire and ensuring the information is comprehensive and accurate, Puzder could present a gift to employers in the form of greater transparency. “The more information the better,” says Lyon. Employers can use information from the LM-2 to point out to disaffected workers that the union representing them or seeking to win their vote might not have their best interests at heart – or at least are not as careful with their money as workers might hope.

The irony here, says Lyon, is that the pendulum swung back in favor of employers with such a stunning pace that it caught the labor movement off guard. “Not six months ago, employers were rightly concerned about being forced to produce too much information regarding their labor strategies with the proposed ‘persuader’ rule, and unions were trumpeting the need for greater transparency. Now the persuader rule is all but dead, and Puzder’s ascendancy to the head of Labor means that the shoe is on the other foot. I’m guessing you won’t hear too many unions clamor for greater transparency when it comes to Puzder and the direction he can take OLMS.”

## **Immigration**

Finally, while most employers are aware of the involvement of the federal government in workplace immigration matters, not all are aware of the fact that the USDOL plays a role in enforcing federal immigration policy. This is one area where Puzder and Trump have not seen eye-to-eye.

Whereas Trump has stated that immigrant workers have a depressing effect on native-born workers' wages, Puzder has stated that he believes they are a crucial element in the American economic system, especially given the aging workforce, says Kim Thompson, chair of the Fisher Phillips Global Immigration Practice Group. Thompson points to a July op-ed coauthored by Puzder that appeared in the Wall Street Journal where he said, "Legal immigrants are an asset to the country." He criticized Trump's plan to deport up to 11 million people as "unworkable" and called for Trump to revisit his proposal.

The USDOL is involved in the H-1B process – and it is worth noting that the President-elect stated on the campaign trail that he favors limiting American job opportunities for skilled foreign workers. The USDOL handles the Labor Condition Application (LCA) step, which is a prerequisite to the filing of the H-1B with the USCIS. "Under Puzder, it is unclear whether the USDOL will start ramping up on H-1B Wage and Hour Division investigations to ensure that the terms and conditions of the LCA are being complied with," says Thompson, although that is an action that the department could take.

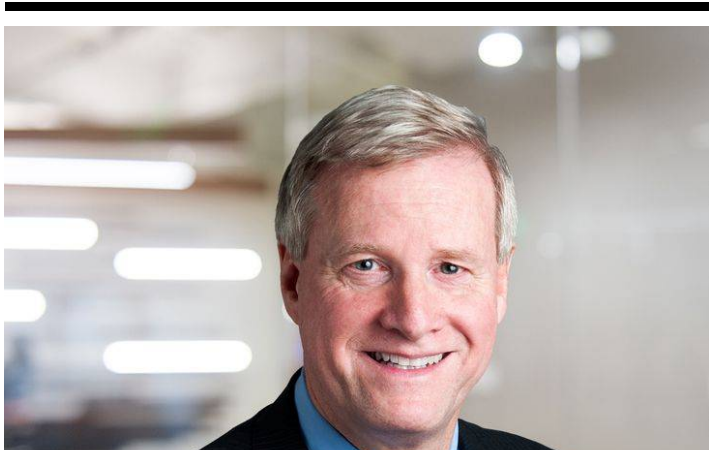
Also, with respect to green card cases, the USDOL handles the PERM/Labor Certification process, which is the first step in most of the employment based green card cases. "There has been talk about modernizing the process for years," says Thompson, "and Puzder could influence the steps involved in recruiting U.S. workers and what hoops an employer needs to go through to get the PERM approved." While the USDOL could also start auditing a greater percentage of the cases, causing delays in getting approval and leading to more denials – and expense – for employers, it is unclear whether Puzder's pragmatic approach will carry the day over Trump's more aggressive attitude on the subject.

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