

## **EXPECTED AND POTENTIAL OUTCOMES OF A TRUMP PRESIDENCY**

This memorandum will address at least some of what can be expected under the soon-to-be Trump administration. I will look at both issues directly related and unrelated to workers and organized labor. For the issues related directly to workers and labor, I have further broken down the analysis into parts related to the Supreme Court, other Executive Action, and action that would require Congressional approval.

### **A. The Supreme Court**

President Trump will have the ability to nominate at least one, and possibly three, Supreme Court justices. The effect of this cannot be understated. There are currently four Supreme Court justices that could in any way be described as friendly to labor and/or workers' rights. Just one nominee is sufficient to change the Court's position with regard to upholding pro-worker legislation. Three nominees could severely walk back the rights of employees to the time of robber barons (particularly if the other two are replacements for Justices Ginsburg and Breyer, both part of the more worker-friendly side of the Court, and both in their eighties). This is not merely about the Court tilting slightly one way or the other; a Trump Supreme Court could roll back gains made for workers to the 1920s.

Undoubtedly, once Trump's replacement for Justice Scalia is confirmed, we will see a revival of the Friedrichs case, which challenged the ability of public sector unions to require all employees to pay their fair share for representation. The Court, minus Scalia, had split 4-4 on the issue earlier this year (leaving in place the Ninth Circuit Court of Appeals' decision upholding the fair share requirement). A Trump nominee would surely vote to strike down the requirement. Essentially, it would impose "right-to-work" legislation nationally for all public sector unions.

A Trump court could also overrule the NLRB's position and court decisions finding mandatory individual arbitration agreements to violate the NLRA. However, as noted above, it could go much, much further than that in undermining worker and union rights. In the early part of the 20<sup>th</sup> century,<sup>1</sup> a number of state and federal laws were passed that were meant to help workers, including laws on minimum wage, child labor laws, and regulations on banking and other industries. The Supreme Court repeatedly struck down such provisions on the grounds that they were unconstitutional deprivations of liberty.

While that line of cases was eventually overturned by the Supreme Court in the 1930s, current conservative legal scholars and judges (including some specifically named by Trump during his campaign as possible nominees, such as Senator Mike Lee and Texas Supreme Court Justice Don Willett) have expressly sought to revive that type of legal analysis.<sup>2</sup> A return to that type of legal era could undo all manner of pro-worker and pro-union laws in effect today: minimum and prevailing wage laws; child labor laws; anti-discrimination laws; even the National Labor Relations Act itself. Given the list of people Trump has provided as possible Supreme Court nominees, this is absolutely within the realm of possibility.

The Building Trades may face even more direct pressure. Given Trump's fondness for threatening to break up large outfits like Amazon with anti-trust tools, one could even see his federal courts weakening the antitrust exemption for labor unions so that things like market recovery programs are no longer lawful. While not necessarily likely, given the potential Supreme Court shift, it is certainly possible.

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<sup>1</sup> Known as the "Lochner era," after one of the seminal cases of the time.

<sup>2</sup> Senator Lee has expressly stated his belief that the New Deal was and is unconstitutional. This is just one example of the legal thinking of someone who has made Trump's short list of possible Supreme Court nominees. I cannot stress enough how problematic this line of legal reasoning would be in regards to the entire structure of our

We can also expect to potentially see more legal challenges to PLAs, particularly in federal court with more Trump-nominated judges in place. There is currently a large backlog of non-Supreme Court judicial vacancies that will be filled by Trump and confirmed by the Republican Senate. If those nominated by Trump are similar to those he has proposed for the Supreme Court, it is easy to see the federal courts being populated by extremely anti-labor and anti-worker judges. Expect such judges are hostile to PLAs and other union and worker rights.<sup>3</sup>

## **B. Executive Action**

We will assuredly also have strong anti-labor folks appointed to the NLRB, which will soon erode all the gains of the past few years. A new Board may do away with things like card check and even neutrality agreements, and possibly reverse the Board's holding that market recovery programs constitute Section 7 protected activity. And certainly a Trump NLRB will likely reverse the Board's relatively recent holding that McDonalds was a joint employer with certain of its franchisees.

The NLRB's General Counsel, former IUOE attorney Dick Griffin, will be replaced in 2017. We will likely see the NLRB's enforcement focus shift from employer wrongdoing to union actions, and see the Board undo the recently-enacted rules speeding up the process of representation elections.

I would also expect a number of pro-labor and pro-worker executive orders to be rescinded. Obama's executive order encouraging agencies to use PLAs on large-scale projects is certain to be overturned. Similarly, the paid sick leave order for federal contractors will likely

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country. Any gains we have made at a state level with regard to employment and labor protections could be thrown out the window.

<sup>3</sup> I would also expect conservative states and localities to be emboldened to take further anti-worker steps. As we saw in North Carolina, we may see certain states prohibit the ability of localities to enact pro-worker standards. On the other side of the coin, we can expect more conservative localities to attempt to enact anti-worker legislation, such as the local "right-to-work" legislation enacted in a county in Kentucky and recently upheld by the Sixth Circuit Court of Appeals. We know that at least two counties considered this in Washington State recently,

be rescinded. Also, orders requiring a higher minimum wage to be paid by contractors, that new contractors offer jobs to their predecessor's employees when they take over a contract, that contractors may not be reimbursed for the costs of any activities in preventing unionization, and that contractors notify their employees of rights under federal labor law will all likely be gone.

The longstanding MOU between DHS and DOL, in which DHS will not become embroiled in a labor dispute, may be gone, making it harder to organize or protect undocumented workers. I would also anticipate that the new FLSA overtime/exempt regulations will be repealed. Presumably enforcement will be non-existent anyway. Trump's proposed Department of Labor head, Andrew Puzder, has been a vehement critic of minimum wage laws in his position as CEO of the company that franchises Hardee's and Carl's Jr, and has similarly criticized the Obama administration's rule expanding overtime eligibility and paid sick leave policies. Under Puzder, DOL presumably will renew focus on union "regulation", instead of wage and hour violations by employers.

### **C. Congress**

With both houses of Congress controlled by the Republican Party, I anticipate an onslaught of anti-worker and anti-labor laws to come to fruition. I would be surprised if we did not see a national "right-to-work" legislation at least come up for a vote. I would also anticipate that there may be attempts to further restrict or eliminate dues checkoff.

There is also the possibility that Congress may try to preempt local/state action for labor standards, such as a higher minimum wage and paid sick leave. We should also expect budget cuts and layoffs for public employees - leaving the various NLRB Regions even weaker than they currently are.

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and more will likely follow elsewhere.

Trump and Congressional Republicans have made clear their intention to repeal the Affordable Care Act, which would have a significant impact on millions of working class people. At minimum, I believe we would see the individual and employer mandates removed. Additionally, Speaker of the House Paul Ryan has already indicated that he intends to get rid of Medicare in its current form. While he claims that current retirees will keep Medicare as is, any changes will still fall on current workers and soon-to-be retirees. Trump has nominated Congressman Tom Price to head HHS. Price has repeatedly attempted to repeal the ACA, and has clearly stated his intention to do away with Medicare within six to eight months. Price has also proposed repealing the Medicaid expansions that came with the ACA and provide health insurance to millions of poor Americans.

Additionally, Trump's tax plan will mean that millions of middle-class working families will see their tax bills rise. For example, certain single parents pay more in taxes. The plan eliminates single parents from filing as head of household, requiring them to file as individuals. The Plan also eliminates dependent exemptions, while simultaneously resulting in the top 1 percent of earners getting about half of the benefits of his tax cuts. For example, a millionaire would get an average tax cut of \$317,000.

There are also a number of concerning non-labor issues that could arise under Trump. I would anticipate further removal of protections under the Voting Rights Act, making it more difficult for more people to vote. His nomination of Senator Jeff Sessions, a staunch promoter of voting restrictions, as attorney general is clear evidence of this. Republicans (including specifically Iowa Congressman Steve King) have also talked about imposing a "Muslim registry," which seems like a possible first step to internment as occurred during World War II with Japanese-Americans.

What I would not expect from him would be to follow through on some of the big ticket items he based his campaign upon. He has already said that he will not be building a wall per se - more like a fence.<sup>4</sup> He has also acknowledged that he will not be deporting 11 million undocumented immigrants - more like two to three million (which is roughly the same amount deported under the Obama administration). Most experts also believe it is very unlikely he can simply walk away from NAFTA, or impose a large tariff against Chinese imports.

### **CONCLUSION**

These are simply examples of what we can expect to see in our new political environment. Certainly, there are other possible outcomes as well.<sup>5</sup> At minimum, I hope this paper sheds light on the severe risk the non-oligarch class of our country faces under the current administration. There are many, many battles to come, and we will have to fight every day to prevent our country from regressing to a time when children worked in coal mines.

Submitted by  
Daniel Hutzenbiler  
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<sup>4</sup> He has also acknowledged, contrary to his repeated campaign claims, that any “wall” would not be paid for by Mexico, but that we would potentially seek reimbursement.

<sup>5</sup> Including other, far worse outcomes, such as trade wars, actual wars, restrictions on freedom of speech and freedom of the press, etc.