

POLICIES & PROCEDURES LEGAL ISSUES

How will labor law change under a new administration?

By CJ Arlotta
Associate Editor

NATIONAL REPORT—With a new administration in power for just two months, many legal and academic experts in the hospitality industry are still unsure of how President Trump will govern when it comes to labor and employment relations. While not much has transpired on the topic per se, questions encircling minimum wage, overtime and joint employer liability are still being assessed for operators and their executives.

“Right now—from the labor and employment front—it’s, for the most part, a big overall unknown,” said David Sherwyn, the John and Melissa Ceriale professor of hospitality human resources and a professor of law at the Cornell School of Hotel Administration. “Look, there’s been a lot of—personal feelings aside—talk. There hasn’t been any legislation, especially when it comes to labor and employment.”

Both minimum wage and overtime have been controversial issues in the hospitality industry—as well as politically. Some states and municipalities have recently increased the minimum wage—19 states began the new year with a higher minimum wage—but the federal government’s minimum wage has remained at \$7.25 per hour. The president’s position on increasing the minimum wage has been inconsistent.

“Many blue states will fill the void here, and pass minimum-wage legislation,” said Todd Soloway, head of Pryor Cashman’s real estate litigation practice. “States are entitled to set a floor for wage and hour protections, so in many blue states, it may



Todd Soloway
Pryor Cashman

not matter what the federal government does. Operators need to be keenly aware of the minimum-wage regulations in the state or states in which they operate, as the applicable wage and overtime scheme is likely to be individually governed by the states rather than by the federal government.”

Currently held up in the courts, the overtime rule, which would have expanded overtime pay to full-time, salaried employees earning up to \$47,476 a year (provided they weren’t covered by another exemption) has been a topic of discussion within the industry for some time now. The Trump administration has asked for additional time to respond to the rule, which the U.S. Court of Appeals for the Fifth Circuit has already granted—twice. “The administration could just not appeal it, and it goes away,” Sherwyn said. “I think that’s what’s going to happen in some way, shape or form.” He noted the possibility of the administration revising the current salary threshold for exemption (\$23,660 per year) by increasing it somewhat, while also taking into consideration cost of living differences throughout the country.

Another significant issue—joint employer liability, which, as it stands, can be detrimental to the franchisor-franchisee relationship and the hospitality industry overall. Under the Obama administration, the U.S. Department of Labor (DOL), under the direction of President Obama and former Labor Secretary Thomas Perez issued an administrator’s interpretation, which outlines the scope of joint employer liability and its practical application.

“The Department of Labor set forth in the administrator’s interpretation that joint employment often involves a ‘larger and more established’ employer ‘with a greater ability’ to implement policy or systemic changes to ensure compliance,” said Jeffrey H. Ruzal, member of Epstein Becker Green in its employment, labor and workforce management practice. “The Department of Labor is effectively saying that investigators can hold the larger company (as opposed to a smaller vendor) responsible for ‘financial recovery’ and ‘further compliance.’ The larger company’s financial resources are of primary importance to the DOL because joint employers are jointly and severally liable for violations. Therefore, if one company is unable to pay its employees back wages, then the larger joint employer will be responsible for paying all of the back wages owed.”

Areas of business that can be affected include work contracted out to third parties, such as vendors or independent contractors: cleaning personnel, housekeeping, accounting, human resources and IT. “The threat of liability will exist wherever putative joint employers utilize outside personnel, especially where the putative joint employers has the ability to exercise control over the third-party workers and where those workers are regularly engaged for significant periods of time by the putative joint employer,” he noted.

It’s important to note that the theory of joint-employment liability is not a concept endorsed solely by the DOL. “Courts recognize the theory of joint employment, and will impose liability upon putative joint employers where there are violations of wage and hour laws, as well as other employment-related laws, rules and regulations,” Ruzal noted. When determining whether joint employment exists, courts and the DOL consider the following “economic realities” criteria: directing, controlling, or supervising the work performed; controlling employment conditions; permanency and duration of relationship; repetitive nature of work; integral to business; work performed on premises; and performing administrative functions commonly performed by employers.

“I do not, however, expect that the Trump administration’s Department of Labor will be charged with enforcing the joint-employment administrator’s interpretation; however, I do expect an uptick in the amount of wage and hour lawsuits, especially those involving this joint-employment theory of liability being filed by the private plaintiff’s bar,” he said.

Rolling back joint-employer liability “could be a game changer in the hospitality space, where franchise relationships are commonplace, but until that time, owners and operators should carefully evaluate their exposure,” Soloway said, adding that a Trump-dominated National Labor Relations Board (NLRB) will more than likely abandon attempts to strengthen joint-employer standards. Even relaxing these rules at some level may potentially curb the “exposure of a hotel brand franchisor for conduct of the hotel owner franchisee.”

“Joint employment has already begun to impact the franchisor-franchisee relationship, especially in the context of the NLRB’s expanded definition of joint employer,” Ruzal noted. “Following the traditional franchise model, many franchisors instructed franchisees to follow their blueprint of, among other areas, employment-related practices, such as wage and hour and benefits practices—as well as the daily working conditions of the franchisee’s employees.”



Jeffrey H. Ruzal
Epstein Becker Green

How the president and his administration will pace employment and labor relations decisions is still up for debate. Being somewhat of a wild card, President Trump is keeping the hospitality industry in waiting. Expectations from previous administrations were more easily defined: Democrats bent one way as Republicans leant another.

The president plays into this populist persona where he’s recognized and condemned the exploitation of the working class by what he calls a group of left-wing elitists. There are some who believe this ideology conflicts when it’s applied to labor relations. “If you’re a friend to the worker, are you a friend to organized labor? Usually, that went hand in hand,” Sherwyn said. “Democrats have always been labor’s party; Republicans have not.”

Finding the answer to Trump’s approach to labor as president could be located within past interactions with unions as a businessman. “I expect a very pro-management administration, given President Trump’s background in labor-intensive business dealings,” Ruzal said. What this may mean: the nomination of more conservative members to the NLRB, as well as management-focused political and senior staff at the DOL.

Right now, there’s a two to one Democratic majority on the NLRB, with two spots needing to be filled. “With a snap of the fingers, if they get confirmed, Trump will get his Republican majority,” Sherwyn noted. “He’s not going to have to wait for terms to expire. He’s just got to do it.” The NLRB’s current general counsel’s term will expire later this year in November.

“The NLRB is a very political tribunal, so we should expect to see President Trump appoint board members who will be much more sympathetic to business interests and more skeptical of claims by the labor movement,” Soloway said. **HB**