



EMORY
LAW

Emory Corporate Governance and Accountability
Review

Volume 4
Issue 0 *Presidential Inauguration Issue*

2017

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Jonathan D. Karmel

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Recommended Citation

Jonathan D. Karmel, *The Workers' President*, 4 Emory Corp. Governance & Accountability Rev. 189 (2017).
Available at: <https://scholarlycommons.law.emory.edu/ecgar/vol4/iss0/17>

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THE WORKERS' PRESIDENT

*Jonathan D. Karmel**

The election of Donald Trump sent shock waves through both sides of the political divide and into all recesses of American life. Among advocates for safe and healthy workplaces, the impact of his election will be immediate and profound. Hoping to continue in a Clinton Administration the steady advance of long overdue regulatory changes that picked up steam in the closing months of the Obama presidency, the election unequivocally signaled an end to this progress. The new silica rule, expanded injury reporting, and increased OSHA penalties, just to name a few, are at risk now that the Trump led Republican Party with their anti-regulatory agenda is firmly in control.

For many Americans, the election was deeply personal, and none more so than for the millions of American workers who invested their vote in Donald Trump as their protector and savior, from exactly what is a matter of some debate and discussion. Nonetheless, the evidence of progress in the area of worker safety at the end of the Obama era is a high water mark for Americans to compare and contrast with its likely undoing. Like archeologists unearthing an ancient civilization, we will all be able to decide if American workers are better off and safer in a Trumpian America as an anti-regulatory and pro-business agenda is implemented like never before. The archeological evidence is there without qualification or comment as an unmistakable fault line for answering these essential questions. Are American workers safer? Have we done everything possible to protect American workers from death and injury? And, if not, why not, and what more can we do?

Make no mistake about it; life for workers under the Obama administration was not an Eden-like realm of health and safety perfection. In 2015, the last year for which the Bureau of Labor Statistics published workplace injury and

* Attorney and author, Jonathan D. Karmel, has extensive experience in the labor and employment fields. He is AV Preeminent peer review rated, the highest rating through Martindale-Hubbell. Jonathan has been named among Chicago's Top Rated Lawyers, and he was selected for inclusion in the 2013–2016 Illinois Super Lawyers. Jonathan is a fellow at the College of Labor and Employment Lawyers. He serves as an adjunct professor at Emory University School of Law, where he teaches trial advocacy skills. Jonathan has taught trial advocacy to lawyers and judges in Mexico as their legal system changes to oral advocacy. He has a B.A. from University of Wisconsin, attended graduate school at Yale University, and received his J.D. from John Marshall Law School. Jonathan recently completed writing "[Dying to Work: Stories of Death and Injury in the American Workplace](#)," which will be published by the Cornell University Press this summer 2017.

death data, 4,836 Americans died from acute workplace injuries, or 13 workers a day who died and did not return home at the end of their work shift.¹ In addition, more than 50,000 workers die each year from occupational illnesses.² All totaled, an estimated 150 Americans die each day from workplace hazards.³ At the same time, workers reported nearly 3.8 million work-related injuries and illnesses.⁴ While this is a far cry from the high of 16,000 occupational deaths in 1951, 4,836 is still far too many.⁵ Nonetheless, under Obama's first Labor Secretary Hilda Soliz, and later Tom Perez, and importantly OSHA Director, Dr. David Michaels, along with the unwavering persistence of worker safety advocates and labor unions, real progress was achieved in the past eight years that promised an even safer future for American workers.

An impressive list of regulatory changes, new rules and OSHA initiatives were realized during the Obama administration, some of which were many years in the making. Following are a few of the highlights. After proposing a final rule in September 2013, and after 34,000 pages of a public record in the rulemaking process, a new silica standard finally became law on June 23, 2016, protecting an estimated 2.3 million workers exposed to silica dust.⁶ Effective August 2, 2016, OSHA's civil penalties were adjusted upwards for the first time since 1990.⁷ The penalty for repeated and willful or repeated violations will increase to \$124,709.⁸ Enhanced employer reporting has been upgraded.⁹ The new rule, which takes effect Jan. 1, 2017, requires certain employers to electronically submit injury and illness data that they are already required to record on their onsite OSHA Injury and Illness forms.¹⁰ Analysis of

¹ The 2015 numbers are due to be published in December 2016. *See* O.S.H.A., JOB SAFETY AND HEALTH (2002), <https://www.bls.gov/news.release/cfoi.nr0.htm>.

² O.S.H.A., COMMONLY USED STATISTICS (2015), <https://www.osha.gov/oshstats/commonstats.html>.

³ NATIONAL SAFETY COUNCIL, INJURY FACTS 2015 EDITION (2015), http://www.nsc.org/Membership%20Site%20Document%20Library/2015%20Injury%20Facts/NSC_InjuryFacts2015Ed.pdf <https://www.bls.gov/news.release/pdf/osh.pdf>.

⁴ D.O.L., EMPLOYER-REPORTED WORKPLACE INJURIES AND ILLNESSES 12 (2015), <https://www.bls.gov/news.release/pdf/osh.pdf>.

⁵ D.O.L., REVISIONS TO THE 2014 CENSUS OF FATAL OCCUPATIONAL INJURIES (CFOI) (2016), https://www.bls.gov/iif/cfoi_revised14.htm.

⁶ O.S.H.A., OSHA'S FINAL RULE TO PROTECT WORKERS FROM EXPOSURE TO RESPIRABLE CRYSTALLINE SILICA (2016), <https://www.osha.gov/silica/>.

⁷ O.S.H.A., OSHA PENALTIES ADJUSTED AS OF AUGUST 2016 (2016), <https://www.osha.gov/penalties/>.

⁸ *See id.*

⁹ O.S.H.A., OSHA PENALTY ADJUSTMENTS TO TAKE EFFECT AFTER AUGUST 1, 2016 (2016), <https://www.osha.gov/Publications/OSHA3879.pdf>.

¹⁰ O.S.H.A., FINAL RULE ISSUED TO IMPROVE TRACKING OF WORKPLACE INJURIES AND ILLNESSES (2016), <https://www.osha.gov/recordkeeping/finalrule/>.

this data will enable OSHA to use its enforcement and compliance assistance resources more efficiently. Some of the data will also be posted to the OSHA website.

In addition, the Obama Department of Labor (“DOL”) made misclassification of employees as independent contractors a high priority, bringing many enforcement actions against cheating employers. Misclassification of workers has dire safety consequences for workers, especially the most vulnerable low wage workers: immigrants, refugees and women. These workers misclassified as independent contractors are often assigned the most dangerous tasks and with little or no training. When the inevitable injury or death occurs, these workers and their families have no access to workers compensation, health insurance and other safety net benefits. They simply fall off the grid and are left to their own devices, or the charity and support of family, churches, or immigrant and workers’ groups.

Although the focus of this Article is on health and safety issues, I would be remiss not to mention another significant achievement for workers under the Obama DOL. In the face of a determined opposition led by the U. S. Chamber and its allies, Obama pushed through massive changes to the overtime rules under the Fair Labor Standards Act by raising the salary threshold for determining who is exempt from overtime pay from \$455 a week to \$913, or annually from \$23,660 to \$47,476, regardless of their job duties. As a result, an estimated 4.2 million American workers stood to receive a long overdue pay increase effective December 1, 2016. However, two intervening events occurred giving American workers a lump of coal for Christmas instead of a pay raise. First, on November 22, a federal district judge in Texas (and Obama appointee) granted a nationwide preliminary injunction barring the new overtime rules from being implemented.¹¹ On December 1, DOL filed a notice of appeal with the Fifth Circuit Court of Appeals, a historically unfriendly circuit to workers¹² And, second, of course was the election of Donald Trump.

Early into the Trump Administration, it is not too early to venture an educated guess as to how he will govern for American workers. His early actions and tweets have provided more than enough clues.

¹¹ D.O.L., IMPORTANT INFORMATION REGARDING RECENT OVERTIME LITIGATION IN THE U.S. DISTRICT COURT OF EASTERN DISTRICT OF TEXAS (2016), <https://www.dol.gov/featured/overtime>.

¹² *See id.*

Most significantly, Trump nominated as Secretary of Labor Andrew Puzder, the CEO of the company that operates Hardees and Carl's Jr. burger chains.¹³ Puzder, who has zero government experience, has been an outspoken opponent of the new overtime rules, opposes an increase in the national minimum wage to even \$10.10, and is on record calling for the repeal of Obamacare, just to name a few important matters under DOL's jurisdiction. On the announcement of Puzder as Trump's choice for Labor Secretary, the New York Times wrote: "When the Obama Labor Department looked at thousands of complaints involving fast-food workers, it found labor law violations in 60 percent of the investigations at Carl's Jr. and Hardee's, usually for failure to pay the minimum wage or time and a half for overtime."¹⁴ It is impossible to imagine a worse choice to protect workers in this era of low wages and enormous income inequality. Instead, under Puzder's DOL, the infamous slur from Marie Antoinette to her subjects of "Let them eat cake" will apparently be updated for American workers to, "Let them eat burgers."

Another clue as to how Trump will govern vis-à-vis workers is his bloated claim that he saved more than a thousand Carrier factory jobs in Indianapolis from being outsourced to Mexico. Hailed by his supporters as evidence of his commitment to American workers, this stunt was criticized as crony capitalism by no less than Sarah Palin for the bribe paid by Indiana taxpayers to keep the jobs in Indianapolis, along with the certain promise that Carrier's parent, United Technologies, will continue to receive lucrative defense contracts. But, most telling, was Trump's reaction to the Carrier workers' union president, Chuck Jones, who called out Trump for overstating the number of workers' jobs saved by his deal. While never challenging the "revised" numbers, Trump instead took to Twitter stating that Jones "has done a terrible job representing workers," while blaming the union, United Steelworkers 1999, and the workers for the decision by Carrier to take its manufacturing to cheaper climes in Mexico.¹⁵ For Trump, working for pesos or cutting their wages and benefits would have been a good deal. Blaming workers for the ravages of

¹³ Noam Scheiber, *Trump's Labor Pick, Andrew Puzder, Is Critic of Minimum Wage Increases*, N.Y. Times (Dec. 8, 2016), http://www.nytimes.com/2016/12/08/us/politics/andrew-puzder-labor-secretary-trump.html?_r=0.

¹⁴ The Editorial Board, *Andrew Puzder Is the Wrong Choice for Labor Secretary*, N.Y. Times (Dec. 8, 2016), <http://www.nytimes.com/2016/12/08/opinion/andrew-puzder-is-the-wrong-choice-for-labor-secretary.html>.

¹⁵ Michael D. Shear, *Trump as Cyberbully in Chief? Twitter Attack on Union Boss Draws Fire*, N.Y. Times (Dec. 8, 2016), <http://www.nytimes.com/2016/12/08/us/politics/donald-trump-twitter-carrier-chuck-jones.html>.

neoliberalism, the same workers who helped Trump get elected, is a common trope of worker bashing. It is also a common trope when workers get injured and killed on the job. It was their fault. Not the employer who cut corners on maintenance, safety and training.

Given the President's Elect's nomination of Andrew Puzder for Secretary of Labor, and the numerous violations that Trump's and Puzder's business's have in the past been assessed by OSHA, it is unlikely that a Trump administration will continue the pro-worker, pro-safety agenda initiated by the Obama administration. Instead, the advances in worker safety that cannot be undone by the Congressional Review Act (CRA)¹⁶ will be effectively undone by a weakened enforcement OSHA regime in an already under resourced OSHA.

Wishful thinking aside, it seems apparent that American workers will be in a crisis under the Trump administration despite his campaign promises otherwise. However, crisis creates opportunity. Workers and their advocates cannot allow Trump and Puzder to deceive and misrepresent, such as Puzder's false claim that the Affordable Care Act has caused a "restaurant recession." As such, workers and their advocates must use the impending crisis to hold Trump's feet to the fire and demand nothing less than the great jobs that he promised while posing as the Workers' President.

¹⁶ The CRA provides that, if Congress adjourns its annual session *sine die* less than 60 legislative days in the House or 60 session days in the Senate after a rule is submitted to it, then the periods to submit and act on a disapproval resolution "reset" in their entirety in the next session of Congress. The purpose of this provision is to ensure that both houses of Congress have sufficient time to consider disapproving rules submitted during this end-of-session "carryover period." Of the approximately 72,000 final rules submitted to Congress since the legislation was enacted in 1996, the CRA was used only one time; OSHA's ergonomic rule was overturned by President George W. Bush in March 2001.