The Professionals Guild of Ohio

PGO UNION NEWS

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Elections Have Consequences

The Republicans have been elected to control Congress, the Presidency, and ultimately through partisan appointments, the Supreme Court. This is the political party that tends to favor business interests over all other interests, including working people, the middle class and the poor. If there is a silver lining, it may be that working people and their supporters will be mobilized to more vigorously defend our democratic institutions, including collective bargaining. The following will probably be some of the more immediate casualties of the Republican Blitzkrieg.

Affordable Care Act (Obamacare)

Throughout his campaign, Candidate Trump promised to repeal and replace Obamacare in its entirety. Now, President Elect Trump says that he wants to maintain coverage for dependents up to age 26, as well as continue the requirement to cover previously existing conditions. It will be difficult for such provisions to remain without continuing the mandate for coverage (bringing many healthy people into the insurance pool) that was put into place to offset the cost of insuring pre-existing conditions.

President Elect Trump seems to believe that allowing insurance companies regulated in one state to offer insurance to residents of a different state, will lower the cost of health insurance. The theory is that insurers operating in lesser regulated states will be able to offer insurance to residents in higher regulated states without being subject to regulation by the other state whose residents are being insured.

The result will be that states desiring tax revenues from hosting insurance companies will incentivize by reducing their regulatory schemes, thus reducing the costs for the hosting insurance companies. Inevitably, the least regulated companies will be the ones providing the most insurance. This is a variation of the Trickle-Down theory of prosperity, a theory proven not to work for folks at the bottom.

Possible Repeal of the Davis-Bacon Act

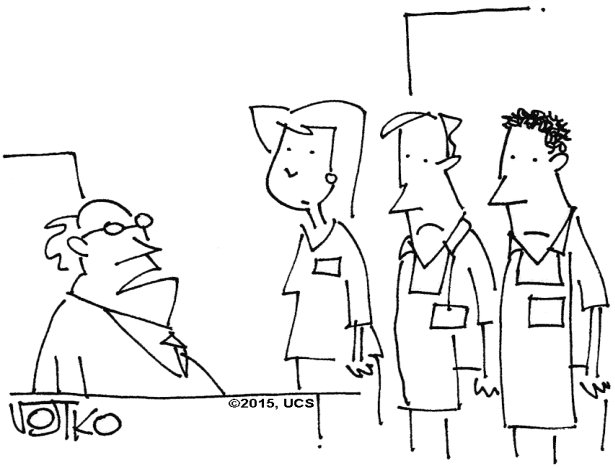
Throughout his campaign and during his victory speech President-Elect Trump promised to fix the inner cities and rebuild highways, bridges, tunnels, airports, schools, hospitals. He promised to rebuild the country's infrastructure so as to make it "second to none." And, he promised to "put millions of people to work" in the process.

Clearly, such initiative would invigorate the U.S. economy, especially if there is a mandate for the use of materials made in the United States. In the past, the Republican majority in Congress opposed any such initiative because of the cost in funding such an enormous government project. Many believe that before signing on to such an initiative, the Republican dominated Congress will look for any means of reducing such costs, starting with the repeal of the Davis-Bacon Act requiring "prevailing wages" to be paid on federal construction projects.

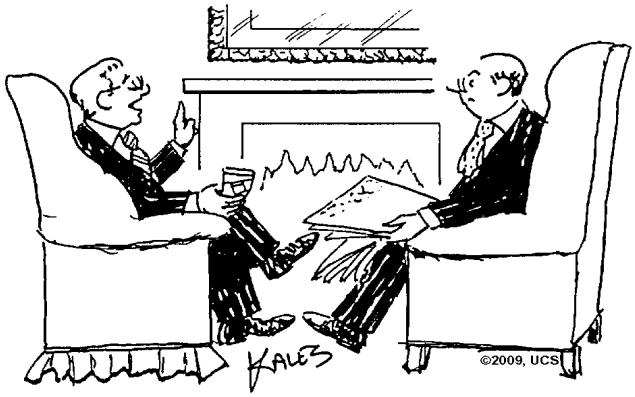
The GOP will undoubtedly hold to the belief that the product of non-union contractors will be just as safe and viable as that which would be performed by higher paid union contractors. However, one needs to just look around at the uninhabitable buildings in Las Vegas built by non-union contractors during its "building boom" years of 1998-2007 to begin questioning the wisdom of using non-union contractors for major infrastructure renovation.

Arbitration of Employment Claims and Class Action Waivers

The likelihood of a Presidential Veto during the Obama administration has prevented the Republican



"I would have given you Christmas bonuses, but none of you believe in Santa."



"I believe the only role government should play in business is saving our butts."

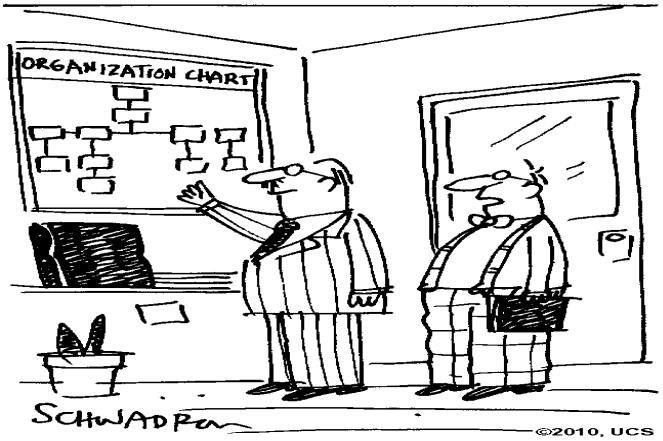
Congress from making any changes to the Federal Arbitration Act, which controls the private arbitration of various employment claims. Many experts believe there may well be a legislative initiative to expand the authority of Federal Arbitration Act in regards to employment and wage and hour claims. New legislation may be introduced to allow a waiver of class action suits in favor of arbitration. These clauses tend to favor employers over employees.

Potential Increase in Race, Sex and Religious Discrimination Cases

Often the rhetoric of the Presidential campaign included incendiary racial commentary that would be actionable if uttered at the workplace in the presence of coworkers. It is no secret that the Trump campaign was openly supported by many racial-based hate groups, especially the KKK. Following the announcement of the election results, both the FBI and the Southern Poverty Law Center have announced a surging increase in hate crimes. Clearly, many citizens now feel inspired, if not empowered, to openly engage in racial, sexual and religious hostility. Some of this hostility is already beginning to manifest in the workplace. Employees should familiarize themselves with their employers' policies and procedures in dealing with a racially, sexually, and/or religiously hostile coworker, then take appropriate action when necessary.

Abandonment of Anti-Bullying Legislation

The incoming First Lady recently announced her campaign against cyber bullying. However, many experts believe that any effort towards federal anti-bullying will be shelved. Most likely, it will be up to the states to decide whether to enact anti-bullying statutes.



"Why is my position the only one in pencil?"

All Ballot Proposed Wage Hikes Approved in November 8 Election

Employees in Arizona, Colorado and Maine will see their minimum wage rates gradually increase until it reaches $12 an hour in 2020. In the State of Washington, the minimum wage will increase until it reaches $13.50 by 2020. South Dakota voters rejected a ballot measure reducing the minimum wage for workers under age 18. The minimum wage propositions approved by the voters in Washington and Arizona includes mandatory paid sick leave for employees.

Right to Work Constitutional Amendments

Alabama passed an amendment that incorporates a right to work provision in the State Constitution. A similar measure was rejected by the voters in Virginia, which still has existing right to work statutory law.

Alabama has been a right to work state since 1953, when it first passed legislation forbidding union membership and fair share fees as a condition of employment. Now, it is the ninth state to make right to work language a part of its state's constitution. The Alabama amendment passed by a vote of 1,105,938 to 483,640.

According to the Bureau of Labor Statistics, Alabama is the most unionized state in the South. 190,000 Alabama workers belonged to a union in 2015, which is about 10.2 percent of the state workforce. Nationally, 11.1 percent of the workforce belonged to a union.

In Virginia, a similar constitutional amendment was rejected. The Virginia amendment failed by a vote of 1,743,916 to 2,016,425. However, the State of Virginia continues to be a right to work state as a result of legislation passed in 1947.

It is unclear why the supporters of the state constitutional amendments believed the existing legislation was inadequate. Perhaps they are of the opinion a constitutional amendment is less vulnerable to the recent lawsuit seeking to invalidate the recently enacted right to work statute in West Virginia.

The lawsuit filed in West Virginia argues that the right to work law amounts to the state government taking private property from the unions without compensation and violates liberty without due process. The legal claim is that giving non-union workers all the rights and benefits of union representation causes an increase in dues for the union members, in order to cover the expenses caused by the freeloading non-union workers.

Colorado Rejects Single Payer Healthcare

The citizens of Colorado decided against a ballot measure creating a single-payer health care system in that state.

2017 PGO Executive Board Meetings Scheduled

Quarterly meetings of the PGO Executive Board are scheduled for January 21 at the PGO offices in Columbus, April 22 at the Montgomery County Children Services offices in Dayton, July 15 at the PGO offices in Columbus and October 21 at the Lucas County Children Services offices in Toledo. All meetings are scheduled to begin at 10:30 a.m. All meeting dates, times and locations may be subject to change by the Executive Board.

PGO Office Holiday Schedule

In observance of the Christmas and New Year Holidays, the PGO office will be closed on December 19, 20, 21, 22, 23, 26, 30 and January 2.

Court Blocks FLSA Exemption

On May 23, 2016, the Department of Labor (DOL) issued its final version of a rule (Final Rule) increasing the minimum salary level for executive, administrative, and professional employees (EAP) granted exemption from the overtime provisions of the Fair Labor Standards Act (FLSA). Effective December 1, 2016, this Final Rule will increase the minimum salary from $23,660 annually to $47,892 annually.

Currently, the Final Rule increasing the salary levels for the EAP exemption remain in effect, though its implementation is subject to delay due to litigation filed by several states in the U.S. District Court for the Eastern District of Texas on September 20, 2016. In *State of Nevada, et al. v. DOL*, the State of Nevada and twenty other states make the claim that, when enacting the FLSA, Congress did not authorize the DOL to create a salary basis test for determining whether or not an employee qualifies for the EAP exemption.

On November 20, 2016, the District Court issued a preliminary injunction suspending implementation of the DOL Final Rule until after the District Court has fully heard the merits of the case and issued its ruling. The date for trial has not yet been announced.

In granting the preliminary injunction the Court determined that the Plaintiff States were substantially likely to succeed on their claim that the DOL did not have statutory authority to issue the rule providing the salary level increase and the automatic updating mechanism. However, the District Court cannot issue a decision rendering the rule null and void until after the case has been fully heard on the merits.

To understand the basis of the current litigation, it is necessary to review the history of the FLSA. The FLSA was enacted by Congress in 1938. It mandates a federal minimum wage (currently $7.25 per hour) for all hours worked and requires payment at one and one-half times the employee's regular rate of pay for all hours worked above forty in a week. When enacted, the FLSA contained a number of exemptions to the overtime requirement. One such exemption applies to "any employee employed in a bona fide executive, administrative, or professional capacity."

The FLSA did not define the terms "bona fide executive, administrative, or professional capacity." Congress delegated to the Secretary of Labor the power to define and delimit these terms through administrative regulations. The Secretary of Labor then authorized the DOL to issue regulations to interpret the EAP exemption. The initial regulations defined "executive," "administrative," and "professional" employees based on the duties they performed in 1938. In 1940, the DOL revised the regulations to require EAP employees to be paid on a salary basis.

In 1949, the DOL again amended the regulations, establishing a "long" test and a "short" test for assessing whether an employee qualified for the EAP exemption. The long test combined a low minimum salary level with a rigorous duties test, which restricted the amount of nonexempt work an employee could do to remain exempt. The short test combined a higher minimum salary level with an easier duties test that did not restrict amounts of nonexempt work. In 1961, Congress amended the FLSA authorizing the DOL to define and delimit the EAP categories "from time to time."

In 2004, the DOL eliminated the long and short tests, replacing them with the "standard" duties test that did not restrict the amount of nonexempt work an exempt employee could perform. The DOL also set a salary level equivalent to the lower salary that the DOL previously used for the long test.

The 2004 regulations are currently in effect and require an employee to meet the following three criteria to qualify for the EAP exemption. First, the employee must be paid on a salary basis (the "salary-basis test"). Second, an employee must be paid at least the minimum salary level established by the regulations (the "salary-level test"). The current minimum salary level to qualify for the exemption is $455 per week ($23,660 annually). And third, an employee must perform executive, administrative, or professional duties (the "duties test").

On March 23, 2014, President Obama issued a memorandum directing the Secretary of Labor to "modernize and streamline the existing overtime regulations for executive, administrative, and professional employees." In response, the DOL proceeded with all federal rulemaking requirements, then published the Final Rule on May 23, 2016, giving rise to the lawsuit filed on September 20, 2016. Essentially, the Plaintiff states are now saying that the language of the FLSA makes it clear that Congress never intended for an employee's salary to be used as a standard for determining whether or not such employee is exempt notwithstanding the 76-year history of the DOL using this factor.