

## **POLITICO Pro Q&A: Labor Department's David Weil**

By Marianne LeVine, 12/29/2016 06:18 AM EDT

*POLITICO spoke recently with David Weil, the Labor Department's departing Wage and Hour administrator, about the fate of the overtime rule, the future of the fissured workplace (a phrase he coined in his 2014 book of that title to describe the proliferation of subcontracting and franchising relationships separating corporations from front-line workers) and the imminent prospect of a fast-food chief executive becoming Labor secretary.*

[This transcript has been edited for length and clarity.]

### **What accomplishments are you most proud of?**

I would group it in two categories.

There's one category around the work we did on the regulatory and the sub-regulatory side. It is obviously in a bit of legal holding right now, but the overtime rule I take great pride in. We have appropriately updated protections for workers across this country who should be eligible for overtime and, because of the erosion of the [salary threshold], fell out of that. [Editor's note: The overtime rule doubles (to \$47,476) the salary threshold below which virtually all workers must be paid time-and-a-half whenever they work more than 40 hours in a given week. The rule was set to take effect Dec. 1, but in late November a federal judge in Sherman, Texas issued a preliminary injunction against it and signaled he would likely follow with a permanent injunction.]

The work we did in the areas of regulation under the executive orders, from [the required \$10.10] minimum wage for federal contractors to more recently [the required] paid sick leave for federal contractors; the [minimum-wage] regulation that's now covering 2 million home care workers [in] one of the fastest growing occupations and industries in the country. I take enormous pride in what we are doing now successfully in our enforcement and our outreach of that rule.

And on the subregulatory side I think the work we did on employment relationships and making clear what the law says [about when a business may classify a worker an independent contractor and when that worker must be classified an employee]. This was a new policy. These administrator interpretations we put out that made it just very clear about who is a legitimate independent contractor and who should be given the protections that most workers should be protected under as employees, and establishing in the changing nature of the workplace joint employment responsibility.

We have very limited resources, we have you know around 1,000 investigators, and yet 7.3 million workplaces are under our responsibility and then in addition to that [we have] the changes in the workplace, the fissuring of employment relationships. We have done 18,000 outreach efforts. We have changed the way we do outreach by adding a whole new category of our capacity, our staff, we have a position called [Community Outreach and Resource Planning Specialist] that's all about outreach to workers, worker advocates and employers. I think the way we have partnered with state and local agencies on the misclassification of workers, we've made great progress in that.

We've recovered \$1.8 billion since 2009, and received back wages or provided back wages for two million workers. We have focused more and more on low-wage vulnerable workers, the workers who need our protection most, the kind of workers like in the retail industry where we recover for a typical worker close to three to four weeks of salary on average. Think about the household budget for a low wage worker. That's huge. That's more than a month's rent. That's three or four grocery trips. It's keeping a car in operation for a low wage worker. I always think that the simplest statement about what the laws that my agency administers are is a "fair day's pay for a fair day's work." I think we have really helped redefine a fair day's pay.

**What do you predict will happen to the overtime rule given the Texas district court's preliminary injunction?**

I remain optimistic ultimately that the rule will prevail. I emphatically disagree with the decision by the court to put a preliminary injunction and enjoin the rule, [but] I feel confident because I know what the outreach was in response to comments to the rule, how carefully the rule was crafted in all phases — it makes me very confident in the legality of all aspects of the rule. I have optimism in part because the public believes in the need to update the overtime rule. If you look at polling that's been done, the majority of Republicans and Democrats believe that the overtime rule makes sense and that protecting more workers, making them eligible for overtime, that it's long overdue.

If you look at the kind of people who voted for the president-elect, many of them were people who will be benefited by this overtime rule. This is a rule that would cut across all kinds of different groups in the workforce. And if you look at the businesses, the nonprofits, the higher ed educators who have, or were ready to go on Dec. 1, many of whom who have said they're going to continue with that. Wal-Mart is going to continue to make the adjustments that they said, other major retailers have said the same. It's dangerous business at best to take back the increases you've given your workforce. We have unfortunately heard stories where now with the uncertainty introduced by the preliminary injunction people think, "Well maybe we're not going to give you that overtime eligibility that you thought

about.” That’s a problem for a business. That hurts people because it’s so needed and so overdue.

**Do you think most business are complying with the rule voluntarily or canceling expected raises?**

I get a sense that both things are happening. I know that there are, for instance, many universities that came forward and said “We’re going to raise postdocs’ pay,” [that] have stood by that and said “ultimately we did the work and it makes sense and we’re going to stand by it.” So I think there are institutions in higher ed, nonprofit[s] and businesses that are going to stand by it. I think for some it’s raised a lot of uncertainties because they’re going to face the potential backlash. I have no doubt that if you have told members of your workforce, particularly the kind of key people who would be impacted by the overtime rule, suddenly “Well, maybe you’re not going to get the pay increases or the adjustment to your time at work,” whatever it was, there are repercussions. I’m sure that businesses are weighing that.

I can tell you in the months preceding Dec. 1 and preceding the preliminary injunction, we know from our own outreach, it was very clear that people had gone beyond initial opposition to the rule and had done the work of figuring out how they were going to adjust, and I think there were lots and lots of organizations that had done the work of getting ready for it, and that makes me again believe that it’s something that was very achievable, very doable.

**Is there anything you wish you had done during your tenure at the Wage and Hour division that you didn’t get to?**

I would put it more in the category of problems we are tackling that [we] just need to continue [tackling]. High on that list is the problem of retaliation, which we focused on extensively both in terms of worker outreach and helping workers understand their rights, in terms of working with law enforcement agency partners like the Department of Justice and [with] state and local partners. It is a particularly difficult and widespread problem in low wage industries. Often those workers are people with immigration status issues, [which] unfortunately employers use as a lever to keep them [from] being paid, often in violation of a minimum wage statute.

That not only impacts those workers. It creates an environment that erodes labor standards in the workplace. So regardless of your immigration status, retaliation hurts you in these low wage industries because it undermines our basic notions of minimum wage and overtime standards. And I have heard story after story about this from workers we have helped and who have been worried about stepping forward and have had the courage to do so, to reach out to our agency. It’s a problem. It’s a big one, and I certainly would have wanted to go further and continue to work in that area. The problem of misclassification of workers is one that I think we have got a lot of traction on. We signed 35 different memorandums of

understanding with states to cooperate on the misclassification problem. We issued administrator interpretations on misclassification and joint employment. We did a lot of enforcement in that area. But again, this ain't going away. The changes in the workplace, the fissuring of the workplace is going to continue and it's a problem that I think we certainly need to continue to be focused on going forward.

**How can enforcement be improved given the limited resources Congress has allotted to the Labor Department?**

What we realized very early on is if you just depend on complaints of workers and you're just recovering the back wages that employers were already supposed to pay them, you're never going to make a dent in the problem. So what we have very consciously and very carefully done is devote more and more to proactive investigations that try to get in front of this problem by prioritizing industries where we know there are low wage workers [who] are particularly vulnerable, by going to workplaces and employers where workers are often unlikely to complain themselves.

We use data and analyses I think in very sophisticated ways now to make sure we are targeting our efforts on employers because they are out there unfortunately with business strategies that are built around not complying with the law. How we make sure we find them and by focusing on them — it helps all the employers who they compete against, who are complying, who are undercut by them. I think this is just responsible law enforcement. The bottom line is we are a law enforcement agency. These are the laws of the land. These are not Tom Perez's laws, President Obama's laws or David Weil's laws. They are laws about basic fairness, they are laws that our children can understand because they're about treating people how you want to be treated, about being paid for the work you do. I certainly think that's something any administration needs to think about.

**What trends in wage theft most surprised you during your tenure? Are there any new trends that the Labor Department should focus on?**

There are still jaw-dropping violations of the most basic minimum wage standards. The [federal hourly] minimum wage [of \$7.25] is ridiculously low. It is below the poverty level, it is below a level that I think any reasonable person would say a family should be expected to live on. Even with that low minimum wage, I have seen far too many cases of people violating that and doing things like not paying people for just an hour's work or hours of work during the week. Those are the things that have continued to surprise me and I've seen them in lots of different industries.

This idea of the fissuring of the workplace, what I have seen is its growth over time into new places. One area that is a big concern to me is what's happening in the retail space. As more and more companies move toward delivering their products to people's homes or delivering food to people's homes, all the instant delivery that

consumers enjoy, unfortunately, is being done increasingly by people who are being misclassified as independent contractors, and I can see a scenario where more and more of the retail sector moves away from brick and mortar operations and is shifted toward this home delivery. It would become more and more reliant on independent contractors who are not being paid according to basic labor standards because they are not being considered as employees doing that work. And if you look at the size of our retail sector, the brick and mortar retail sector, that could be millions of workers and the erosion of labor standards for them is very troubling to me and something we have to keep our eye on.

**What are your thoughts on President-elect Donald Trump selecting Andrew Puzder for Labor secretary?**

He has to go through confirmation. As someone who went through a long and difficult confirmation procedure myself, it's a long road, so I'm not going to speculate on whether he'll be confirmed or what he might do. What I would say to you is that any person who assumes the responsibilities of the secretary of Labor or the responsibilities of the administrator of the Wage and Hour division needs to understand that their fundamental responsibilities are protecting worker rights as defined by our very clear labor standards statute. That's what their responsibility is, is the protection and the enforcement of basic labor standards. And for the person who becomes the secretary of Labor, that portfolio includes making sure working people have the skills they need, have the protections they need not only in my area but in health and safety, the protections around receiving the benefits that they are entitled to, all of those are very critical, basic protections. We are a nation of laws, those laws are very clear. I would hope anyone who assumes that position understands really their fundamental responsibility to make sure those standards and those programs are protected and advanced.

**What are your plans after the Labor Department?**

Sleep a little bit, maybe. I'm going back to my academic position [as an economist at Boston University], but I will tell you, this job has been in many, many ways transformative. These are issues I studied as an academic but it's eye-opening when you see them and have the responsibility of administering these laws and so I want to continue to work on these issues and find ways I can be helpful to continue this work in a variety of ways when I'm on the other side. I've had a lifetime interest in the problems and the opportunities facing working people. I think I speak for a lot of us who have had the honor to have these political positions — I think we all feel an obligation to continue to work on these issues going forward.