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Backing away from the ledge after Trump

BY BETH EWEN

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After the election I had this reaction, like a popular majority of the voting public unless in fact 2.8 million of those votes were illegal: UUUUGGGGGGGGGHHHHHHH. But I didn't think I could fill this column with that word, so I began moving through the seven stages of grief.

They were horror, denial, anger, bargaining. (Please, if you don't make Rudy Giuliani secretary of state I'll gladly accept Mitt Romney without a fuss.) Ceremonial burning of all my pantsuits. More bargaining. (Please, if you don't appoint Ted Cruz to the Supreme Court I'll silently accept Sarah Palin as head of the VA, but only because Tina Fey could then come back to play her on Saturday Night Live.)

And finally, acceptance, at least of the fact that I had to ask people in franchising what operators should be doing now to prepare for President-elect Trump's administration.

Many people obliged, eloquently, and so many of my best legal sources expect potential benefits ahead that I'm now backing away from the ledge.

Overtime rules on hold

The new overtime rule was the first to fall, when a federal judge temporarily deep-sixed it right before its implementation date, December 1. (For operators who had gone through all the work to comply, I imagine a response similar to mine above.) The rules would raise the salary threshold for exemption from entitlement to overtime from $23,660 to $46,476 annually. "The injunction is only temporary, so

franchisees are in somewhat of a holding pattern, and will need to be prepared to comply if the injunction is lifted," wrote Michael Drumm, an attorney with Drumm Law.

What will happen next is not certain, and depends in part on the Trump administration's actions after the inauguration, agrees Daniel Thieme, a shareholder in Littler law firm in Seattle. Many employers are considering pulling back previously announced salary increases and re-classifications, which seems imprudent for reasons beyond uncertainty—try telling your general manager that the $10,000 raise you promised is now going away. Thieme notes state law limits an employer's ability to change pay terms for at-will employees. "The common law in all states requires that any reduction in pay rates must be communicated to the employee before the employee starts the work that will be covered by the new rates," he writes. Some states require notice in writing, and Maryland, Connecticut, Alaska and Pennsylvania are among states with additional notice requirements.

Starr Harry, from G&A Partners, advises this: For organizations that have already implemented changes, such as increasing salaries or redefining job duties, "we advise against making any changes. In the event that the judge's decision is reversed, employers will still be required to comply with these changes." For organizations that have not implemented any changes, Harry continues, "We advise that you put any plans…on hold until a final ruling is issued." So much for being proactive, as so many restaurant and retailer operators diligently were.

New faces at NLRB

Few agencies drew more ughs from the franchise community than the National Labor Relations Board, which rocked our world two years ago by saying it would consider franchisors as joint employers with their franchisees and hold them liable for alleged wage and hour violations. Tal Grinblat, an attorney with Lewitt Hackman, believes President Trump will without a doubt change the leadership of the board. "We may see an about-face when it comes to joint-employer liability for franchisors," Grinblat writes. "Franchisor concerns have been growing. Under the new administration, there is a possibility the tide may swing back to find that franchisees' employees are only employed by franchisees, thereby reinvigorating the franchise industry."

John Dienelt with Quarles & Brady is watching for movement on the same issue, but in the legislatures, particularly the U.S. Congress. "Franchise agreements typically characterize franchises as independent contractors. Yet, it seems clear that franchisees are not independent contractors in the traditional sense; they are too dependent on their franchisors. Franchisors may seek legislation exempting them from being deemed employers of their franchisees or joint employers with them," he writes. "Will franchisors go further and seek to define the relationship in a third way?"

So there's the executive branch and the legislative branch. Lee Plave of Plave Koch points out a third source of joint employer hoo-hah still waiting to play out, private lawsuits. "As in past cases, the focus

will inevitably be on the details and context in which those claims are raised. More cases of this nature are likely, and it will take a keen emphasis on operational excellence for franchisors and franchisees to stay on the right side of these claims," he writes.

A Trumpian economy

Many people who responded to my query expected a cut in regulations, especially Obamacare, and a reduction in corporate tax rates as a boon for the economy. (In other words, they were among those who would have been looking for a cliff had the election gone the other way.)

But none expressed the sentiment better than Andy Puzder, the CEO of CKE Restaurants and a keynote speaker at the Restaurant Finance & Development Conference. "We have a government-mandated restaurant recession," he told the crowd of restaurant operators and financiers. "The government did not intend this result. But it shows what happens when government tries to manipulate the economy. You cannot mandate the benefits of economic growth without actual growth."

Puzder indicated earlier that he would have been the one in great distress had the election gone the other way, so I'll give him the last word. When he was nominated for labor secretary, in early December, many in the franchising community were likely backing away from the ledge as well—and many more were cheering loudly.

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