# Bring back our jobs (with fewer protections though)!

*di Davide Zecca*

**Abstract**: **Restituiteci i nostri posti di lavoro (anche se con meno garanzie)!** – The article attempts to outline the main avenues through which the Trump administration has influenced labor and industrial relations over the past four years. After a focus on the relevant unemployment provisions encompassed in the *CARES Act* and on the administrative rule-making carried out by the Department of Labor, due consideration is given to the impact of Trump's appointments to the Supreme Court and the National Labor Relations Board for what concerns employment related litigation. Some remarks are eventually offered on the possible short and long-term legacy of the Trump era onto US labor law.

**Keywords**: Employment; Unions; CARES Act; NLRB; Trump administration.



## 1. The Employment Policies of the Trump Administration: an Overall Assessment

One of the reasons propelling the unexpected election of Donald Trump in 2016 was his promise to stop the outsourcing by American firms, delocalizing towards third countries in seek of cheaper labour cost. The phenomenon had taken a massive tool on employment rates in the area of the country that was once considered the engine of the US manufacturing industry, *i.e.* the so-called '*Rust Belt*', that extends from the Eastern state of Pennsylvania to the core of Midwestern states such as Ohio, Michigan and Wisconsin, which Trump swept in 2016 on his way to clinching the majority of the Electoral College. The social fabric of this area of the country, which has been traditionally made up of middle-class workers and 'blue collars', may thus prove a reliable litmus test for determining how much the 45th President of the United States has delivered on his promise to protect American workers and create millions of new jobs (he even tweeted that on the day he took the oath of office).[1] While the electoral results of November 3rd, 2020 Presidential elections have yet to be certified, it appears that the incumbent President has lost all but one of the above states (Ohio), while still receiving more votes than in 2016 in each of them. It is therefore

[1] Donald J. Trump, @realDonaldTrump, *We will bring back our jobs. We will bring back our borders. We will bring back our wealth - and we will bring back our dreams!*, posted on *Twitter* at 6:54 PM on 20 January 2017, retrieved at twitter.com/realdonaldtrump/status/822502601304526848.

*DPCE online*
ISSN: 2037-6677

suitable to provide some data to frame and contextualize the effects of Trump policies on the labour market, before dealing more in depth with the actions taken by the administration within this domain of law.

It is fair to anticipate that the statistics of the last year of Trump term have been influenced by the overwhelming effects on the US job market of the Covid-19 pandemic, which has inverted what would have otherwise been a rising economy (although, as usual, assessments on how much the policy of an administration influences the performance of an economic system should always be handled with care). It has been estimated that in January 2020, three years into the term of Donald Trump, there were 6.6 million jobs more in the USA than on his inauguration day (accounting for a 4.3% increase). However, the series of limitations to circulation of individuals, opening hours of shops, restaurant and other economic activities meant that approximately 20.5 million people lost their occupation in April and, come September, the total amount of people employed throughout the country was still down by 4.6 million in comparison to January 2017.[2]

By going through the rough data illustrated above, a first preliminary account could be that the economic and fiscal recipes of the Trump administration have been able to increase job opportunities for quite a consistent number of residents, were it not for the occupational crisis that the Covid-19 pandemic has provoked and the effects of which are still visible in the statistics presented before. Yet, it would be naïve to take only this side of the coin and ignore the other, *i.e.* a progressive attempt to downsize the guarantees for workers under a wide array of perspectives. This was especially true with reference to federal workers: for all those working in the public sector, the last four years have arguably represented a dramatic step backwards in the prerogatives to which they are entitled as (organized) workers *vis-à-vis* their employers.



Before delving into the analysis, it is worth outlining the structure that will be followed. First, an account of the actions carried out by the administration itself (Presidential actions and administrative regulations by the Department of Labor) or by the majority backing it up in Congress will be offered for consideration. Next, the focus will shift towards the influence that the appointments by President Trump have had on the decisions concerning labour and employment matters handed down by judicial (the Supreme Court) and quasi-adjudicatory (NLRB) bodies. Finally, some concluding remarks will be put forward, in order to draw a conclusive picture of the legacy of the Trump Presidency over the field of labour and industrial relations.

[2] K. Amedeo, *Has Trump Brought Back American Jobs? A Timeline of the President's Policies*, updated on 26 Oct. 2020, retrieved at www.thebalance.com/trump-and-jobs-4114173. The data have been taken by the US Labor Statistics Bureau, references are in footnotes to the above article.

## 2. The Wavering Relationship with The Congress

Congress has seldom been the place where the labour policy of President Trump was shaped, likely for a combination of its contentious relationship with Congress in the first half of his term,[3] that has made it more and more difficult to pass legislation that the White House was pushing for, and the fact that the Democratic party gained a majority of the seats in the House of Representatives after the 2018 mid-term Congressional elections, thereby making it more difficult for the incumbent administration to implement its intended agenda. While there had been two fairly relevant amendments to the *Fair Labor Standards Act* of 1938,[4] introduced by the so-called *Consolidated Appropriations Act 2018*,[5] the distinguishing feature of the 115th Congress has been the unprecedented resort to joint resolutions of disapproval of administrative rules adopted under the Obama administration, pursuant to the *Congressional Review Act* of 1996.[6]

Interestingly, it was only in the last year of Trump term that Congress took action to tackle the very serious employment crisis stemming from the measures adopted to fight the spread of coronavirus. Indeed, it is no doubt that the following bills could not have been passed in Congress were it not for a bipartisan effort and an agreement struck by the leaders of the Democratic party, which held the majority in the House of Representatives, and the Republican party, holding an edge in Senate seats, so that more than an actual accomplishment of the Trump administration, this should at least be qualified as a coordinated attempt to remedy what otherwise could have well soon turned into an employment *carnage*.[7] The strategy to fight the effects of the Covid-19 pandemics on the job market has revolved around two bills passed by Congress in March 2020 and addressed both to employees and employers.



First, on March 18th, 2020 the *Families First Coronavirus Response Act*[8] was signed into law by President Trump after a mere four days since its introduction on the House floor and on the very same day the Senate had passed it. The statute provided the first measure to ensure a safety net for many workers unable to go to work and obliged to stay at home either

[3] See G.F. Ferrari, *President Trump and the Congress*, in the present issue of *DPCE on line*.
[4] 29 U.S.C. 201 *et seq*.
[5] H.R.1625 – 115th Congress (2017-2018), later become Public Law No: 115-141.
[6] Subtitle E, *Contract with America Advancement Act* of 1996, Public Law 104-121. The two above tendencies have been dealt with more in detail in D. Zecca, *Haunted by an Oppressive Ghost: The Trump Labour Agenda beyond The Dismantlement of The Obama's Legacy*, in G.F. Ferrari (ed.), *The American Presidency Under Donald Trump. The First Two Years*, The Hague, 2020. For an overall analysis of the resort to the Congressional Review Act under the Trump Presidency, see N. Palazzo, L. Parona, *Trump's Fight against the Regulatory State: Reloaded*, in the present issue of *DPCE on line*.
[7] The choice of the word is intended to refer to the resort to the expression '*American carnage*' by President Trump in his first address to the nation after being sworn in on January 20, 2017.
[8] H.R. 6201- 116th Congress (2019-2020), later become Public Law No: 116–127.

*DPCE online*
ISSN: 2037-6677

because of the lockdown of their young children's schools or since they tested positive to the virus and were subject to quarantine. The bill, which applied to business with 500 employees or less, provided two distinct forms of paid leave. The so-called paid family leave could be claimed by those who were unable to go to their workplace because they had to remain at home with their school-aged children whose schools had been put under lockdown. The measure consisted in a financial support that could last up to 12 weeks and enabled beneficiaries to receive two thirds of their regular payroll, up to a maximum of 200$ per day or 1000$ per week. The amount was paid directly by their employers, who would then be reimbursed by the IRS when paying their taxes at the end of the financial year.

The other instrument put in place was the so-called paid sick leave, available for workers who were quarantined at home after testing positive for coronavirus and, thus, prevented from going to work. This latter was designed to have a cap of 80 hours of pay leave, with the employee receiving the regular pay up to maximum 511$ per day or 5,110$ in total. Both measures are set to expire on December 31st, 2020, thereby covering all the remaining months of the year following the outbreak of the pandemic and ensuring a fair support for those employees whose ability to go to work has been hampered either directly or indirectly by the appearance of Covid-19.



Then, after less than two weeks President Trump signed into law the historic *Coronavirus Aid, Relief and Economic Security Act* (*CARES Act*),[9] which, together with many other provisions aimed at supplementing the US economy by encouraging consumption by citizens who received money directly from the government, entailed as well measures specifically designed to tackle the unemployment crisis that was beginning to unfold. The statute included first a measure directed at employers to give them an incentive not to fire their employees in the midst of a serious employment crisis and notwithstanding a prospective decrease of work and revenues. Namely, employers who were either ordered to stop operations by the government because of Covid-19 or had a significant decrease (50%) of gross receipts in a given quarter of the year would be entitled to a so-called employee retention tax credit of up to 5,000 $ for each employee they retained between March 13th and December 31st, 2020. The bet behind this measure was that employers had more convenience in accumulating consistent amounts in tax credits rather than firing many employees while still having to pay taxes in full on their (expectedly diminished) yearly revenues.

Then, the bill expanded the cluster of beneficiaries entitled to request and obtain unemployment insurance, *e.g.* by including gig economy workers, who ordinarily qualify as independent contractors, within the category. Moreover, the statute provided for an extension of the time frame during which unemployed individuals are entitled to receive unemployment benefits

[9] H.R. 748 - 116th Congress (2019-2020), later become Public Law No: 116–136.

of 50%, by bringing it from 26 to 39 weeks, so as to cover all the months until the end of 2020.

The most relevant provision, however, may have been the one introducing a so-called Federal Pandemic Unemployment Compensation (FPUC), consisting of a federal unemployment grant of 600$ per week, which may be added to State benefits (which, on average, at the beginning of 2020 were of 385$ per week) for up to four months. Independent research has estimated that the grant of the sum of the two benefits (roughly 1000$ per week on average) made 76% of the unemployed workers earn more than their regular salary,[10] which is one of the reasons why President Trump was not willing to renew the measure, set to expire after July 31st. The attempt of the President to find an agreement with Congress on an employment benefit of a lower amount failed and the expiration of the provision left many unemployed without a major source of income, as State benefits accounted for just more than one third of the sum of the two.

To mitigate the financial consequences of the failure to renew the FPUC, President Trump resorted to two distinct Presidential actions in the form of Memoranda. The first, which was signed on August 8th, directed the Secretary of Treasury to defer withholding, deposit and payment of taxes due between September 1st and December 31st, 2020 by employees whose wages did not meet a given threshold.[11] The goal pursued was to prevent the combination of the lack of sources of income with the duty to comply with fiscal obligations, which were put off to the beginning of 2021.



President Trump attempted also to make up for the expiration of the FPUC by signing into law on the same day another memorandum, which was aimed at supplementing State unemployment benefits by setting up a lost wages assistance program.[12] The grant consisted in 300$ per week redirected from the Disaster Relief Fund of the Federal Emergency Management Agency (which is ordinarily devoted to offer financial support to the areas of the country struck by natural disasters such as hurricanes or floods) and 100$ per week that States should take from the Coronavirus Relief Fund (CRF) they were granted under the *CARES Act*, for a total amount of 400$ per week instead of the previous 600$ and only until December 6th, 2020 (but for no more than 6 weeks per each State). While the measure might have been of great help for a number of people across the country, its limited time frame and the fact that, while being an allocation of federal funds, it was not passed by Congress but deliberated by the President, make its long-term effects less and less effective.

[10] P. Ganong, P.J. Noel, J.S. Vavra, *US unemployment insurance replacement rates during the pandemic*, *National Bureau of Economic Research working paper series*, Working Paper 27216, retrieved at http://www.nber.org/papers/w27216.
[11] *Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster.*
[12] *Memorandum on Authorizing the Other Needs Assistance Program for Major Disaster Declarations Related to Coronavirus Disease 2019.*

*DPCE online*
ISSN: 2037-6677

### 3. The Presidential Attack on Regulations for the Public Sector

Presidential actions have been a regular feature of the Trump term, yet in the field of labour law their goal has been steady for the whole four years. The resort to executive orders has been regularly targeted either to remove obligations for federal contractors arising out of precedent executive orders (often passed by the Obama administration) or to downsize the prerogatives of unionized workers on their workplaces.

An example of the first tendency may be that of Executive Order 13782 on the *Revocation of Federal Contracting Executive Orders*,[13] which makes it no longer mandatory for offerors for solicitations related to contracts over $500,000 to comply with specific transparency and reporting duties (with the very likely effect to undermine the guarantees provided by a simultaneous executive order aimed at prohibiting discrimination on the ground of sexual orientation and gender identity in the labour environment). Executive Order 13897 *Improving Federal Contractor Operations by Revoking Executive Order 13495*[14] belongs to the same category, as it revokes the obligation of successor government service contract employers to offer their predecessor employers' employees the right of first refusal in positions for which they are qualified, thereby threatening the stability and continuity of the occupation of workers carrying out works in the interest of the government.



Turning to the other kind of executive orders, the most relevant consist of the cluster of three executive orders 13837,[15] 13838[16] and 13839[17] signed on May 25th, 2018. With the first, President Trump provided that federal employees spend the prevailing part of their work-hours performing the duties they are assigned: the aim of the instrument of law was to avoid the practice of federal workers being paid for performing activities related to the collective representation of employees' interests, unless it is so provided by the law. The second executive order excluded those individuals who enter into a contract relationship with the government for seasonal and recreational services on federal land (*e.g.* guides that bring tourists hiking around federal parks) from the right to minimum wage, on the ground that they allegedly work overtime very often and would therefore imply higher expenses that would in turn lead to increased fares to visit federal parks. The

[13] Executive Order 13782, 27 March 2017, available at www.federalregister.gov/documents/2017/03/30/2017-06382/revocation-of-federal-contracting-executive-orders.
[14] Executive Order 13897, 31 October 2019, available at www.federalregister.gov/documents/2019/11/05/2019-24288/improving-federal-contractor-operations-by-revoking-executive-order-13495.
[15] Executive Order 13837, *Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use*, 25 May 2018.
[16] Executive Order 13838, *Exemption From Executive Order 13658 for Recreational Services on Federal Lands*, 25 May 2018.
[17] Executive Order 13839, *Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles*, 25 May 2018.

third act was aimed at ensuring a heightened accountability of federal employees who have consistently performed poorly their tasks by streamlining the procedures for their dismissal. As it is apparent, the three executive orders share the goal of pursuing a more productive and efficient federal government, by ensuring that employees are committed to their tasks and that public spending remains under control.

Interestingly, the legitimacy of the measures above has been the object of a judicial and arbitral controversy during the last year: first, the federal District Court for the District of Columbia granted an injunction against the directions adopted by the US Patent and Trademark Office in execution of the provisions enshrined in the above mentioned executive orders,[18] which was then reversed on jurisdictional grounds by the US Court of Appeals for the DC Circuit, which ordered the federal workers to pursue a resolution of the dispute through arbitration.[19] On September 21st, 2020 a sole arbiter found that the implementation of the EOs amounted to an unfair labour practice, thereby violating the provisions of the *Federal Service Labor-Management Relations Statute*, and shall thus be rescinded.[20] The filing of an exception for review before the *Federal Labor Relations Authority* is expected, and a further appeal to a federal appellate court is likely to eventually address the outcome of the case.



To round up the domain of the Presidential actions by Donald Trump affecting the American job market, it is worth mentioning Proclamation 10014,[21] that was signed in the midst of the Covid-19 pandemic to limit the potential effect on a job market already plagued by a stellar unemployment of the access of aliens seeking an occupation in the country. The document provided an explicit exemption for health-care professionals and was due to expire after two months, but it was later amended so that the prorogued provisions applied for the whole year 2020.[22]

## 4. From the Department of Labor to the Department of Employer Rights?[23]

Any assessment of the labour policies under the Trump Presidency would be incomplete if the armed branch of the administration were to be

[18] *American Federation of Government Employees v. Trump*, No. 1:18-cv-1261, 25 August 2018, District Court for the District of Columbia.
[19] *American Federation of Government Employees v. Trump*, No. 18-5289, 16 July 2019, US Court of Appeals for the District of Columbia Circuit.
[20] *National Treasury Employees Union v. Department of Commerce, United States Patent and Trademark Office.*
[21] *Proclamation Suspending the Entry of Immigrants Who Present Risk to the US Labor Market Following the Coronavirus Outbreak*, 22 April 2020.
[22] *Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak*, 22 June 2020.
[23] The expression is taken from the title of an article appeared on the website of *The Los Angeles Times*, see M. Hiltzik, *Column: Trump has turned the Department of Labor into the Department of Employer Rights*, July 22, 2019, 11:55 AM, retrieved at www.latimes.com/business/story/2019-07-22/trump-attack-on-labor.

neglected. The Department of Labor (DoL), as the governmental agency responsible for implementing the directions and actions of the President and the provisions of statutes into concrete policies, has played a pivotal role in the strategy of the White House to make the business environment as favourable to entrepreneurs as possible and to take away from workers prerogatives they were reluctant to relinquish.

The DoL has enjoyed a greater stability at its apex compared with other departments of the Federal administration under President Trump, at least until Secretary Jim Acosta resigned in July 2019 amid mounting pressures after the outburst of the Epstein scandal.[24] President Trump then picked Eugene Scalia, son of the late Supreme Court Justice Antonin, who was confirmed by the Senate and took the office at the end of September 2019.[25]

The most important issue tackled by the DoL to be singled out is arguably the entering into force of the new final rule regarding the determination of workers entitled to overtime wage. The relevant statute provides that minimum wage and overtime requirements do not apply to employees employed in a bona fide executive, administrative or professional capacity and for outside sales and computer employees.[26] More specifically, the so-called overtime rule is used to identify the employees that are exempted from the benefit ('white collars exemption') due to the nature of their tasks and the level of their fixed salary. A DoL regulation details the professional characteristics that qualify a member of each of these categories of workers as exempt, while also setting specific salary requirements:[27] regulations have historically required workers to meet a threefold cumulative test, designed to ascertain whether they were paid a predetermined and fixed salary (salary basis test) matching a minimum amount (salary level test), and their tasks primarily involved executive, administrative or professional duties as defined by each regulation (duties test).[28]



The amendment of the rule by the Trump administration has been focused on the salary level prong of the test, which had last been reviewed

[24] Acosta was the District Attorney who struck a favorable plea bargaining with Epstein enabling the defendant not to spend a single day in jail.
[25] For a bitter portrait of Scalia's track as Secretary of Labor see E. Press, *Trump's Labor Secretary Is a Wrecking Ball Aimed at Workers*, in *The New Yorker*, October 26th, 2020 Issue, retrieved at www.newyorker.com/magazine/2020/10/26/trumps-labor-secretary-is-a-wrecking-ball-aimed-at-workers.
[26] *Fair Labor Standards Act*, §13(a)(1), 29 U.S.C. 213.
[27] 29 Code of Federal Regulation – Part 541 – Defining and delimiting the exemptions for executive, administrative, professional, computer and outside sales employees.
[28] Wage and Hour Division of the Department of Labor, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, Final Rule, 23 May 2016, I. Executive Summary, available at www.federalregister.gov/documents/2016/05/23/2016-11754/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and.

under the Bush Jr. administration 2004. Former President Obama directed the Department to update the rule in 2014, which resulted in the adoption of a Final Rule in 2016 setting the standard to $913/weekly ($47,476/year), thereby requiring businesses to pay overtime wages to an estimated 4.2 million employees earlier excluded from the benefit.[29] The rule never entered into force, since its effects were soon paralyzed by a nationwide preliminary injunction granted by a District Court from Texas in late November 2016.[30] Following the publication of a request for information regarding the matter during the first months of Trump's term, a summary judgment found that the agency did not have authority to adopt the salary test as the only marker for the exemption of 'white-collar' workers, in consideration of Congress' unambiguous delegation of powers.[31] The judgment was later appealed by the Department of Justice (on behalf of the DoL) seeking a declaratory judgment that recognized its authority to set a predetermined salary to serve as the basis for the salary level test, so that a new version of the rule could be elaborated.[32] The Court of Appeals for the Fifth Circuit decided to held the case in abeyance pending further law-making by the administration, which materialized in July 2019 with prospective application from the beginning of 2020. The current version of the salary level test threshold has been brought up from 455$/weekly and 23660$/yearly to 684$/weekly and 35568$/yearly, which is indeed a relevant increase but is a far cry from the 913$/weekly and 47476$/yearly threshold that would have applied in case the Obama-era rule had entered into force. Preliminary accounts estimate that the rule, while granting 1.4 million more employees the overtime benefits, leaves out approximately a further 6 million workers.[33]



The DoL had earlier targeted other regulations adopted under the Obama administration, such as the so-called Persuader Rule, which imposed employers an obligation to report to union representatives the hiring of consultants for the purpose of addressing the organization of union representation and collective bargaining.[34] The regulation declared

[29] United States Department of Labor, *Overtime for White Collar Workers. Overview and Summary of Final Rule*, available at www.dol.gov/sites/default/files/overtime-overview.pdf.
[30] *Nevada v. US Department of Labor*, Case 4:16-cv-00731-ALM, 22 November 2016, United States District Court for the Eastern District of Texas.
[31] *Nevada v. US Department of Labor*, 31 August 2017, United States District Court for the Eastern District of Texas.
[32] K. Tornone, *DOL Abandons Overtime Rule, Asks Court to OK Salary Threshold Concept*, *HR Dive*, 30 June 2017, available at www.hrdive.com/news/dol-abandons-overtime-rule-asks-court-to-ok-salary-threshold-concept/446257/.
[33] Wage and Hour Division, Department of Labor, *Notice of Proposed Rulemaking: Overtime Update*, available at www.dol.gov/whd/overtime2019/index.htm.
[34] Labor-Management Standards Office, *Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act*, Final Rule, 24 March 2016, available at www.federalregister.gov/documents/2016/03/24/2016-

mandatory the notification of the hiring of consultants for any of the purposes illustrated above to the workers' representatives, even when the consultant and workers were not supposed to ever enter into contact with each other. After a Federal district judge granted a nationwide injunction to the application of the rule on the eve of its expected date of entering into force,[35] the DoL amended the rule by going back to the precedent framework where owners were subject to reporting duties only when the hired consultants entered into contact directly with employees. The reason argued to rescind the regulation was the intention to guarantee the rights of citizens to exchange views with and receive advice from their lawyers without mandatory disclosure to the government.[36]

The most baffling example of the genetic mutation in making at the DOL has been the agency's (in)action before the Covid-19 pandemic, which should have been met by the Department with fierce resistance to any attempt to undermine the health and financial security of workers. Instead, not only it failed to stand behind the rising quest for security on workplaces that proved to be relevant clusters for the spreading of the virus among the employees (such as the case of slaughterhouses), but it even went so far as to limit through an interpretive regulation the access to benefits such as the paid sick leave granted by Congress with the *First Family Coronavirus Response Act*. [37] The rule held that employees qualified under the first hypothesis provided for under the statute for enjoying the measure only if the workers themselves were the object of an order to stay at home in quarantine, and not if their workplace was ordered to shut down because of State or local decisions generally applicable. Thus, they were entitled to apply for and receive paid sick leave if their employer had actually work for them to perform, thereby disqualifying from the benefit all those whose work could somehow end up being considered "not necessary".



Yet, the rule has soon be challenged in court by the State of New York and in early August some of its provisions have been struck down for they exceeded the agency's authority, here included the above mentioned "work

06296/interpretation-of-the-advice-exemption-in-section-203c-of-the-labor-management-reporting-and.

[35] *National Federation of Independent Business v. Perez*, Case 5:16-cv-00066-C, 27 June 2016, U.S. District Court for the Northern District of Texas, available at www.chamberlitigation.com/sites/default/files/cases/files/16161616/Order%20Granting%20Preliminary%20Injunction%20--%20NFIB%20v.%20Perez%20%28U.S.%20District%20Court%20-%20Northern%20District%20of%20Texas%29.pdf.

[36] E.M. Hutchinson & R. Meisburg, *DOL Repeals Obama-Era "Persuader Rule"*, *Hunton Employment & Labor Perspectives*, 26 July 2018, available at www.huntonlaborblog.com/2018/07/articles/labor-unions/dol-repeals-obama-era-persuader-rule/.

[37] *Paid Leave Under the Families First Coronavirus Response Act*, 6 April 2020, retrieved at www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act.

availability" requirement.[38] An updated temporary rule has since been re-instated by the DoL, but it appears as it fails to properly address many of the concerns put forth by the federal judge in his finding, thereby threatening to make the foundations of the support of workers and employees by the Trump administration during the pandemic shakier and shakier.

## 5. The Uneven Performance of an Increasingly Trump-Like Supreme Court

If a general inquiry on the impact of the Presidency of Donald Trump may by no means be limited to the actions directly carried out by his administration, this is even more the case in the field of labour and employment policy, where (quasi-)judicial developments have altered the landscape if compared to four years ago. First, reference must be made to the case law of the highest judicial body of the country, the Supreme Court (for the sake of space and the purpose of this essay, due attention may not be given to lower federal courts, although during Trump term vacancies have been filled with an outstanding rate, thereby installing a slate of conservative judges in several areas of the country[39]). As it is well known, in only four years President Trump had the chance to fill three vacancies in the Supreme Court, picking three allegedly very conservative Justices to ensure a stronghold of this legal ideology within the college.[40] As Amy Coney Barrett (nominated to fill the seat of the late Ruth Bader Ginsburg) has yet to take part in a decision of the Court, it is indeed premature to make any guess on her approach to labour and employment law disputes. Conversely, after three and two full terms on the bench, there is sufficient material to make some considerations on the contribution of Neil Gorsuch (who joined the Court in the spring of 2017, following the death of Antonin Scalia and after the Senate refused to even convene a hearing of the Judiciary Committee to examine the appointee of President Obama, Judge Merrick Garland) and Brett Kavanaugh (the successor of Justice Kennedy, who retired after the 2018 term) to the case law of the Court in this domain.



The first reference actually dates back to the 2017 term, when Kavanaugh was still a Judge of the DC Circuit of Appeals: Justice Gorsuch authored the majority opinion in *Epic Systems Corp. v. Lewis*, holding for a narrow majority of five that arbitration agreements imposing individualized proceedings must be enforced in spite of the Arbitration Act's saving clause

[38] *State of New York v. US Department of Labor*, 20-CV-3020, 3 August 2020, US District Court for the Southern District of New York.
[39] *See., e.g.*, L. Zwarensteyn, *Trump's Takeover of the Courts*, *U. St. Thomas L.J.*, 16, 2020, 146-177.
[40] For President Trump appointments, see P. Passaglia, *President Trump's Appointments: A Policy of Activism*, in the present issue of *DPCE on line*. For an assessment of the performance of the Justices nominated by Trump so far, see R. Toniatti, *Non-Deferential Judicial Checks and Balances and Presidential Policies*, in the present issue of *DPCE on line*.

*DPCE online*
ISSN: 2037-6677

and the *National Labor Relations Act*.[41] The decision, which contradicts a case delivered by the NLRB in 2012 and several following judgments by lower federal courts, inflicted a serious blow to the possibility of employees to unite the forces and sue employers in a court of law with a collective action, thereby saving money and boosting their chances of ending up with a favourable finding. The fact that Gorsuch wrote the opinion for the conservative majority makes his contribution already meaningful to the switch of the balance of the case law of the court towards stances more protective of the prerogatives of employers, though this proved wrong at least in a recent case which will be addressed below.

Gorsuch joined the conservative majority, without writing the opinion of the Court himself, as well in the case *Janus v. AFSCME*, decided the later month and representing a very unfavourable outcome for trade unions in the public sector.[42] The decision, which ideally follows the offensive of the Presidency targeting the collective rights of workers employed by the federal government, held that the imposition of agency fees to non-unionized workers in the public sector is unconstitutional because it violates the freedom of speech granted under the I Amendment. Requiring workers that are not associated with the majoritarian union to pay fees that are deducted from their salary (even when only the percentage of fees corresponding the activities carried out for the common interest of all employees, so-called chargeable expenditures) implies, according to the five conservative justices, compelling them to finance a speech that they do not support, thereby infringing on their constitutional rights. The Court held that agency fees may be collected by unions from non-unionized workers only when employees explicitly consent to it. It is worth noting that agency fees were already outlawed at the federal level, while some States had forbidden them even before the Supreme Court struck down the Illinois provision as unconstitutional.



The case is of interest also because it is an example of an overruling of a long-standing precedent, *Abood v. Detroit Bd. of Ed.*:[43] Justice Alito, writing for the majority, argued that the doctrine of *stare decisis* did not play a decisive role in the case at stake. According to the Court, the reasoning of the precedent was flawed by a misinterpretation of two previous decisions, the case did not provide an adequately workable standard, it had remained an exceptional circumstance in the I Amendment case law and contracts

[41] For an insight to the case and its likely consequences, *see* S. Greene & C.N. O'Brien, *Epic Backslide: The Supreme Court Endorses Mandatory Individual Arbitration Agreements: #TimesUp on Workers' Rights*, *Stan. J. C.R. & C.L.*, Vol. 15, 2019, 43-85.

[42] 138 Sup.Ct. 2448. For an overview of the 2017 Term Supreme Court decisions affecting labor and employment law the most, *see* J.M. Glover, *All Balls and No Strikes: The Roberts Court's Anti-Worker Activism*, *J. Disp. Resol.* 2019, 129-139.

[43] 431 U.S. 209 (1977). For references to the Supreme Court case law between *Abood* and *Janus* and the signals that pointed to a finding of the Court in this direction, *see* D.F. Forte, *To Speak Or Not to Speak, That Is Your Right: Janus v. AFSCME, 2017 Cato Sup. Ct. Rev.*, 2017-2018, 171.

stipulated within that normative framework would soon expire and be up for renegotiation.[44]

The majority opinion dismantled the reasoning of *Abood v. Detroit Bd. of Ed.* by criticizing the finding that, even if labour peace may be regarded as a compelling State interest, the designation of the majoritarian union as the only subject entitled to negotiate with the employer for all employees implies the imposition of agency fees on workers who were not associated with the union. The Court even rejected the argument claiming that the intent to prevent free-riders from enjoying the benefits paid for only by unionized employees is a compelling State interest; on the contrary, non-unionized employees would be coerced into financing speech that they do not support.

Finally, another decision of the Supreme Court deserves to be addressed, especially since it is an interesting case where the two Trump's appointees split and voted in different fashion. In *Bostock v. Clayton County*,[45] handed down in June 2020, Gorsuch surprisingly led a liberal majority of 6-3, joined by Chief Justice John Roberts, while Kavanaugh bitterly dissented, criticizing the method and findings of the majority opinion. The case concerned the interpretation to be given to a provision enshrined in Title VII of the *Civil Rights Act* of 1964, providing that discrimination against an individual employee by a private employer because of his/her sex is prohibited (the text had been amended in 1991 to provide that it is sufficient that sex and other reasons are a motivating factor, even if not the only). Interestingly, Gorsuch applies an originalist statutory interpretation holding that the construction of the provision must necessarily entail discrimination based on sexual orientation and gender identity as well. The pivotal argument may be summarised as follows: discrimination against an individual because he/she is homosexual or transgender is impossible without simultaneous discrimination of him/her because of the birth gender (*i.e.*, you discriminate an homosexual man not simply because he loves men, but because he loves men **and** is a man; in fact, such a discrimination does not extend to women loving men, although the underlying conduct is identical). The legal reasoning in support of the majority decision, which has been met with harsh criticism in the more conservative environments of the American legal community,[46] is however somehow curtailed by its limited scope of application (only enterprises employing 15 or more employees) and by the existence of an explicit religious exception provided for by the statute at stake which, together with the *Religious Freedom Restoration Act* of 1993,



[44] *Janus v. ACSFME*, 138 Sup.Ct. 2448 (2018), Alito, J., VI, 33-47, Slip op.
[45] 140 Sup.Ct. 1731 (2020).
[46] *See, e.g.*, N. Lund, *Unleashed and Unbound: Living Textualism in Bostock v. Clayton County*, in *Federalist Society Review*, Vol. 21, retrieved at fedsoc.org/commentary/publications/unleashed-and-unbound-living-textualism-in-bostock-v-clayton-county.

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may eventually prove an effective way out for employers from the otherwise wide-ranging finding of the Court.

## 6. A Roll-back After Another: The Building of Distrust in The Role of The NLRB

The picture of the legacy of the Trump Presidency in the field of labour and employment may not be comprehensive without a reference to the changes undergone by the National Labor Relations Board (NLRB) under his term. The agency, a five members institution established under the so-called *Wagner Act*[47] at the height of the Roosveltian welfare legislation on the eve of WWII, is tasked with the powers to oversee elections to form or decertify unions of employees working for private employers and prosecute alleged violations of the rights granted under the *National Labor Relations Act* (NLRA). The President of the United States has the power to appoint its members, who shall then receive the Senatorial advice and consent before being sworn in for a five year-long term. Each term expires on a different year, so that ideally a new member shall be appointed each year to the NLRB; when appointments are delayed, the appointee only serves the remainder of the term. The members of the NLRB may be re-appointed and they may be removed only for negligence and misbehaviour in carrying out their office.



Interestingly, despite the statute establishing the agency does not provide any partisan balance requirement, as it the case for several other federal institutions,[48] nominations to the NLRB have customarily ensured the presence of members representing the minority party to counterbalance majorities usually favourable to the incumbent administration.[49] This constitutional convention has not prevented bitter challenges to some appointments, that have ended up before the Supreme Court which has unanimously held that President Obama's recess nominations were invalid under the Recess Appointments Clause,[50] since Senate was not technically in recess when he appointed the two members taking part to the challenged decision.[51] A major weakness and a factor undermining the effectiveness of the agency has been its perceived excessive politicization, due to its tendency to reverse precedents and change the trajectory of its case law according to the party in power, thereby downsizing the trust of workers and their reliability on the performance of its statutory functions.[52]

[47] *National Labor Relations Act* of 1938, 29 U.S.C. §§ 151-169.
[48] For references *see* B.D. Feinstein & D.J. Hemel, *Partisan Balance with Bite, Columbia Law Review*, Vol. 118, No. 1, 2018, 9-82.
[49] For an extensive account of the appointments to the NLRB *see* J. Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB 1935-2000, Ohio St. L. J.*, Vol. 61, No. 4, 2000, 1361.
[50] Art. II, Sec. 2, Cl. 3 US Constitution.
[51] *National Labor Relations Board v. Noel Canning*, 573 U.S. 513, 134 Sup.Ct. 2550 (2014).
[52] J.J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future, Comp. Lab. L. & Pol'y. J.*, Vol. 26, No. 2, 2005, 221.

After first filling two empty seats by nominating Marvin Elliot Kaplan and William Emanuel to the Board, thereby re-establishing a 3-2 Republican edge within the agency, which was ensured, save for four months, even after the expiration of Philip Miscimarra's term, when John Francis Ring was appointed to the Board and assumed the duties of Chairman, Trump had re-appointed the former Chairman Mark Gaston Pearce, but his nomination lagged before the Senate until the appointee himself stood down and the nomination expired after a new session of the Senate was convened. President Trump has since re-appointed Democrat Lauren McFerran and Republican Kaplan for new terms[53], so that currently the Board has a 3-1 Republican majority and an empty seat, which could be filled by prospective President Joe Biden together with that of William Emanuel, expiring in 2021, provided that Senate Republicans do not obstruct the nominations.

After President Obama eventually secured a Democratic majority on the Board, despite the staunch opposition of Republican Senators threatening to filibuster the appointments, the NLRB consistently delivered a string of decisions altering the labour law environment, especially by reversing long-standing precedents, which were welcomed with fierce criticism from the other side of the political spectrum.[54] As widely expected, as soon as Trump re-established a Republican hold on the agency the progressive stances taken in the previous years have been progressively set aside in favour of standards and rules more favourable to employers.



From a chronological standpoint, the NLRB has begun its work by rolling back the decision adopted in *Browning-Ferris Industries of California*,[55] where it held that subcontractors may claim the liability not only of their direct employers (contractors), but even of indirect employers who have no actual control over them, thereby changing the so-called joint-employer standard. The above finding was reversed in *Hy-Brand Industrial Contractors*,[56] where the pre-existing version of the standard was deemed the one to be applied. Yet, *Hy-Brand* has been vacated by the Board after only three months, following the discovery that one NLRB member was as well a shareholder of one of the law firms assisting one of the parties to the case.[57] At the end of the year, the US Court of Appeals for the DC Circuit, on petition of review of the NLRB's Order in *Browning-Ferries*, stepped in upholding the agency's construction of the joint-employer standard as

[53] *Trump Re-Nominates Two NLRB Members For New Terms*, in *The National Law Review*, March 5, 2020, retrieved at www.natlawreview.com/article/trump-re-nominates-two-nlrb-members-new-terms.

[54] Reference is made to the switch in the NLRB's attitude under the Obama administration by K.A. Jenero, *The NLRB's Successorship Doctrine, Perfectly Clear Successors, Executive Order 13495, and Worker Retention Laws: What the Trump Administration Has Inherited*, in *A.B.A. J. Lab. & Emp. L.*, 32, 2017, 353-379, namely at 353.

[55] *Browning-Ferris Indus. of Cal.*, 362 N.L.R.B. No. 186, 27 August 2015.

[56] *Hy-Brand Industrial Contractors, Ltd.*, 365 N.L.R.B. No. 156, 14 December 2017.

[57] *Hy-Brand Industrial Contractors, Ltd.*, 366 N.L.R.B. No. 26, 26 February 2018.

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encompassing both direct and indirect control of employees' terms and conditions of employment.[58] The judgement, however, pointed to the failure of the Board to draw the borders of indirect control over essential terms and conditions of employment (that implies the existence of joint employment) and indirect control considered intrinsic to ordinary third-party contracting relationships. The agency has since seized the opportunity and in early 2020 it issued its final rule on joint-employer which, needless to say, curtails the instances in which indirect control is relevant. Under the amended framework, a business will qualify as joint employer as long as it shares and codetermines one or more of the essential terms and conditions of employment (wages, benefits, hours of work, hiring, discharge, discipline, supervision and direction) of the employees of another employer.[59]

The day after the decision in *Hy-Brand*, the NLRB tackled the issue of the determination of bargaining units for the purposes of unions' elections, reversing the holding in *Specialty Healthcare*,[60] according to which the traditional community of interest test shall apply to draw the boundaries of bargaining units and that, when challenging an allegedly inappropriate bargaining unit, the employer had to demonstrate that the existence of an overwhelming community of interest between the concerned unit and the employees excluded. The decision in *PCC Structurals* declared the standard of *Specialty Healthcare* excessively deferential to petitioned-for units, adding that it amounted to a betrayal of the legislator's intent by requiring an overwhelming (rather than merely substantial) community of interest.[61]



Employers' autonomy in amending contractual conditions has been under review as well, after the very recent decision in *E.I. Du Pont de Nemours*[62] had found that the obligations to negotiate prior collective bargaining agreements with employees prevent employers from unilaterally amending contractual conditions to re-instate past practices previously in force. In *Raytheon*,[63] the NLRB has now censured the stance taken and, arguing that it brings about a distortion of the meaning of the word 'changes', thereby undermining its task to foster stable bargaining relationships, it found that the application of past contractual conditions is not a 'change', while still acknowledging that employers unilaterally altering the content of the terms of employment are bound by the bargaining duties stemming from a union request.

[58] *Browning-Ferris Indus. of Cal. v. NLRB*, No. 16-1028, 28 December 2018, US Court of Appeals for the District of Columbia.
[59] *Joint Employer Status Under the Fair Labor Standards Act*, 85 Fed. Reg. 2820, 29 CFR 791.
[60] *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 N.L.R.B. No. 934, 26 August 2011.
[61] *PCC Structurals, Inc.*, 365 N.L.R.B. No. 156, 15 December 2017.
[62] *E.I. Du Pont de Nemours*, 364 N.L.R.B. No. 113, 26 August 2016.
[63] *Raytheon Co.*, 365 N.L.R.B. No. 161, 15 December 2017.

So-called employer-rules have also been dealt with by the agency, as the NLRB has since departed from the *Lutheran Heritage* standard,[64] which was relied upon by the Board in *William Beaumont Hospital*[65] to hold the provisions of a Hospital's Code of Conduct aimed at fostering the creation of a harmonious workplace for employees unlawful, for they impinged on the rights of employees under §7 NLRA. In *Boeing*,[66] the agency discarded the *Lutheran Heritage* rule, under which employer-rules were invalid when employees would reasonably construe them to restrict the activities protected by the statute, since it failed to consider potential justifications of the rules, it required employers to avoid any possible interference with §7 NLRA, it penalized rules for their mere ambiguity, it excessively limited the Board discretion and it made the result of any challenge to such rules extremely uncertain. The NLRB has thus adopted a new standard, combining the assessment of the nature and the extent of the potential impact of the rules upon NLRA protected rights together with the existence of legitimate justifications associated with the rules. Under the newly-established framework employer-rules are now classified as either lawful, if according to a reasonable interpretation they do not prohibit or interfere with the exercise of NLRA's rights or such adverse impact is outweighed by the connected justifications, and as such subject to particularly strict and individualized scrutiny, or unlawful, for limiting NLRA's protected rights while failing to be accompanied by appropriate justifications.



After a fairly quiet 2018 from the adjudicatory point of view, in 2019 the Board has reactivated its offensive on the rights and prerogatives of employees, delivering judgements on several different grounds[67]. The agency has rolled back on yet another decision of the Obama era, *FedEx Home Delivery*,[68] that had partially departed from the established common law agency test for the determination of the status of the workers as an employee or a contractor by reducing the role of the entrepreneurial opportunity factor and shifting the focus of the analysis upon the fact that the worker rendered a service as part of an independent business. While courts had already refused to grant enforcement to the decision, the Board has since returned to the traditional criteria, holding in *Supershuttle*[69] that gig economy workers such as drivers for a company operating transport services within Dallas Fort Worth airport qualify as independent contractors. It is also worth noting, incidentally, that the residents of California have voted in November 2020 in favour of Proposition 22, which

[64] *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. No. 646, 19 November 2004.
[65] *William Beaumont Hospital*, 363 N.L.R.B. No. 162, 13 April 2016.
[66] *Boeing Co.*, 365 N.L.R.B. No. 154, 14 December 2017.
[67] For an insight to the 2019 NLRB activity, *see The National Labor Relations Board 2019 year end review: an overview of major developments in labor law*, retrieved at www.mcneeslaw.com/national-labor-relations-board-2019-year-end-review/.
[68] *Fed-Ex Home Delivery*, 361 N.L.R.B. No. 55, 30 September 2014.
[69] *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75, 25 January 2019.

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qualifies gig economy workers as independent contractors rather than employees.

The second set of decisions concerns the use of company property or workplaces premises by employees for union-related activities. In *UPMC Presbyterian Hospital*[70] the NLRB held that employers may prohibit any activity linked to unions in the company public spaces (*e.g.* cafeteria), as long as there are other channels available for the union to inform employees and all promotional activities carried by non-employees as well are banned from employer's property. The decision, which overrules the decades old precedent in *Ameron*,[71] adopted a narrow interpretation based on the Supreme Court decision in *NLRB v. Babcock & Wilcox Co.*, allowing employers to restrict unions' activities unless discrimination is shown.[72] A similar issue was tackled by the Board also in *Bexar*,[73] where the agency found that employees working for an employer which is only a contractor of the site where they work may be forbidden to access the premises by the actual owner to perform activities protected under §7 NLRA, unless they work regularly and exclusively on the site and another non-trespassory alternative is not available to them. The decision reverses the previous findings of the NLRB in *New York New York Hotel & Casino* and *Simon DeBartolo Group*.[74] Similarly, in *Kroger Ltd.*,[75] the Board went even further than in *UPMC*, by holding that unlawful discrimination exists only as long as the activities forbidden to union representatives are similar in nature to those allowed for non-employees (be they charitable, civic or commercial), therefore finding that no unfair labour practice occurred when the employer alerted the police to have the union' representatives removed while still allowing solicitations by charity organizations or other forms of civic and commercial solicitation. Notably, also this decision reverses a precedent judgement rendered by the Board in *Sandursky Mall*.[76]



A third area of labour law that has been affected by the exercise of the NLRB adjudicatory powers in 2019 is that of the use of company owned e-mail systems to communicate with co-workers about workplace issues. The

[70] *UPMC Presbyterian Shadyside and SEIU Healthcare Pennsylvania*, 368 N.L.R.B. No. 2, 14 June 2019.
[71] *Ameron Automotive Centers*, 265 N.L.R.B. No. 511 (1982). Appellate federal courts had actually rejected in several instances the exception elaborated in *Ameron*.
[72] 351 U.S. 105 (1956). *See*, S. Hamilton & R.T. Dumbacher, *NLRB Strengthens Employer Property Rights: What UPMC Means for Employers*, 10 July 2019, retrieved at www.huntonlaborblog.com/2019/07/articles/nlrb/nlrb-strengthens-employer-property-rights-what-upmc-means-for-employers/.
[73] *Bexar County Performing Arts Center Foundation*, 368 N.L.R.B. No. 46, 23 August 2019.
[74] Respectively, 356 N.L.R.B. No. 907, 25 July 2011, and 357 N.L.R.B. No. 1887, 30 December 2011.
[75] *Kroger Limited Partnership*, 368 N.L.R.B. No. 64, 6 September 2019.
[76] *Sandusky Mall Co.*, 329 N.L.R.B. No. 62, 30 September 1999.

agency had previously found, in *Purple Communications*,[77] that employees may make reasonable use of the e-mail account given by the company for the performance of their tasks to communicate with fellow workers about union-related and organizational issues. In *Caesars Entertainment Corp.*, instead, the agency found that such use of the company e-mail is prohibited, unless it is the only reasonable means ensuring communication between employees, thereby curtailing the chances of workers to exchange views and ideas concerning their workplace conditions.[78]

Finally, it is also worth noting that the NLRB overruled its previous decision in *Banner Estrella Medical Center*,[79] allowing employees to discuss internal investigations with fellow co-workers absent special circumstances, by holding in *Apogee*[80] that investigative confidentiality requirements imposed until the investigation is pending are lawful.

Lastly, a remark on the rule-making activity of the NLRB is due as well. The most relevant issue concerns representation case rules, which provide for the creation of unions and the holding of elections in private workplaces. In April 2015, a final rule amending the existing one eased the process to unionize and made it faster to organize elections within a bargaining unit, in a move that was widely perceived as favourable to workers.[81] The Board, after requesting comments from the public on the appropriateness of amending these rules, has eventually published a new Final Rule in December 2019, notably expanding the time frame between the filing of a petition and the date of the election, thereby enabling employers to a few more days to comply with their obligations.[82] Some of the provisions encompassed by the Final Rule have since been invalidated in court,[83] despite the remainder of the regulation has meanwhile entered into force.



## 7. An Unfinished Business? Final considerations on Trumps' labour policy

Taking an ultimate stance on the legacy of the labour and employment policy of the Trump administration is no easy task, mainly due to the fact

[77] *Purple Communications*, 361 NLRB No. 126, 11 December 2014. The decision was itself a reversal of *Register Guard*, 351 NLRB No. 70, 16 December 2007, issued under the Bush Jr. administration.
[78] 368 NLRB No. 143, 17 December 2019. For a critical comment on the decision, *see* S. Estreicher, C. Owens, *Labor Board Wrongly Rejects Employee Access to Company Email for Organizational Purposes*, 19 February 2020, retrieved at verdict.justia.com/2020/02/19/labor-board-wrongly-rejects-employee-access-to-company-email-for-organizational-purposes.
[79] *Banner Estrella Medical Center*, 362 N.L.R.B. No. 137, 26 June 2015.
[80] *Apogee Retail LLC*, 368 NLRB No. 144, 16 December 2019.
[81] A full account may be available at www.govinfo.gov/content/pkg/FR-2014-12-15/pdf/2014-28777.pdf.
[82] *Representation-Case Procedures*, 84 Fed. Reg. 69,524, 29 CFR 102.
[83] *AFL-CIO v. NLRB*, 20-cv-0675, 30 May 2020, US District Court for the District of Columbia.

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that the most relevant developments have occurred at the administrative and regulatory level or through decisions rendered either by the Supreme Court or the NLRB. This entails that any assessment forecasting a long-lasting effect of the policies adopted may be short-sighted as the following administration may well decide to rescind a number of regulations or executive and Presidential actions taken in the past four years, thereby downsizing their concrete effects. That notwithstanding, a few concise remarks may be briefly developed.

The *prima facie* impression is that there never was a real Trump labour agenda, as the actions of the administration, especially during the first half of the term, appeared erratic and rarely concerted in order to pursue a pre-determined strategy. Many of the initiatives illustrated in the previous paragraphs have consisted in attempts to scale back policy changes that had been introduced in the eight years of the Obama Presidency. This was made possible through an extensive recourse to Congressional joint resolutions of disapproval pursuant to the *Congressional Review Act*, but also by directing the Department of Labor to rescind regulations perceived as unfriendly to business owners (such as the Persuader Rule) and by reshaping the composition of the Supreme Court and the NLRB so as to favour the rollback on a number of decisions allegedly too favourable to employees and unions.[84]



Whether such a 'negative' strategy of targeting policies enacted by a previous administration may be framed as a proper agenda is up for debate.

Yet, there is no shortage of examples witnessing the 'allergy' of President Trump for intermediate bodies, interposing themselves between employers and employees. The consistent attempt to weaken the role of unions has gone hand in hand with the limitation of certain collective rights of the workers, which nonetheless have effects on each of them, such as the decision of the Supreme Court in *Epic Systems Corp.* or the limited step forward made with the implementation of the new overtime rule.

If there is a sworn enemy of President Trump, however, it cannot be any other than unions in the public sector. From the string of executive orders of May 2018 to the decision of the Supreme Court in *Janus*, there is no doubt that government and State employees will face tougher times in the near future as the erosion of their union-related guarantees is well underway and these latter may not come back anytime soon.

If a tendential yet consistent attempt to evade from the application of the guarantees granted under the *NLRA* to employees is an evident feature of the four years of Donald Trump at the White House, what could matter even more in the long run is the increasing distrust in the capability of the NLRB to perform the tasks it is vested with and to ensure that the business

[84] For a critical overview of the NLRB decisions under the Trump administration, *see* C. McNicholas, M. Poydock, L. Rhinehart, *Unprecedented. The Trump NLRB's attack on workers' rights*, Economic Policy Institute, 16 October 2019, retrieved at www.epi.org/publication/unprecedented-the-trump-nlrbs-attack-on-workers-rights/.

community, both on the side of employers and employees, is able to deal with rules that are certain and endure over time. That is, however, not the case nowadays, as it may be noticed by taking account of the several instances in which the Obama and Trump NLRB has overruled precedents that only dated back to a few years before, thereby exacerbating the employer-employee divide that could become a black hole of the US job market before a prospective occupational crisis due to Covid-19 restrictions.

As it may be said for many of the policies enacted by the Trump administration during the last four years, the most important consequences may yet have to come, and it is fairly likely that they will show up in the guise of a decision from the highest court of the land, the sole institution which is going to be Trump-like even after the incumbent President leaves its office.

Davide Zecca
Dipartimento di studi giuridici
Università comm.le "L. Bocconi"
zecca.davide@unibocconi.it