

Workplace Law Under President Trump:

The New Normal for Human Resources Professionals in the Empire State

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About the Firm

Represents management exclusively in every aspect of employment, benefits, labor, and immigration law and related litigation

800 attorneys in **56 locations** nationwide

Current caseload of **over 6,000 litigations**
approximately **800 class actions**

Founding member of L&E Global

A leader in educating employers about the laws of equal opportunity, Jackson Lewis understands the importance of having a workforce that reflects the various communities it serves

Introductory Statement

The materials contained in this presentation were prepared by the law firm of Jackson Lewis P.C. for the participants' reference in connection with education seminars presented by Jackson Lewis P.C. Attendees should consult with counsel before taking any actions and should not consider these materials or discussions about these materials to be legal or other advice.

BACKGROUND

Background

- ◆ The U.S. has a Republican President; both houses of Congress are led by Republican majorities.
- ◆ On the campaign trail, Trump promised to reverse or eliminate many of the Obama Administration's employee-friendly enforcement positions and rules.
- ◆ ***BUT***, how fast can these changes really occur?

Procedural Considerations

Trump has a number of means to change existing labor and employment laws and guidance:

◆ Executive Orders and Actions

- Can be rescinded (or implemented) immediately by the President.

◆ Agency Guidance and Opinion Letters

- Once in place, political appointees will direct staff priorities and enforcement positions, including the issuance/rescission of agency guidance and formal opinion letters.
- It takes time to get appointees in place, and Office of Management and Budget (OMB) clearance is required for major guidance documents.

Procedural Considerations

◆ Regulations

- Rescission, amendment or modification of formal regulations takes longer than changes to agency guidance or opinion letters.
- Typically require notice and comment periods.
- Trump could also work with Congress to defund the enforcement of rules he does not support (either without going through, or while going through, the formal rescission or modification process).

◆ Legislation

- Labor & employment initiatives may be stalled pending larger agenda items in Congress, including tax reform.

Background

- ◆ Trump's signature issues and priorities?
 - Trade
 - Immigration
 - Health Care Reform
 - Deregulation
- ◆ How fast will changes happen?
 - Executive orders
 - Appointment and nomination process
 - Notice and comment period for regulations

GOVERNMENT AGENCIES

Government Agencies

Under Trump, agencies such as the Department of Labor, Equal Employment Opportunity Commission, Occupational Safety and Health Administration and National Labor Relations Board are expected to focus more on achieving employer compliance and less on aggressive enforcement.

DOL: Secretary of Labor

◆ Meet **R. Alexander Acosta**

◆ Background

- U.S. Attorney for the Southern District of Florida
- NLRB Board Member
- DOJ Civil Rights Division
- Labor and Employment Law at Kirkland & Ellis
- Dean of Florida International University College of Law



◆ What to expect

- More middle-of-the-road approach.
- During confirmation hearing, noted that Trump is his “boss” and that “we all work for the president and we all will ultimately follow his direction unless we feel like we can’t.”
- On June 7, 2017, withdrew Obama-Era Independent Contractor Interpretation, which had broadly defined “employee” for purposes of independent contractor/employee analysis.

DOL: Return of Opinion Letters

- ◆ DOL announced it will reinstate long-standing practice of issuing opinion letters regarding application of the Fair Labor Standards Act.
- ◆ Opinion letters address specific, and often nuanced questions, regarding application of the FLSA and its implementing regulations. They provide guidance to employers, who, under the FLSA can rely on the guidance in structuring operations and compensation.
- ◆ If the employer relies on the opinion letter, even if a court later decides the DOL opinion letter does not accurately apply the law, the employer may be able to avoid liability under the “good faith” defense established by the FLSA.

DOL: Overtime Rule

- ◆ A Texas District Court issued a nationwide preliminary injunction enjoining the DOL from implementing and enforcing its final overtime rule.
- ◆ The rule, which was scheduled to take effect on December 1, 2016, would have increased minimum salary levels required for an employee to achieve exempt status under the FLSA, with automatic increases thereafter.
- ◆ DOL appealed decision to the Fifth Circuit Court of Appeals.
- ◆ DOL filed their reply brief on appeal – they are contesting the District Court's finding that they do not have authority to establish the salary basis, but are not advocating for the salary basis set forth in the rule.
- ◆ Appeal is now moot given summary judgment decision by the District Court that the overtime rule is invalid.

DOL: Overtime Rule

- ◆ Acosta indicated during his confirmation that he believed a salary basis “somewhere around \$33,000” was more reasonable.
- ◆ On July 26, 2017, the DOL issued a request for information on the overtime rule, seeking public comment on eleven questions, including:
 - Whether the salary threshold should vary based on factors like size of employer, census region, census division, state, metropolitan statistical area, or some other method;
 - Whether executive, administrative and professional employees should be subject to different salary thresholds;
 - Whether employers increased salaries of exempt employees (to \$913 or more) in anticipation of the overtime rule going into effect or whether employers adopted other strategies to deal with employees who would have been newly eligible for overtime pay under the rule;
 - Whether a test for exemption that relies solely on duties (and does not consider salary) would be preferable, and, if so, what duties should be included; and
 - Whether the salary threshold should be automatically updated from time to time, and, if so, how updates should be calculated.
- ◆ Deadline to respond is September 25, 2017.

National Labor Relations Board

- ◆ The NLRB is a five-member board: two members from each political party, and a fifth from the President's party.
- ◆ Under President Obama, the NLRB drastically changed existing policies and legal precedents for both unionized and non-union employers.
- ◆ Trump appointed existing Board member Philip A. Miscimarra as Chair.
- ◆ Trump nominated Republican attorneys Marvin Kaplan and William Emanuel to fill the two open seats on the Board. A third is scheduled to open next year.
 - Kaplan confirmed by the Senate on August 4, 2017. Emanuel's confirmation vote has been delayed.
 - Kaplan was Counsel to the Commissioner of the Occupational Safety and Health Review Commission. Emanuel is a labor attorney.
- ◆ General Counsel's appointment expires in November 2017 – Trump just nominated Peter Robb, a management-side labor attorney.
- ◆ Expect a more business-oriented NLRB.

National Labor Relations Board

- ◆ Expect the new Board to revisit numerous NLRB decisions from the Obama administration, including those regarding:
 - Micro-units;
 - Class action waivers (an issue being decided by the Supreme Court);
 - Joint employers;
 - Inclusion of temporary workers in bargaining units with an employer's regular workers;
 - Quickie elections;
 - Protected concerted activity in areas such as social media, confidentiality, and employer policies and handbooks; and
 - Status of college/university adjunct faculty, graduate students, and student athletes.

National Right to Work Bill?

- ◆ A National Right to Work Bill would prohibit “union security clauses” in collective bargaining agreements.
- ◆ "I love the right to work I like it better because it is lower. It is better for the people. You are not paying the big fees to the unions. The unions get big fees. A lot of people don't realize they have to pay a lot of fees. I am talking about the workers. They have to pay big fees to the union. I like it because it gives great flexibility to the people. It gives great flexibility to the companies." – Trump, February 16, 2016.

Equal Employment Opportunity Commission

- ◆ In June 2017, President Trump nominated Janet Dhillon as EEOC Chair.
- ◆ EEOC Commissioner Victoria Lipnic serving as Acting Chair until Dhillon's confirmation.
- ◆ EEOC currently comprised of three Democrat Commissioners and one Republican Commissioner.
- ◆ One vacant Commissioner seat – if Dhillon is confirmed, Acting Chair Victoria Lipnic likely will fill the vacancy.

Equal Employment Opportunity Commission

- ◆ President Trump nominated **Janet Dhillon**, Republican, to fill the Chair position.
 - Unlikely to support the initiatives of the previous administration
 - General counsel and Corporate Secretary for Burlington Stores, Inc.
 - Prior to Burlington, Dhillon served as in-house counsel for J.C. Penny Co. Inc. and U.S. Airways
 - Contributed to the campaigns of Republican candidates for elected office, including John McCain, Rick Perry and Ted Cruz



Equal Employment Opportunity Commission: Strategic Enforcement Plan

- ◆ In mid-October 2016, the EEOC issued its updated Strategic Enforcement Plan (“SEP”) for Fiscal Years 2017-2021.
- ◆ Lipnic has stated there will be no change in SEP without a vote by the full EEOC; unclear if Dhillon will hold same position.
- ◆ Moreover, Courts and plaintiff attorneys may take their lead from existing SEP.
- ◆ SEP sets forth six primary initiatives: (1) eliminating barriers in recruitment and hiring; (2) protecting vulnerable workers; (3) addressing emerging issues; (4) ensuring equal pay; (5) preserving access to the legal system; and (6) preventing systemic harassment.

Equal Employment Opportunity Commission

- ◆ Expect a shift from expanding the law to enforcing the law as it exists.
- ◆ However, EEOC will likely always pursue:
 - Hostile Work Environment;
 - Religious Accommodation;
 - ADA Accommodation (*especially* if no interactive process);
 - Pregnancy Discrimination and Accommodation; and,
 - Large and small disparate treatment cases where statistical and anecdotal evidence support finding of discrimination.

Pushing Your Luck – Practices That Can (Still!) Get You In Trouble With The EEOC

- ◆ Posting job advertisements without careful monitoring for potential issues – the EEOC is focusing on advertisements that limit or deter older workers from applying, e.g., ads looking for “students” or “recent college graduates”.
- ◆ Speaking internally or externally about the Company’s desire or success in hiring millennial workers.
- ◆ Rigid time or attendance policies that run afoul of the EEOC’s May 9, 2016 Resource Document on the ADA.
- ◆ Use of pre-employment selection techniques/criteria (including pre-employment tests and criminal background screens), without collecting gender and race/ethnicity information in the application process and without monitoring same for adverse impact.

Pushing Your Luck – Practices That Can (Still!) Get You In Trouble With The EEOC

- ◆ Having certain jobs or departments that are largely or exclusively comprised of one gender or ethnic group.
- ◆ Providing light duty work to the disabled or persons with work injuries, but not pregnant women.
- ◆ Failing to follow EEOC Guidance on criminal background checks – which requires employers communicate with persons with criminal records before making an adverse employment decision.
- ◆ Not having a policy or practice in place for addressing gender transitioning employees.

Farewell to the Revised EEO-1 Report!

- ◆ On August 29, 2017, the OMB halted the collection of pay data under the expanded EEO-1 Report.
- ◆ This new Report – which was due to go into effect on March 31, 2018, would have required employers to submit W-2 wage information for their entire workforce, broken out by race and gender.
- ◆ Employers must still continue to file EEO-1 reports with traditional demographic (race/ethnicity) and sex data.
- ◆ Employers are authorized to use the historical EEO-1 Report format to satisfy the 2017 filing requirement.
- ◆ Deadline to file is still March 31, 2018.

EEOC Merger With OFCCP?

- ◆ In his recent budget proposal, President Trump proposed to merge the OFCCP and EEOC by the end of fiscal year 2018.
- ◆ In order for a merger to occur, Congress would have to transfer enforcement authority under the Rehabilitation Act and VEVRAA from the Secretary of Labor to the EEOC.
- ◆ Merger is opposed by both employer and employee groups, unclear whether it could gather the support needed to make it through Congress.

OSHA Recordkeeping Rule

- ◆ Rule permitted OSHA to cite employers for failing to record work-related injuries and illnesses during a five-year retention period, instead of the previous six-month statute of limitations.
- ◆ Rule took effect January 2017.
- ◆ On April 3, 2017, President Trump signed into effect a joint resolution disapproving of the Rule (“Clarification of Employer’s Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury”).
- ◆ Effectively repeals the rule – six-months remains the current statute of limitations in which OSHA may issue citations for recordkeeping violations.

OSHA Walk-Around Rule

- ◆ Under the previous administration, OSHA had taken the position that employees in non-union workplaces had the right to choose a union affiliated representative for “walk-around” inspections by OSHA.
- ◆ April 25, 2017 - OSHA issued a memorandum announcing it had changed its policy and employees at non-union workplaces do not have a right to choose a union-affiliated representative for “walk-around” inspections by OSHA.

A blurred photograph of an office interior. On the left, a window reflects the words 'JACKSON LEWIS'. On the right, a window looks out onto a building with a prominent dome, likely a government or institutional building. The overall scene is out of focus, creating a professional and modern atmosphere.

THE COURTS

U.S. Federal Courts

- ◆ President Trump nominated (and the Senate confirmed) Justice Neil Gorsuch to the U.S. Supreme Court.
- ◆ Justice Gorsuch is a conservative jurist who created a 5-4 majority of Republican appointees to the Court.
- ◆ His decisions call for less deference to agencies.
- ◆ Likely Trump will appoint more Justices – Justice Ginsburg and Justice Kennedy are both over the age of 80.
- ◆ Trump will have opportunity to appoint upwards of 100 judges to the lower federal courts.

NEW YORK'S RESPONSE

How Much Will Change in New York?

- ◆ Expect New York State and New York City to fill in some of the “employer friendly” gaps left by the Trump administration.
- ◆ In other words – while things may change on the federal level, we still be dealing with burdensome laws and aggressive agency enforcement from the State.

New York Legal Developments: Pay Equity

- ◆ As part of the “New York Promise Agenda,” Governor Cuomo signed two pay equity-related executive orders:
 - Executive Order 162: Requires New York State contractors to disclose employee job titles and salary for each employee working on a State contract.
 - Executive Order 163: Prohibits New York agencies from asking an applicant for current or prior salary before a conditional offer of employment is made.
- ◆ On May 4, 2017, Mayor de Blasio signed into law a bill that makes it an “unlawful discriminatory practice” for employers to inquire about the salary history of a prospective employee **at any time**, or to rely upon salary history unless the applicant offers the information voluntarily.
 - Law goes into effect October 31, 2017.

New York Legal Developments: Paid Family Leave

- ◆ After passing the legislature with overwhelming margins, New York's Paid Family Leave Act was signed into law on April 4, 2016.
- ◆ Takes effect on January 1, 2018.
- ◆ Employee payroll deductions can begin on July 1, 2017.
- ◆ Reasons for Leave:
 - Care for Family Member
 - Bond with Child
 - Military Qualifying Event
- ◆ Job protected leave is nearly identical to FMLA job restoration benefits – employee is entitled to be restored to the position of employment held when the leave began, or a comparable position with comparable employment benefits, pay and other terms and conditions of employment.
- ◆ Must maintain group health coverage under the same terms as if the employee was working.

PFL Provides Greater Family Leave Benefits Than the FMLA

NY PFL	FMLA
12 weeks of paid leave (by 2021).	12 weeks of unpaid leave.
Applies to all Employers subject to NYSWC Law regardless of size.	50 or more employees in a 75 mile radius.
Covered after 26 weeks of employment (after 175 th day for part time employees).	Covered after 12 months and 1,250 hours of work.
Family member means the employee's child, parent, grandparent, grandchild, spouse, or domestic partner	Family Member means the employee's spouse, son, daughter, or parent
If offered by the employer, employees may supplement PFL benefits up to their full salary or wages with accrued vacation, or personal leave time during the paid leave.	An employer may compel an employee to substitute paid time off for unpaid family and medical leave.

GOVERNMENT RELATIONS & ADVOCACY

Government Relations Lobbying:

- ◆ All Organizations are impacted by federal, state and local regulatory and legislative developments. The complexity and variability of laws and regulations can be staggering.
- ◆ Most companies that operate in New York State inevitably interact with government.
- ◆ A lobbyist:
 - Keeps close tabs on governmental actions, interpret and analyze them, and continually communicate useful information, insights and implications to our clients.
 - develops and negotiates a client's legislative and political message and budget requests.
 - Assists in navigating the bureaucracy of government and aids in the development of viable business solutions.

Industries Represented:

- ◆ Healthcare
- ◆ The Professions
- ◆ Hospitality
- ◆ Energy
- ◆ Racing and Gaming
- ◆ Telecommunications
- ◆ Taxation
- ◆ Insurance
- ◆ Pharmaceuticals
- ◆ Broadcast Industry
- ◆ Manufacturing
- ◆ Transportation
- ◆ Financial Services
- ◆ Education
- ◆ New Technologies
- ◆ Construction
- ◆ Entertainment
- ◆ Municipal Governments
- ◆ Engineering

Why Hire a Lobbyist?

- ◆ Is there a threat to business or social interest?
- ◆ Does a business want to position itself to get ahead of its competition.
- ◆ Is there an issue area that a potential not-for-profit or association wants to monitor for legislative or regulatory action without active engagement?.
- ◆ Does a company want to do business with the state or local government?

Effective Lobbying

- ◆ Elevates and clarifies an organization's point of view on a variety of issues for the benefit of local, state and federal legislators.
- ◆ Provides strategic advice and counsel to clients on navigating the process of governance.
- ◆ Creates a system of checks and balances between opposing interests.
- ◆ Keeps one group from attaining a permanent position of power, thereby leveling the playing field.

Government Relations Lobbying Includes:

- ◆ Development and negotiation of legislative and political message and budget requests, effectively articulating issues before various governmental bodies.
- ◆ Navigating the bureaucracy of government and aid in the development of viable business solutions.
- ◆ Keep close tabs on governmental actions, interpret and analyze them, and continually communicate useful information, insights and implications.

Government Relations Includes:

◆ Legislative/Policy Lobbying

- Work closely with lawmakers to effectively communicate positions on key issues, fostering an advocacy agenda. Whether or not legislative efforts culminate into signed law, they often elevate and clarify issues for legislators, which can be of equal or greater relevance to achieving desired outcomes.

◆ Appropriations Funding

- Access funds to support various initiatives. Work closely with legislators to fund projects that create jobs, strengthen economic development, and access funds that match private investments. We monitor, identify and advise clients on both city and state-funded grants and competitive funding opportunities and eligibility requirements.

Government Relations Includes:

- ◆ **Regulatory:** Timely legal counsel across all Executive and non-Executive agencies at the New York State and New York City levels, including:
 - Professional licensing;
 - Compliance and Corporate Governance;
 - Drafting and reviewing industry-specific disclosures;
 - Analyzing regulations and how they impact businesses;
 - Drafting comments and challenges to proposed and enacted regulations;
 - Drafting *amicus* briefs and litigating where rulemaking is potentially outside the scope of regulatory authority; and
 - Representing clients before Agency tribunals.

Government Relations Includes:

- ◆ **Procurement:** For clients seeking to create or leverage new business opportunities government relations assistance includes:
 - Timely reports on potential opportunities and activities;
 - Assistance with developing strategic business plans;
 - RFP development; and
 - Representation during meetings with government officials, decision-making bodies, and others involved in the procurement process.

NYS Legislature

The NYS Legislature is made up of two houses:
The NYS Senate and The NYS Assembly.

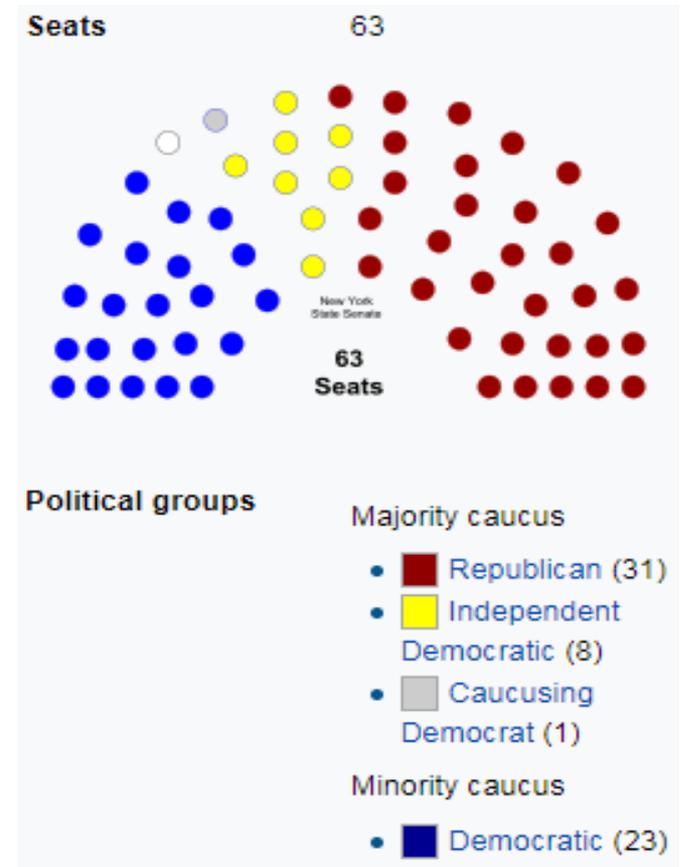


NYS Senate

**Majority Leader /
Temporary President
John J. Flanagan (R)**
since May 11, 2015



**Leader of the
Independent Democrats
Jeffrey Klein (IDC)**
since January 9, 2013

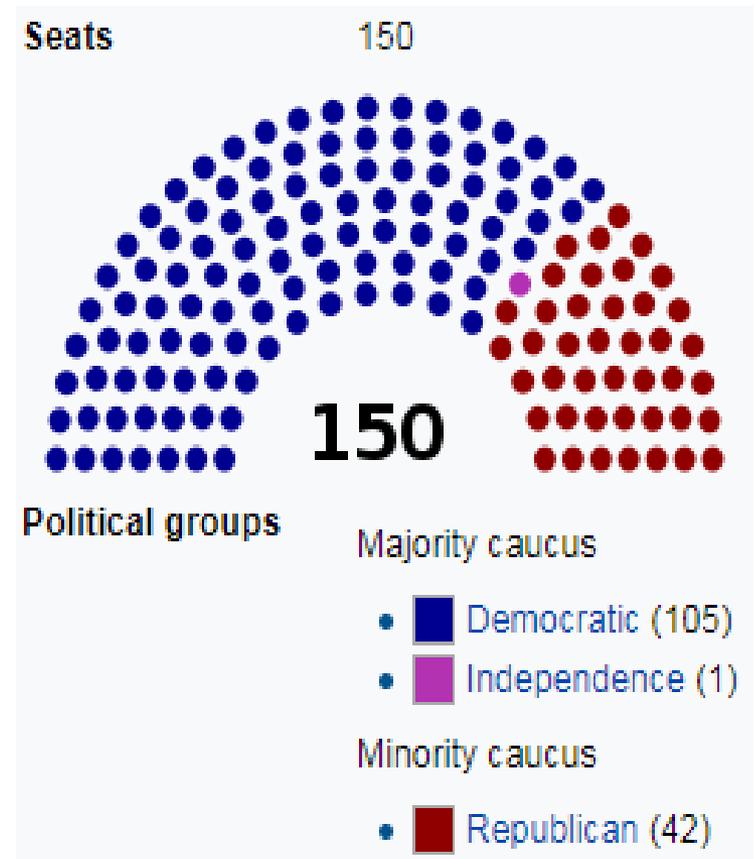


NYS Assembly

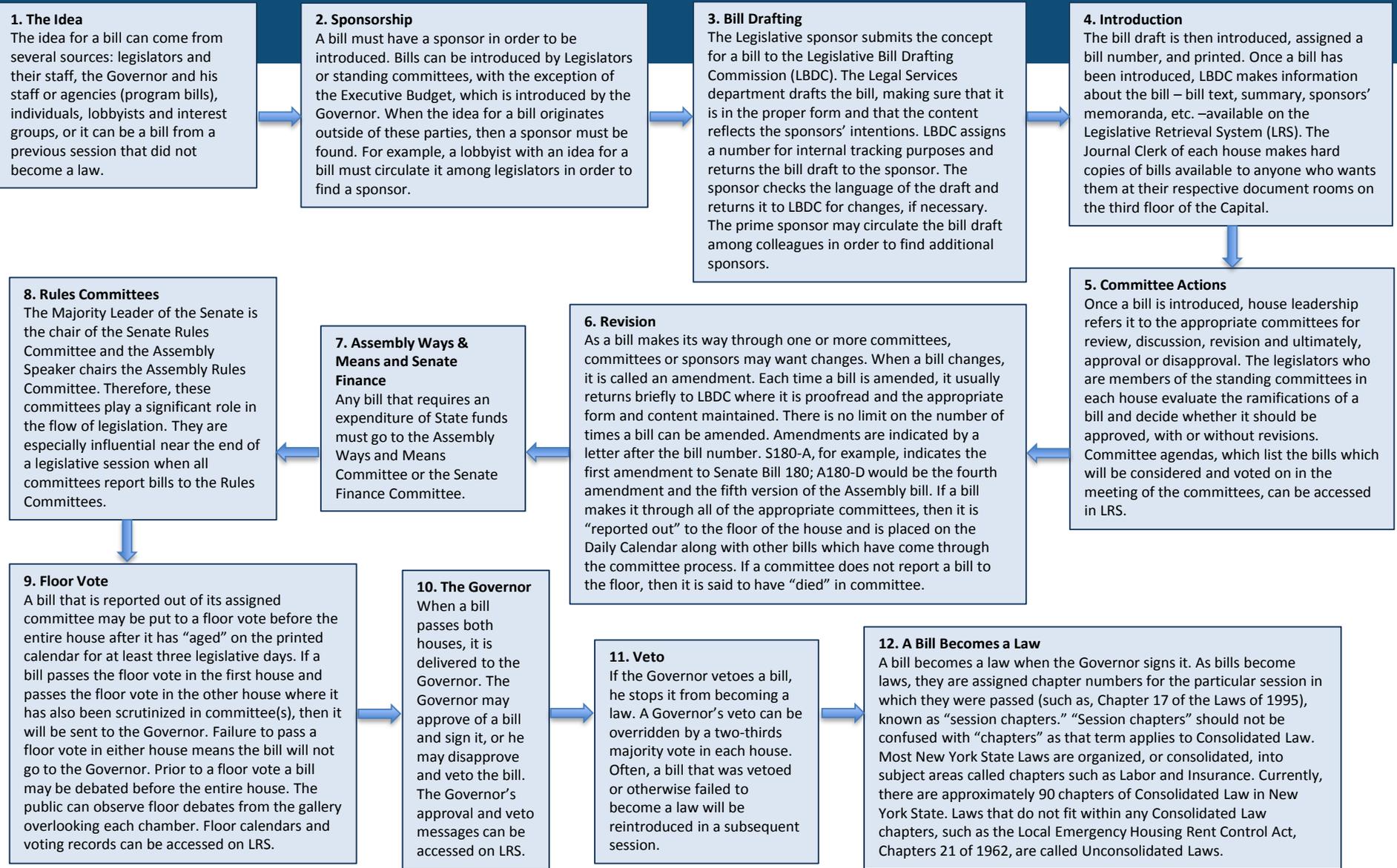
**Speaker of the
Assembly
Carl Heastie (D)**
since February 3, 2015



**Majority Leader
Joseph Morelle (D)**
since January 9, 2013



How a Bill Becomes a Law



Pending Bills of Interest

- ◆ A1924: Prohibits unlawful hiring discrimination by employers and employment agencies based upon an individual's unemployment status.
- ◆ A5310A: Prohibits the use of consumer credit history in hiring, employment and licensing determinations.
- ◆ S2425A: Requires employers to make a conditional offer of employment before inquiring about any criminal convictions of a prospective employee.
- ◆ A3020A: Relates to prohibiting employers from seeking salary history from prospective employees.

