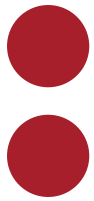

Pulse

Change is in the Air: What Employers Should Expect Under the Biden Administration

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▶ Employers have become accustomed to shifts in federal labor and employment law during the past several Presidential transitions. Republican administrations tended to favor employer-friendly policies while Democrat administrations took union and worker-friendly stances. The pendulum has begun to swing away from management in favor of organized labor and workers since the inauguration of President Joe Biden in January. As the landscape continues to evolve under the Biden administration, there are several areas that employers should monitor.

Labor Unions and Collective Bargaining

Shortly after taking the oath of office, President Biden demanded the resignation of National Labor Relations Board (NLRB) general counsel, Peter Robb, a Trump appointee. Robb, who had ten months left on his term, was terminated after he refused to resign. Peter Sung Ohr was tapped by the President to serve as Robb's replacement. Immediately upon assuming office, the new general counsel rescinded ten general counsel memoranda issued by the Trump-era Board, including GC 20-13, which sought to limit unions' ability to use neutrality agreements to boost membership. With the announcement, general counsel Ohr promised that additional policy guidance will be issued soon.

What other changes might employers expect from the Biden-era NLRB? Given that President Biden served as Vice President during the Obama administration, it is reasonable to expect that the Board will look back to restore some of the key labor-friendly policies implemented between 2009 and 2017. These include rules regarding

employer-owned email systems and "quickie elections." In the 2019 case *Caesars Entertainment*, the NLRB reversed its controversial 2014 Purple Communications decision, which held that employees could use company-owned email systems to engage in union and other activities protected by the National Labor Relations Act. Caesars effectively put control over company email systems back in employers' hands. A Biden Board is likely to restore purple communications and authorize employee use of company-owned email systems to engage in union activity.

Reinstituting so-called "quickie elections" is also expected to be a priority of the NLRB over the next four years. In 2014 and 2015, the Board finalized rules that greatly reduced the time between the date an election petition is filed (most petitions are filed by unions seeking to represent a business's employees) and the date of the election. The post-petition, pre-election period is key for employers, since it is usually the only time an employer has to present its case to employees regarding the question of unionization. In 2019, the Board promulgated a rule putting the brakes on "quickie elections" and extending election timeframes. A Biden-era NLRB is likely to reverse the rule (or at least significantly revise it) to make election procedures more favorable to unions once again. If the Board takes such action, employers faced with these elections will be left with little time to make their case before votes are cast. Whatever changes come from the NLRB in the next four years, expect organized labor to benefit.

Equal Employment Opportunity

Part of President Biden's campaign platform was to increase funding to, and thus the investigative capabilities of, the Equal Employment Opportunity Commission (EEOC). Over the past four years, the commission's funding had been cut and employers who were the subject of a charge of discrimination routinely saw those charges dismissed without much (if any) investigation by the commission. With an increase in funding, that is likely to change. Presumably, the EEOC will receive a cash injection under the Biden administration, and that would mean a larger complement of investigators and greater capability of the Commission to scrutinize the charges before it.

Pay data collection is also likely to center stage yet again. In 2016, the EEOC was to begin collecting expanded pay data to monitor whether employers' pay practices were discriminatory (a process that was never implemented due to repeated litigation). The Trump administration did away with the practice before its effects were felt by employers. Now, the Biden administration could very well take up the mantle again. If the Commission implements similar procedures as those proffered under the Obama administration, the EEOC would likely use pay data to raise claims of discrimination based on sex and/or race.

Wage and Hour

In the wage and hour arena, several actions by the Biden administration could significantly affect employers. First, the Biden administration will likely abandon the DOL's rule for classifying employees and independent contractors under the Fair Labor Standards Act (FLSA). Whether an individual is an employee or independent contractor is important because employees are entitled to the FLSA's minimum wage and overtime protections, while independent contractors are not. The rule, issued during the final days of the Trump administration, adopts an "economic reality" test to determine whether an individual is economically dependent on a potential employer for work (an employee) or is in business for him or herself (independent contractor). The rule is perceived as making it easier to classify workers as independent contractors and is therefore employer friendly.

The Biden administration has already moved swiftly. The DOL recently proposed delaying the effective date of the rule from March 8, 2021, to May 7, 2021, which could give it time to propose a repeal. Alternatively, President Biden and his Democratic allies in Congress could invoke the Congressional Review Act to kill the rule. But even if the independent contractor rule goes into effect and Congress does not act – and it survives any legal challenge – the DOL could adopt a new standard to replace it. That standard is likely to be modeled on California's onerous ABC test, which President Biden expressed support for as a candidate, and which presumes that a worker is an employee unless its three requirements are met. Thus, in contrast to the independent contractor rule, the ABC test makes it harder to classify workers as independent contractors, meaning more workers would be entitled to minimum wage and overtime compensation.

Second, the Biden administration may choose not to defend the DOL's joint employer rule, as it was defined under the FLSA in 2020. Joint employer status is important because joint employers are jointly and severally liable for payment of all wages, including overtime, for all hours worked by the employee for any and all such employers. The rule adopted a test for joint employment that focuses on the degree of control exercised by the putative joint employer.

Several states and the District of Columbia challenged the rule under the Administrative Procedure Act (APA). In September 2020, a New York federal judge found that the rule violated the APA and vacated it. The Trump administration appealed to the U.S. Court of Appeals for the Second Circuit, but the Biden administration could drop the appeal. Moreover, the Biden DOL could move to

adopt a broader definition of joint employment, embraced by the former Obama administration, that focuses on whether an employee is economically dependent on the putative joint employer. That test could expose more employers to potential liability under the FLSA.

Third, the Protecting the Right to Organize Act (PRO), which President Biden supports, would ban employers from requiring employees to enter into mandatory arbitration agreements in which employees waive or relinquish their right to bring class or collective action claims. Claims under the FLSA and analogous state laws are often pursued as class or collective actions. Consequently, the PRO Act's ban could open the door to a wave of class and collective action lawsuits that employers may have otherwise avoided through mandatory individual arbitration.

Fourth, President Biden has proposed reinstating and expanding the emergency paid leave program created under the Families First Coronavirus Response Act (FFCRA) that expired at the end of 2020. The Biden plan would, among other things, extend paid leave requirements to all employers, including employers with more than 500 and fewer than 50 employees who were exempt under the FFCRA; provide over 14 weeks of paid sick and family and medical leave; provide refundable tax credits to employers with fewer than 500 employees to reimburse them for the cost of the leave; and extend the emergency paid leave program to September 30, 2021.

Immigration

The Biden administration's immigration policy is also likely to be protective of worker rights and focus enforcement on employers instead of on workers. For example, President Biden has stated that he would end workplace raids so that concerns over workers' status do not interfere with their ability to organize. Moreover, the U.S. Citizenship Act of 2021, which President Biden proposed on his first day in office and which may be known best for providing a pathway to citizenship for undocumented immigrants, would increase penalties for employers of seasonal and migrant workers who violate labor laws. The bill would expand access to "U Visas" to undocumented immigrants who are victims of serious labor violations and cooperate with worker protection agencies. The bill would also protect from deportation workers who suffer retaliation in order to be interviewed by labor agencies.

In the labor and employment law sphere, the winds of change are blowing. Employers will do well to stay informed and ready to adjust in order to weather the coming storm. ■

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