

The Future of Workplace Law Under President-Elect Joe Biden

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As President-elect Joe Biden selects members of his Cabinet and prepares for his transition into the presidency, he and a Democratic majority in the House of Representatives may pursue a number of significant pieces of federal workplace legislation. Many of these employment law measures successfully passed the House in 2019 and 2020.

Moreover, as with any transition from the President of one party to the President of another party, presidential appointments to the administrative agencies such as the Equal Employment Opportunity Commission and the National Labor Relations Board are likely to have further effect for employers.

Changes may come to the following areas:

Affordable Care Act (ACA)

President-elect Biden will likely fight to strengthen the ACA and its underlying policies. Whether a Biden Administration or Congress will have to start from scratch will depend on the outcome of the U.S. Supreme Court's highly anticipated decision in *California v. Texas*. It is widely thought that a Biden Administration will robustly support efforts to enhance coverage options for the uninsured and underinsured. Biden is expected to oppose recent deregulation of short-term, limited duration insurance plans on the grounds they do not comply with consumer protections, frequently omit basic healthcare benefits, and provide too little coverage for too great a price.

Arbitration

President-elect Biden has indicated his support for the Forced Arbitration Injustice Repeal (FAIR) Act, legislation that would prohibit employers from requiring employees to sign pre-dispute arbitration agreements as a condition of employment. The FAIR Act was introduced in 2019 with little chance of passage, given a Republican majority in the Senate and President Donald Trump's vow to veto the measure. If the Republicans maintain their Senate majority, a reintroduced bill is unlikely to fare any better. President-elect Biden is almost certain to sign such a bill if it comes to his desk.

Government Contracting

President-elect Joe Biden probably will revoke President Trump's ["Executive Order on Combating Race and Sex Stereotyping"](#) that restricts the federal government, federal contractors, and certain federal grant recipients from conducting specific types of diversity and unconscious bias training. The executive order affects government agencies and any organizations that have or plan to enter into federal contracts or that receive federal grants.

Immigration

President-elect Biden will likely restore the Deferred Action for Childhood Arrivals program protections modified by the previous administration and keep protections for Temporary Protected Status and Deferred Enforcement Departure beneficiaries in place. Expect a call for making E-Verify mandatory for all employers and a de-emphasis on non-criminal immigration enforcement by U.S. Immigration and Customs Enforcement.

The Biden Administration is expected to make it easier for businesses to use immigration to strengthen their businesses. Biden will likely fortify programs for entrepreneurs and innovators and allow county or municipal executives to petition for additional immigrant visas to support economic development. Exemption of science, technology, engineering, and math (STEM) graduates from caps on employment-based visas is expected. In addition, a move toward a potential points-based immigration system, including expanding the number of high-skilled visas available and eliminating the per-country visa caps, can be expected.

Independent Contractors

The Biden Department of Labor (DOL) will likely withdraw the DOL's proposed independent contractor rule, which has not been finalized yet. If the rule is finalized before the end of the Trump Administration, a Biden DOL may initiate new rulemaking to then rescind it. The proposed rule clarifies who qualifies as an "independent contractor" under the Fair Labor Standards Act (FLSA). Moreover, the Biden DOL may take steps to further expand the definition of who qualifies as an "employee" under federal law, making it harder for businesses to contract with independent contractors without fear of misclassification.

Minimum Wage

President-elect Biden previously called for a \$15 federal minimum wage. The Biden Administration also will seek to eliminate the reduced minimum wage for tipped employees (*i.e.*, the tip credit) and likely will seek an increase in the minimum salary to qualify as an exempt employee under the FLSA.

National Labor Relations Board (NLRB)

President-elect Biden ran on a platform of strengthening worker organizing, collective bargaining, and unions. He has expressed strong support for the Protecting the Right to Organize (PRO) Act, which would significantly strengthen unions by: banning employer mandatory “captive audience” group meetings; requiring mandatory immediate collective bargaining days after a union becomes employees’ representative for 90 days and, if no agreement is reached, binding interest arbitration of contract terms; preempting states’ “right to work” laws; allowing “unfair labor practice” claims to be brought as civil actions in court; adding fines and liquidated damages (possibly six figures) as remedies for unfair labor practices; and adding personal liability for unfair labor practices for corporate directors and officers. President Biden will be able to appoint a majority of NLRB members, giving him an opportunity to appoint individuals who share his views on unions and collective bargaining, and who are likely to overrule many of the precedents issued during the past few years.

Paid Leave

President-elect Biden is expected to support paid leave benefits for employees. For instance, Biden previously voiced support for universal paid sick days and the leave provisions of the Families First Coronavirus Response Act (which requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19). It is likely that existing COVID-19 coverage expansions, most of which are set to expire on December 31, 2020, will be extended. Additionally, President-elect Biden supports 12 weeks of paid leave for all workers to care for their newborns, newly adopted or fostered children, for their own or a family member’s serious health condition, or to care for injured service members or deal with “qualifying exigencies arising from the deployment” of a family member in the Armed Services.

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