

Insights

What's on Biden's Wish List for Employment Reform?

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Joe Biden campaigned on worker-friendly reforms, many of which require legislative action and Senate cooperation. But even if the Georgia runoffs leave Republicans in control of the Senate, the Biden Administration can unilaterally and dramatically impact employment policy through executive departments such as Department of Labor, Homeland Security, Health and Human Services, and a range of federal agencies. Ah, politics and priorities...

President Trump's DOL subagencies spent 2020 finalizing industry-backed, deregulatory actions. The Biden Administration will likely work quickly to develop a list of those to target first. Besides Republican opposition, Biden will have to navigate a political push-pull among Democrats: progressives pressing for bolder and more enduring workplace regulations and moderate forces urging against heavy and expensive regulation of businesses still tottering from the pandemic. And, his Labor Department will need to dedicate time and resources to advancing new actions tied to COVID-19, while also prioritizing what it will likely see as objectionable Trump Administration DOL rules and policies.

Biden will certainly ramp up enforcement of federal labor, employment, and tax laws. His campaign website forewarned increases in the number of investigators in federal agencies and "aggressive pursuit" of employers who "steal" from their employees by violating labor laws for minimum wage, overtime, forcing off-the-clock work, and misclassifying employees as independent contractors. It must be anticipated that Biden's DOL, like Obama's, will focus enforcement on industries that outsource employment to contractors or franchisees. That could entail renewed push toward broader interpretations of joint-employment liability for affiliated businesses and the legal definition of an employee under the Fair Labor Standards Act (FLSA) and the National Labor Relations Act (NLRA).

Biden is also seeking a singular test for classifying workers across all federal agencies. He's expressed interest in a test modeled after California's "ABC" test, which classifies all workers as employees unless the employer can show that: (a) it does not contractually or practically control or direct the performance of the work; (b) the work performed is outside the employer's usual course of business; and (c) the worker ordinarily performs the same work as part of an independently established trade, occupation, or business. Few workers, even many traditionally

viewed as independent contractors, can meet all three prongs of this test because so frequently they are performing work within the employer's usual business. California has suffered many obstacles in implementing the ABC test, which now unsystematically exempts about 65 random industries and types of workers (to whom the prior test applies). The ABC test would require considerable tweaking before it could be considered workable for the entire country but, certainly, some reform is afoot.

This independent contractor classification affects application of the FLSA, obligations for payroll taxes, as well as the NLRA because only "employees" have the right to organize. Any test that causes more workers to be classified as employees would therefore support unions and facilitate unionization — another Biden goal. Biden has proposed "sweeping changes" to the NLRA and passage of the Protecting the Right to Organize Act (PRO Act) (to hold corporations and executives personally accountable for interfering with organizing efforts and violating other labor laws), which would require Congressional support. But, he could strengthen unions through control of federal contracts by implementing his warning of longer federal debarments for employers who illegally oppose unions, restoring the Obama Administration's Fair Pay and Safe Workplaces executive order (taking into account employers' compliance with labor and employment laws in determining whether they are "responsible" bidders on federal contracts), and requiring bidders on federal contracts to sign "neutrality agreements" committing not to run anti-union campaigns.

Restrictions on the use of non-compete agreements have received some bi-partisan support. Most proposed reforms aim at prohibiting non-competes for low-income employees, requiring independent financial consideration to the employee, making them unenforceable for the first two years' employment, or banning them completely except as part of a corporate sale, merger, or dissolution. Many propose to allow the employer only to protect trade secrets, which many states already protected statutorily by adoption of the Uniform Trade Secrets Act. If non-competes are banned, employers could use employment contracts to augment existing statutory trade secret protections. Even without legislation to restrict use of non-competes, additional constraints may arrive by rulemaking, through the Federal Trade Commission's authority to prohibit unfair or deceptive acts and unfair competition.

Biden has promised to increase workplace safety and health by strengthening Obama Era regulations of the Occupational and Safety Health Administration (OSHA) that Trump rolled back, such as those requiring companies publicly to report workplace injuries and alleged labor law violations. Biden has said he will also direct OSHA and the Mine Safety Health and Administration (MSHA) to expand enforcement efforts and will increase the number of their investigators. Substantial resources would likely be devoted immediately to more robust pandemic-related enforcement. This will likely include a push for OSHA to issue mandatory safety guidelines to protect employees from COVID-19 exposure.

Racial justice and diversity will also take high priority in the Biden Administration, with a likely increase in the number of investigators — and therefore investigations. Federal contractors could be required to disclose publicly their recruitment practices for certain underrepresented groups, implying that a bidder's more diverse workforce and recruitment process might give it a better shot at being awarded the federal contract. Certainly, the Trump

executive order that prohibited federal contractors and other entities from using "blame-focused" diversity training that it says stereotypes groups based on race or sex is already being targeted for reversal by Democrats. It's possible that Biden will issue a new order compelling that this worker training *include* a discussion of concepts prohibited by Trump's order.

It is expected that executive departments and federal agencies will soon be shifting focus again toward classifying most workers as employees, underscoring their right to wages, overtime, and other FLSA rights, protecting their right to unionize, restricting use of non-competes, and heightening standards and investigations of safety rules. Employers accustomed to the business-friendly Trump administration might wisely take inventory now to reflect how these changes will impact them:

- **Conduct an audit** to prioritize adjustments for potentially problematic policies and practices
- Take a fresh **look at handbooks and other written policies**
- **Train employees** at every level to avoid missteps in these new movements by the incoming administration

If you have additional questions, please contact **Nancy J. Townsend** or a member of Krieg DeVault's **Labor and Employment Law Team**.

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