

John Wright: Welcome to Business Better, a podcast designed to help businesses navigate the new normal. I'm your host, John Wright.

After serving nearly 15 years as Senior Vice President and General Counsel at Triumph Group Incorporated. A global aerospace component supplier. I'm now a member of the securities and M&A groups at Ballard Spahr, a national law firm with clients across industries and across the country.

Today's episode features around table discussion among three of my Ballard, Spahr colleagues, Meredith Dante, Steve Sufilas, and Chris Kelly. We will discuss what employers can expect from the Biden-Harris administration in the areas of labor and employment law.

To begin, we will turn to Meredith Dante, a partner in Ballard Spahr's Philadelphia office, who represents employers across many industries in a broad range of labor and employment disputes. Meredith will bring in her colleagues and start off the discussion.

Meredith Dante: Hello everyone. My name is Meredith Dante, and I am a partner in Ballard Spahr's Labor and Employment Group. Thanks so much for joining us on this podcast where we will talk a bit about what employers can expect from the Biden and Harris administration.

I am joined by my esteemed colleagues, Steve Sufilas and Chris Kelly. And I will turn it over to Steve to briefly introduce himself before we get started. And then to Chris.

Steve Sufilas: My name is Steve Sufilas. I'm Senior Counsel at Ballard Spahr, and I work in the Denver office of the firm. I've been a management side, labor and employment practitioner for quite some time.

Meredith Dante: Thanks Chris.

Chris Kelly: Hi, I'm Chris Kelly. I'm a counsel in Ballard's New Jersey office. I also do labor and employment law and have been for much of my career in California and back on the East Coast now in New York and New Jersey with a focus on discrimination and wage an hour and non-compete matters.

Meredith Dante: Great, thanks. So let's get started and talk about some of the key issues that employers can expect to see out of the new administration. So I know one of the biggest areas of anticipated change is in the labor space. So Steve, can you give us an overview of what we can expect based on what we've heard and what we've seen so far from the President-elect Biden and his team?

Steve Sufilas: In order to understand where we are going in the world of traditional labor law and the National Labor Relations Board, I think it's important to understand how we got here.

If you look back, first remember that the National Labor Relations Board establishes the substantive legal principles through an adjudicative process. In other words, it is NLRB decisions in individual cases that form the substantive principles that unions, companies and employees have to apply and its decisions in specific cases. As a result, what we have seen over the last 25 years is what academics call policy oscillations. What we have seen is with each change in administration, the changes in the substantive law of the NLRB have become more extreme.

During the Obama administration, the NLRB Chairman Pearce led a remarkable change in the landscape of labor and employment law. And what we have seen during the Trump administration, now with a Republican-dominated NLRB is a wholesale reversal of all of the legal principles established under the Pearce board.

So what hints have we received in terms of what's coming? Well, they're pretty blunt. First of all, the Biden transition team overall contains 27 union officials among its membership. For the transition team at the NLRB the names that are attached are Jennifer Abruzzo, a former career NLRB attorney who is now an in-house lawyer for the communication workers. And Sandra Block, herself, a former democratic nominee who sat on the board.

We know that in February of this year, the democratic-dominated house passed a piece of legislation called the Protect the Right to Organize Act or the PRO Act, which would substantially change the statutory language of the National Labor Relations Act. Now obviously with a Republican Senate, that legislation got no traction, but certainly those are hints is too mild a term to indicate where the Biden administration will be going in the area of labor law.

Meredith Dante: Yeah, absolutely. And one of the questions I'm getting from clients now, and I suspect you are as well is, knowing that that is a foreshadowing of what is to come, what can the Trump board still do in the time that it has left?

Steve Sufas: Well, one of the interesting things is that even with a tremendous amount of union advocacy already to the incoming administration, the makeup of the National Labor Relations Board is going to remain Republican-dominated through the rest of the year. Currently, there are four of the five seats at the NLRB filled, three are filled by Republican appointees, and none of those seats comes up for expiration until August of '21 at the earliest, when member Emanuel's term comes to an end. The general counsel of the NLRB, he is the prosecutorial arm of the board. His term does not expire until November of '21.

Now organized labor has made noises to try to pressure President-elect Biden to fire general counsel Robb, as soon as he is sworn in. That would be a very controversial move and no one is exactly sure how that could be effectuated. But to your point, Meredith, because we still have a Republican-dominated

board, at least for the next nine months, we can see a couple of additional areas that the Obama board had staked out that might get reversed.

Preeminent among those is the never-ending issue of whether graduate student assistants are employees or students. The substantive law on that issue is changed every time there's a change in administration. The Trump board is trying to address that through rulemaking. Which once instituted is harder to undo. I expect that we will see final rulemaking on graduate student assistants within the next nine months.

We also could see a re-examination of the union use of Scabby the Inflatable Rat, frankly, even though I am a management advocate, I like the rat, but lots of employers do not. And we may see the Trump board say that use of Scabby the Rat violates the secondary boycott provisions of the NLRA, notwithstanding some pretty significant first amendment issues that are triggered.

And finally, we could see a re-examination of the contract bar doctrine, which is for how long a period of time does a union contract, which is signed, sealed, and in place bar a decertification petition to try and oust the union?

Meredith Dante: Great. And so then thinking ahead, there seem to be quite a few areas that the new Biden board would seek to examine. What are some of the big issues that you see being tackled? And do we have a sense of what the priority may be in terms of what down the pike first?

Steve Sufas: The interesting answer to that question is that one thing that the Trump NLRB has accomplished, and regardless of your political stripe, this is an important accomplishment. They have substantially reduced the backlog of cases pending at the board level, and they have substantially increased the efficiency and reduced the delays in the investigation and the processing of cases. What that means is that there are not a lot of cases in the pipeline.

So again, remembering that board law changes through decisions. That means it's going to be a longer period of time for cases to get into the pipeline so that a Biden board can reverse a Trump board and return to the principles of the Obama board. I think in terms of priority, the answer is everything. When GC Robb came in, as part of the Trump administration, he immediately issued a memo and listed about two dozen Obama-era decisions that he wanted to re-examine.

I think a new general counsel at the NLRB appointed by the Biden administration will take that memo and just change the names. But I think the key ones that we can expect are a re-examination of the rule making rulemaking by the Trump board on joint employer status and what was called the quickie elections, the expediting of the processing of elections.

In terms of decisional law. I think we can quickly expect a re-examination of the Boeing case where the Trump board reversed Pearce board precedent that aggressively expanded principles of the NLRA into employee handbooks and policies and non-union workplaces.

I think we can expect top priority to go to the FedEx SuperShuttle cases, dealing with the definition of independent contractor status for the National Labor Relations Act. We can see in a re-examination of the General Motors' case involving employee outbursts in the workplace. We can expect Caesar's Entertainment, which reversed Purple Communications on the issue of employee access to employer email systems for union organizational purposes.

We can expect a reexamination of PCC Structural, which reversed specialty health care. The so-called micro bargaining unit community of interest cases. Apogee Retail, which reversed Banner Health dealing with the confidentiality of statements made during internal employer workplace investigations.

And finally, under the Pearce board, on the issue of a duty to bargain, their view was employers had to bargain absolutely everything, and we can expect a very high priority placed by a Biden board to reverse MV Transportation, which adopted the DC Circuits' contract coverage doctrine and eliminated the previous clear and unmistakable waiver doctrine for unilateral changes in terms of conditions of employment during the term of a collective bargaining agreement. And a reversal of Raytheon, which reversed a DuPont case, which Ballard Spahr and I handled on behalf a DuPont dealing with unilateral changes to employee benefits in a unionized setting.

So we'll expect a lot Meredith and in closing, I think the word to the wise for the employer community is, to quote Betty Davis from All About Eve, "Fasten your seat belts, it's going to be a bumpy night."

Meredith Dante: Yeah, you can say that again. You know, one quick thing I wanted to follow up on is I know that when the quickie election rules first came out a while back, that certainly caused employers to scramble given the short period of time that they were provided to respond when there was a union organizing activity in petitions filed, how does what happens in Georgia impact or potentially impact what may happen to the concept of the quickie elections? And what are your thoughts in terms of a Democrat House and Senate and White House in terms of legislation that may be passed with respect to union elections?

Steve Sufas: Yeah. Excellent point, Meredith. As in many areas, the Georgia election is going to be really important. If the Democrats win both seats and therefore have control of the Senate with the Vice President casting the deciding vote, then you're going to have the PRO Act, which will fundamentally change the National Labor Relations Act in a way that will be extraordinarily pro union.

If the Georgia election doesn't play out that way, and Republicans have a narrow majority in the Senate, that means legislative changes to the National Labor Relations Act are going to be extraordinarily difficult to achieve. And number two, it also raises questions as to happens with appointments, to vacant seats on the board?

Right now, there is a vacant Democratic seat that is unfilled and the General Counsel slot will eventually come up. You could see a situation where if a Republican Senate is completely uncooperative, that the board shuts down if the GC slot is vacant.

Now this president can appoint an Acting GC, but more importantly, a second, eventually board seats will come vacant and once the board drops below a quorum of three seats... We saw that happen earlier in earlier administrations, the Supreme Court has said the board can issue no decisions, and the board is basically shut down.

So Chris, turning to the area of wage an hour, that is an area where we ha and especially independent contractor misclassification, those are areas that we have seen tremendous developments at the state level in so-called Blue States. What do you see as a Biden administration approaching these important issues?

Chris Kelly:

Exactly as you said, these have been issues that have been fought about tremendously at the state level in recent years, particularly in more progressive Blue States as they're called. And what we've seen from the Biden administration so far is that they've made clear that this is going to be a priority for them, both in their public statements, on the transition website, that wage an hour and misclassification in particular will be a priority for this new administration. And that we're going to see an increasing amount of at least attempts at federalization, whether they're successful, will obviously depend on whether or not they take the Senate, but we will see an increasing move towards federalization in this area.

The Biden administration has signaled support for using what's referred to as the ABC Test for determining whether workers are classified as independent contractors or employees. This is the test that is used by several States, but most notably California, which about two years ago now passed legislation called AB5, which made it very, very difficult to classify any worker as an independent contractor.

The key factor in this test that makes it so difficult is that the worker has to do work that is outside the normal course of business for the company, which makes it difficult for any normal worker at the company to be considered an independent contractor, it would have to be someone performing an ancillary service for the company. That law has caused a significant amount of in California for the freelancer and gig industries, and actually led to several lawsuits. And ultimately it was just overturned by voters with a proposition to

exempt certain categories of employees from that and to also allow them to allow expansion of existing exemptions, for example, for freelance journalists.

But moving this to a federal level would make a marked change for many states that still use the old common law test, which is much more flexible and allows for many, many more workers to be classified as independent contractors.

Steve Suflas: Chris, let me ask you this. What have you seen in terms of the names being floated for important positions within the US Department of Labor by a Biden administration?

Chris Kelly: One thing we've seen that would mark a significant change for employers is that California's Labor Secretary, Julie Su, has been considered a top contender for the Labor Secretary position. Obviously, California has been very aggressive in protecting worker rights and expanding wage an hour protections and independent contractor classification issues, as I just discussed. Julie Su was the California Labor Commissioner for many years, and that's the individual who's in charge of enforcing the wage an hour laws, advocating for employees.

So that will be a significant employee side hand on the scale in any decisions that are being made by the Department of Labor here. And it's signals that what the administration is looking for is a change towards California's types of policies that are much more hands-on than the typical federal rules have been thus far.

The federal Fair Labor Standards Act is really a set of minimum principles. It is not an all-inclusive regime like some states like California have that controls every aspect of the employment relationship. I think it's also a signal about what they're going to be doing on overtime rules. And, as we saw at the end of the Obama administration, the DoL tried to raise the salary threshold for exempt employees so that the amount exempt employees would need to be paid in order to qualify for an exemption from overtime was going to be significantly higher.

That led to a significant amount of challenges, one of which was ultimately in blocking those rates as being beyond the rule-making authority of the Department of Labor. And I expect we're going to see the Biden administration seeking to raise the salary threshold again. And it's not entirely clear whether they will be any more successful than the Obama administration was. Although, at least they have the guidance of the one decision that came out from the Eastern District of Texas to tell them what limitations they have, and hopefully they can work within that if that's their goal. But there's going to be a lot of uncertainty ahead for employers as to whether these rules, if they're enacted, will even apply.

The new incoming administration has also indicated that they're going to raise the threshold to qualify as highly compensated, which is currently a salary of at least \$100,000 a year. And that they're going to be moving to strictly enforce

many of these requirements to step up enforcement rules, both in the overtime and minimum wage areas, and also for the prevailing wage requirements for federal contractors. So there's a significant amount of change I think we'll see there.

We're also expecting to see some raises in the minimum wage. The Biden administration is pushing to raise the minimum wage to \$15 an hour. That's been championed in again, many Blue States, and to make that federal so that it applies to workers across the country. They're also in an interesting new proposal seeking to tie that minimum wage change to the median hourly wage going forward so that we won't have to be waiting and seeing, when is Congress going to act, when are they going to change? There'll be some predictability in this going forward that employers will know what's going to be expected of them. And arguably that could de-politicize this a little bit and take it out of the realm of a fight between labor and management and move it more into this is what's going on. This is how the wages are raising and we should accommodate accordingly.

We're also expecting to see some changes in terms of employees' ability to enforce their rights, the Biden administration is looking to ban individual arbitration agreements for employees. This has been an area we've seen a significant amount of development in at the state level over the past several years with California and New York, notably, trying to ban in various manners of arbitration agreements for employees. Those attempts have been hindered however, by the fact that this is largely a federal scheme, the Federal Arbitration Act by and large allows arbitration agreements for any interstate employers, they can do that for their employees.

And this is particularly clear in light of the fact that the FAA originally exempted employment arbitration agreements from its scope, and that was amended to remove that. So it's pretty clear that the employment agreements are covered between that and Supreme court case law saying that, that they are allowed. So the state's ability to do anything on that has been very limited. So this could be a significant change if the Biden administration is successful at amending federal law to prohibit employment arbitration agreements.

The administration has also signaled that they are looking to ban any waivers of rights to file collective litigation, such as under the FLSA and also class action suits.

Meredith Dante: So Chris, kind of along those same lines, I've seen that the Biden and Harris campaign has a focus on employee wages and emphasizing the ability of workers to earn a living and pursue job opportunities. Has there been discussion or some preview in terms of what that may mean from a non-compete or restrictive covenant standpoint?

Chris Kelly: Yes. Again, the administration has made this a clear priority that they want to ban virtually all non-competes and following sort of the approach that California and Colorado and several other states have taken, which basically limit any attempts to restrict an employee's mobility. And that's, again, the California statute is very specific about that, that the word noncompete, restrictive covenant doesn't show up anywhere in the statute. What it says is, "Any contract that prohibits a worker from gaining lawful employment or working in their profession is to that extent is void."

And so the approach that the Biden administration would take would be similar. And while there are limited exceptions in those states for non-competes that protect, for example, trade secrets, or in the context of sale of a business, it would by and large eliminate the ability for employers to restrict their employees from taking jobs with competitors immediately after they leave the company.

So Meredith, can you tell us a little bit about where you see the new administration taking us in terms of equal employment opportunity and pay equity issues?

Meredith Dante: Sure. So I think as we've alluded to earlier on this podcast, whether or not President-elect Biden will be able to implement his full campaign platform when it comes to these kinds of employment issues without congressional approval, it remains to be seen.

So the Georgia election really will have a pretty significant impact in terms of what kind of employment laws may be passed that could impact pretty significantly employers when it comes to equal employment, opportunity policies and pay equity. Certainly both of those items have been front and center during the Biden-Harris' campaign, and both he and Vice President-elect Harris have been incredibly vocal about their support of legislation that would expand protections for workers.

And so I'll talk, I guess, about a few of those laws here. There are a number of areas where we anticipate some change, whether that be at the agency level, through regulation or guidance at the executive level, through executive order, or that the congressional level, of course, depending on what happens when it comes to statutory changes.

So one of the statutes that Biden is supportive of is something called The BE HEARD Act, which stands for Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act. So BE HEARD Act is a lot easier way of saying that, which is kind of a mouthful, and that act has several notable provisions in it.

So one is that it would expand the Title VII protections to smaller employers. So currently Title VII applies to employers with 15 or more employees. And this law

would expand those protections to smaller employers. Now, whether that actually makes a significant impact or not may depend on the state in which employers are located or in which they have employees, because a number of state laws already cover employers with a smaller number of employees.

But I think perhaps more significantly what this act does is it expands those traditional protections to independent contractors. And so again, traditionally under Title VII which prohibits discrimination and harassment on the basis of certain protected classes, those protections were limited to employees.

If this is expanded to independent contractors that could potentially increase the amount of litigation. We see, EEO claims as well as federal lawsuits, by millions of people. And I think what I saw from a 2019 BLS study is that there's an estimated 10 to 15 million independent contractors in the workforce, and that was from 2019. And I think certainly the events of 2020 may have shaped that in such a way that we may even have more independent contractors than we did then. So that could be a pretty substantial expansion and it may require employers to, and companies to, revisit their contractor agreements. It calls into question, what kind of obligations companies then would have vis-à-vis of either independent contractors. So I think that would be a pretty substantial change if that piece of legislation were to be passed.

That legislation also specifically covers sexual orientation and gender identity. And I think that this has less of an impact in light of the Supreme Court's decision in *Bostock* most recently, but it would specifically then amend the statute to provide those protections at a federal level. It also contained some restrictions on nondisclosure agreements and non-disparagement clauses. And we've seen a lot of discussion around this over the past several years, and in prior administrations about what kind of an impact did these provisions and agreements may have on employees, especially when it comes to sexual harassment. And so this legislation would contain restrictions on those provisions as well.

It also would provide a number of other requirements and obligations for employers that may necessitate a review, not only of current agreements and onboarding documents, but also training programs and certainly policies. So to the extent that this kind of legislation were to be enacted, that definitely has the potential to alter the landscape a bit for employers. I think in particular, when it comes to the independent contractor requirement, as well as any kind of restrictions on non-disclosure agreements and non-disparagement clauses.

So in addition to the BE HEARD Act President-elect Biden has also talked about changing the standard for age discrimination claims. So currently a plaintiff who brings an age discrimination claim has to show that, but for his or her age, he or she would not have suffered the adverse employment action. This but for causation standard is higher than what is typically required for other kinds of discrimination claims where the plaintiff need only show that the protected

characteristic was a motivating factor, so potentially one of many factors in the adverse action as opposed to the but for reason.

So from a practical standpoint, this could make it more challenging for employers to defend against these kinds of age claims in the future. And I think particularly coupled with our workforce demographics and uncertain economic times, this change actually could have the potential to have quite a big impact on age discrimination, litigation, moving forward.

One of the other areas that Biden has been quite vocal about is the Pregnant Workers Fairness Act, which addresses employer obligations with respect to pregnant women. And more specifically requires employers to provide reasonable accommodations to women who are pregnant when their abilities are limited by pregnancy childbirth or related medical condition. Now, again, similar to what I mentioned earlier, a number of states and even localities have actually addressed this type of these types of issues and already have legislation in place that provide workers, pregnant workers, with these kinds of protections.

And even at the federal level, depending on the circumstances, there are a number of accommodations or protections that are already afforded to pregnant workers under federal laws like the FMLA or the FLSA, and even the ADA, depending on whether or not there's a certain kind of medical condition at play. So that is another area though, where we at least expect to see some increased awareness under the Biden-Harris administration.

And Chris, as you mentioned, in addition to the EEO-type policies and discrimination, harassment, retaliation equal pay has been a pretty significant component of Biden's agenda when it comes to women and in particular women of color. He is on record multiple times and in citing statistics with respect to the wage gap and how that not only exists for women, but is also even more pronounced when it comes to women of color. And so I think employers can expect a return to Obama-era protections and certain policies with respect to pay equity.

That includes potentially additional reporting requirements, disclosure requirements, and things that relate to pay transparency. He is looking at the Paycheck Fairness Act, which would codify some of those Obama-era protections. And I think we can expect him to build upon that work that he started when he was then Vice President. And certainly I would not be surprised to see some kind of national momentum around salary history bands that we've seen at the state and local level related to whether or not employers can ask and/or rely upon prior salary history when making hiring decisions and setting salaries. So stay tuned on that front.

And I think in sum, when we take a look at this particular area as a whole, I think we can expect expansions consistent with what we've talked about so far on

this podcast here today. And I think what those expansions will look like, what form they take and how significant of an impact they have on employers and their policies and their documents and the way in which they conduct business will in large part depend on what happens in Georgia and also will depend on the individuals who Biden's appoint to the respective agencies and the approach that those agencies take in terms of enforcing their respective laws.

And I think on that note, one of the things that Biden has been also vocal about is that he will be increasing funding to those agencies to allow them to, I think in his view, effectuate their mission. So where we may have seen cut funding in the past resulting in maybe less enforcement. I think we can expect to see the opposite under the Biden-Harris administration,

Chris Kelly: Certainly a lot on the horizon in that area for employers, in addition to EEO issues, I've had a lot of questions from clients about potential changes in paid leave programs. Have you heard anything about that? Do you have any thoughts on where that might be going Meredith?

Meredith Dante: Sure. Yeah. And that's always a question I think on client's mind. Right now, clients are faced with dealing with all of the different states that have addressed this particular issue. So there's quite a bit of a patchwork when it comes to whether or not there is any type of paid leave that employers are obligated to provide employees and then under what conditions.

And so Biden is supportive of a federally mandated paid leave. And he has stated that he believes that employees should be entitled to 12 weeks of paid leave. Now, we haven't really seen the concrete specifics of what that would look like. And I think perhaps most importantly, how that would be funded. So whether or not it would be funded through some kind of insurance type of a program that we see some states using, whether it would have to come out of employer's pockets. So I think we stay tuned on that front.

I think another interesting question is whether or not there would be total preemption if there were some kind of federally mandated paid leave? In which case that actually depending on what the structure is and the requirements that may not be such a bad thing for employers that operate in a variety of jurisdictions to have one set of paid leave rules, as opposed to trying to figure out how to implement paid leave policies across jurisdictions that may vary widely in terms of what they require. But again, I think the devil will be in the details on this one. So stay tuned.

Steve Suflas: That concludes our podcast. We appreciate your taking time out of your busy lives to listen to our observations and predictions on what may be coming in the area of labor and employment law from a new Biden administration. Thank you very much.

John Wright: Thanks again to Meredith Dante, Steve Suflas and Chris Kelly.

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