



2020 Labor and Employment Election Preview

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THE NATIONAL LABOR RELATIONS BOARD

A Biden Administration's approach to the National Labor Relations Board (NLRB, or the Board) is revealed by the designees to his transition team. All are union-side lawyers, with no management representatives.

Organized labor is openly lobbying for the immediate dismissal of current NLRB General Counsel Peter Robb after the inauguration, but his term does not expire until November 2021. Whenever that change comes, expect quick changes in the NLRB's investigative and prosecutorial initiatives. Many of the Trump-era NLRB opinions will be challenged through litigation, with a new GC asking the Board to reverse course and return to Obama-era precedents.

On the Board side, the current four-member complement (plus an open Democratic seat) will remain in place until August of 2021. If there is senatorial inaction on filling Board vacancies, Trump appointees would hold a 2-1 advantage until December 2022. Thus, changes in the substantive law through Board decisions may be delayed.

Expect a Biden Board to give high priority to a return to the "quickie election" procedures, and Obama-era opinions on topics like joint employer status, independent contractor definition, and the application of the National Labor Relations Act (NLRA) to a myriad of workplace policies.

How quickly these changes come will depend on control of the U.S. Senate.

EEO, PAY EQUITY, AND ACCOMMODATIONS

The Biden presidency will likely bring with it significant changes related to civil rights in employment. President-elect Biden has indicated an intent to support legislation to reduce workplace harassment and discrimination, including the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace (BE HEARD) Act, which would, among other things, extend anti-discrimination protections to employers of all sizes, lower legal standards for actionable claims, and provide for additional training on harassment in the workplace. It also is expected that Biden will emphasize the importance of diversity and inclusion, including by enacting the Equality Act, which would prohibit employment discrimination (as well as discrimination in other areas such as housing, education, public accommodation, and jury service) on the basis of sexual orientation and gender identity. Biden has a consistent history of advocating for reduction of the gender pay gap, and it is expected he will enact the Paycheck Fairness Act, take action to improve pay transparency, and protect workers against retaliation for discussing wages. Biden also has pledged to make racial equality a focus of his presidency and it is expected that the Biden administration will take steps to require transparency about workplace diversity.

Biden is expected to enact changes enhancing employment protections to qualified workers with disabilities and pregnant employees. It is anticipated that Biden will mandate that employers disclose information about their efforts to accommodate qualified workers with disabilities in the workplace. Additionally, Biden has expressed support for the Pregnant Workers Fairness Act, which was co-sponsored by Vice President-elect Harris. This Act would require employers to offer reasonable workplace accommodations to qualified pregnant workers, similar in many ways to the accommodations required under the Americans with Disabilities Act.

WAGE AND HOUR

A Biden administration is likely to bring many changes in the wage and hour arena. Biden has signaled his support for Federal legislation that would set a uniform nationwide standard for determining whether a worker is an independent contractor or an employee using the ABC test which several states, including notably California, have adopted. This test makes it significantly more difficult to classify workers as contractors than the older common-law test. The incoming administration also favors increased enforcement and increased penalties for intentional misclassification. It is not yet clear what classifications will be considered “intentional.”

It is expected that Biden will push for a ban on individual employee arbitration agreements as well as agreements where employees waive rights to file collective litigation or class-action suits. The administration would seek to raise the minimum wage from its current level of \$7.25 per hour to the \$15 per hour wage championed by some prominent Democrats. Going one step further, the new administration would index the minimum wage to the median hourly wage going forward, so that new legislation would not be required to keep up with wage growth. Biden also favors eliminating the ability of employers to include tips as part of the payment of minimum wage, and eliminating employers’ option to pay disabled employees less than minimum wage.

During the campaign, Biden promised to work to undo the Trump Administration’s changes to Federal overtime rules. As President, he can be expected to seek to raise the general salary threshold for exempt employees, and raise the threshold for employees to qualify as highly compensated. Biden would also seek to strictly enforce prevailing wage requirements for Federal Contractors.

LEAVE

Biden is looking to shake up the area of paid leave. Two of the incoming administration’s stated priorities are Federal legislation providing universal paid sick days and making the 12 weeks of FMLA leave paid. There is no indication of whether those leaves would be paid by employers or through a government program, but a hybrid system is possible with the government paying for employees of small businesses and larger businesses covering leave costs directly. Given Biden’s stated goal of achieving bipartisan solutions, it is possible that the paid leaves being proposed would preempt state laws that provide greater protections. This would guarantee a minimum level of protection to employees and provide a concession to the business community.

NON-COMPETES

Another goal of the incoming administration is eliminating virtually all non-compete and no-poaching agreements. Biden’s approach would mirror that of California and Colorado, broadly banning restrictions on employee mobility except those narrowly tied to the protection of trade secrets.

IMMIGRATION

We expect significant changes in the immigration space. Biden has announced an ambitious immigration plan, and we anticipate a rollback of a number of executive orders. Biden also has stated an intention to raise the limit on H-1B visas.

STAY TUNED

As the presidential transition unfolds, our attorneys will continue to monitor the latest developments and develop guidance, webinars, and podcasts to keep you informed.

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