

Top 11 Workplace Law Developments To Expect Under President Biden

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It appears to be official: unless the election results can be overturned in several states, Joe Biden will soon be our nation's 46th president. Now the work begins to forecast what the next four years will bring. We've spent some time gathering our firm's collective wisdom on what the next administration will mean for workplace law and the nation's employers. Here are our predictions in 11 key areas.

1. **Workplace Safety**

"I'm sure it comes as no surprise that workplace safety issues related to the ongoing pandemic will be at the top of Biden's agenda when he assumes office," says Todd Logsdon, co-chair of Fisher Phillips' Workplace Safety and Catastrophe Practice Group. Biden has been extremely critical of the Trump administration's reliance on existing statutory and regulatory tools, such as the Occupational Safety and Health Administration's (OSHA's) general duty clause, to maintain safe workplaces. "Biden will most likely push OSHA for a mandatory emergency standard, which would require employers to develop and submit a workplace safety plan – and may even require government approval."

Logsdon also noted that OSHA cut its workplace safety inspectors to the lowest level ever in its 49-year history during the Trump administration. "There are roughly 761 OSHA inspectors working right now, compared to about 1000 or so who were in place a decade ago," he says. Biden has promised to increase the number of inspectors during his administration, which, of course, will likely be accompanied by a corresponding increase in safety-related inspections.

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SERVICES

Affirmative Action and Federal Contract Compliance
Data Security and Workplace Privacy
Employee Benefits
Employee Defection and Trade Secrets
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Logsdon further predicts that Biden will reinstate an Obama-era workplace safety reporting rule. “This was slated to go into effect in 2017 but was abandoned when Trump took office,” he says. If resurrected, the rule would force certain employers to report detailed injury and illness information (including OSHA 300 Logs) to OSHA. The agency would then make the information available to the public by posting it online. “Biden has championed this rule as a means for OSHA inspectors to more readily identify dangerous working conditions and, in turn, put pressure on businesses to comply with workplace safety laws,” says Logsdon. “Most employers are accustomed to reporting certain injuries and illnesses to OSHA, but the public disclosure aspect of Biden’s proposed rule will not likely receive a warm reception.”

Finally, Logsdon predicts a steady increase in the amount of penalties issued by OSHA for safety-related infractions. OSHA watchdogs have been particularly critical of the amount of penalties issued during the pandemic, noting that the agency has not proposed a single penalty greater than \$28,000 since the beginning of the pandemic. “While OSHA penalties are established by a pre-determined formula based on the severity of the infraction,” says Logsdon, “it’s presumed a Biden OSHA will lean more towards the maximum amount for COVID-related infractions, with additional penalties added for willful violations.”

2. Wage and Hour Law

“Wage and hour issues under President Biden will be marked by a progressive agenda focused on middle- and working-class issues,” predicts Kathie Caminiti, co-chair of the firm’s Wage and Hour Law Practice Group. First on the agenda? “We can expect to see a push for a \$15 minimum wage on the national level – an increase from \$7.25 per hour,” she says. One of Biden’s campaign promises called for an increase to \$15 by the year 2026, so we can expect to see him push for Congressional efforts to move in that direction. But if this initiative gets hung up in political wrangling or moves too slow for worker advocates, Caminiti says you can expect to see states and local governments to continue to implement their own measures expanding the minimum wage in their own areas.

Employers should brace themselves for enhanced penalties and enforcement actions targeted at employers who do not comply with the wage hour laws under the Biden administration, says Caminiti. His agenda might also include increased federal regulation designed to protect workers such a national wage theft protection act – which could include both notice and recordkeeping requirements. A Biden administration also is likely to take steps to limit mandatory arbitration and class action waivers in the employment and wage hour context. “All in all,” says Caminiti, “I expect President Biden to advance a progressive agenda designed to benefit and protect workers and to take a tougher stance on employers who do not comply.”



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3. Future of Work

President Biden's administration will be faced with a particularly difficult challenge: ensuring workers receive fair treatment from businesses while not stifling the flexibility and efficiency of modern business models that rely upon contingent workers and gig-economy strategies. "The next four years could be a bit of a rollercoaster when it comes to refining and applying existing laws to very innovative business arrangements," says Rich Meneghello, co-chair of the Gig Economy Practice Group.

Biden's campaign platform touts that he will put a stop to employers intentionally misclassifying their employees as independent contractors. "You can expect his administration to drive an aggressive, all-hands-on-deck enforcement effort to curb misclassification," says Meneghello. "This will likely involve multiple federal agencies working in tandem with state tax, employment, and labor agencies to identify and address disputes." The million-dollar question: will we see a California-like ABC test implemented on a national level, making it increasingly difficult for businesses (including gig economy companies) to use independent contractors? Meneghello thinks it will be a tough sell. "While Biden has indicated his support for national federal legislation that would introduce such a legal standard, I'm not sure he'll get congressional support to push through that law," he says.

While the Trump Department of Labor has released regulations to make it harder for workers to claim they are joint employees of multiple organizations and easier for hiring entities to classify workers as independent contractors, the future of each rule is uncertain at best. Meneghello notes that the joint employer regulation was overturned by a federal court and may not be resurrected, while the proposed misclassification rule is almost certain to be challenged in court before taking effect.

"Look to the states over the next four years," says Meneghello. "That's where the action will be." He notes the effect of the misclassification rule is severely diminished by the fact that many states have enacted their own legal standards (such as California's ABC test) that stand untouched by federal law. This is yet one more battle that will be primarily fought at the state level and remain somewhat blunted by the Biden administration.

4. Pay Equity

What does Biden's victory and the Senate being captured by the Democrats mean to Cheryl Pinarchick, co-chair of the Pay Equity Practice Group? "It means we're much more likely to see pay equity legislation passed at the federal level," she says. She notes that the U.S. House passed the Paycheck Fairness Act in 2019 but the Senate took no action on the bill. "I



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can't predict that it will pass the Senate, but it's certainly up for debate in early 2021," says Pinarchick.

The bill's stated purpose is to address wage discrimination on the basis of sex and reduce the gender pay gap. If passed, it would amend the Fair Labor Standards Act to (1) restrict the use of the "bona fide factor" defense to wage discrimination claims, (2) enhance non-retaliation prohibitions, (3) make it unlawful to require an employee to sign a contract or waiver prohibiting the employee from disclosing information about the employee's wages, and (4) increase civil penalties for violations of equal pay provisions. Pinarchick notes that Biden supports passage of the Paycheck Fairness Act and has vowed to sign it into law if it comes before his desk once he becomes President. And if the federal bill doesn't pass? "Expect to see an increasing number of states pass their own pay equity statutes, increasing the compliance challenges for multistate employers," says Pinarchick.

Finally, we can expect to see the Biden administration reinstitute the federal EEO-1 "Component 2" reports that require employers to collect and turn over pay data and hours worked information to the government. "This federal initiative was originally spearheaded by during the Obama years and only briefly took effect before being ended by the Trump administration," says Pinarchick. "It seems likely we'll see President Biden resurrect this program fairly quickly."

5. Labor Relations

Steve Bernstein, co-chair of Fisher Phillips' Labor Relations Practice Group, says that the Biden presidency will likely bring about a return to the pro-labor agenda that was a hallmark of the National Labor Relations Board (NLRB) under the Obama administration, and a corresponding reversal of pro-employer initiatives implemented by the agency over the past four years. "It's safe to assume that his victory will bring about a sea change in the federal framework regulating the labor relations arena, with the objective of resurrecting an organized labor movement that has seen its share of setbacks in recent years."

The new president can be expected to return the Board to a Democratic majority by next summer. At that point, the agency is likely to set its sights on overturning a slew of decisions and regulations that have swung back and forth like a pendulum dating back to the Clinton administration. Among those issues for priority review are the recent rollback of: (1) accelerated "quickie election" procedures and timetables that had made it easier for unions to organize; (2) rigid standards regulating handbook rules governing social media, electronic communication systems and workplace conduct; and (3) agency doctrine invalidating class waivers within binding arbitration agreements.



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In the meantime, the new administration has indicated it will lend its support to a controversial piece of legislation known as the “PRO Act,” which passed the House along partisan lines this past February. This unabashedly pro-union bill reads like a “wish list” for big labor, and if signed into law would potentially bring about the greatest shift of balance on the labor relations front since the Taft-Hartley Act of 1947. Among its many components are provisions that would institute costly financial (and even criminal) penalties for labor law violations, replace secret ballot representation elections with the concept of “card check,” and impose collective bargaining agreements on employers in the absence of mutual agreement. “It’s safe to say that if even a small portion of this measure were to become law,” says Bernstein, “it would bring about sweeping labor reforms tilting the scales toward unions in ways we have never seen. Union win rates can be expected to reach record levels – and unwary employers face the prospect of collective bargaining in industrial sectors and geographic regions that have traditionally avoided unionization in years past.”

6. Employee Benefits

“Biden promises a rigorous defense and expansion of the Affordable Care Act once he sits in the Oval Office, says Ron Pierce, an attorney in the firm’s Employee Benefits Practice Group. Although the U.S. Supreme Court will hear oral arguments in an ACA case on November 10 and a decision on the statute’s fate is expected by the spring of 2021, Biden has repeatedly pledged to preserve pre-existing condition guarantees regardless of the Court’s ruling. He has also promised to build on other aspects the ACA – specifically, with “BidenCare,” he aims to give individuals more choice, reduce health care costs, and make health care easier to navigate.

Pierce notes that Biden’s retirement plan policy looks to “equalize” the tax breaks of retirement savings for low and middle- income workers through tax credits. He also wants to expand opportunities for small businesses to help their workers save for retirement. “Biden vows to put Social Security on a path to ‘long-run solvency’ by increasing taxes on those with especially high wages,” says Pierce, “and it will be interesting to see whether the new Congress fully supports him in these efforts or throws roadblocks in his way.”

7. Employee Leaves

As for employee leave, Biden has a history of supporting family and medical leaves for employees, according to Megan Winter and Myra Creighton, co-chairs of the firm’s Employee Leaves Practice Group. But he may not be willing to go as far as some progressive activists and lawmakers would like him to go.

The paid leave program supported by Biden during the campaign calls for legislation that



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would provide 12 weeks of paid leave for all workers for their own or a family member's serious health condition. However, Biden has thus far stopped short of fully endorsing a Democratic-sponsored proposal – the FAMILY Act – that would require paid leave for a broader list of situations.

8. Employee Privacy and Data Security

"I would expect the next four years to see Biden and congressional Democrats push for federal privacy legislation favoring consumer rights, borrowing to some extent from California's CCPA," says Risa Boerner, Chair of the firm's Data Security and Workplace Privacy Practice Group. At a minimum, any federal law would establish new transparency and data access requirements, forcing many businesses to change their approach to handling personal data. In fact, Senate Democrats have already introduced their own privacy legislation in 2020 that would head down this road. While similar in some respects to Republican proposals, there are also notable differences because it would create a private right of action (favored by Democrats) but would not include a pre-emption feature to block conflicting state laws (favored by Republicans).

One sign that the new Biden administration may take this up as priority: look no further than Vice President-Elect Kamala Harris. "You have to remember that Harris made consumer privacy a cornerstone of her efforts as California's Attorney General," says Boerner, "and continued to emphasize the importance of privacy in the digital age as a senator." It would not be surprising to see Harris take the lead on this subject and use her energy to push for a federal solution.

And if federal legislation does not emerge? "Look to the states," says Boerner. When the pandemic struck in early 2020, a number of CCPA-inspired bills were pending at the state level. They have largely taken a back seat to other priorities, she notes, but could certainly be revitalized in 2021 if Congress does not act. "This could create a patchwork of conflicting obligations for multistate employers, unless the state laws mirror each other," she says. "Which means we could see privacy laws contribute to the existing compliance headaches already faced by many employers."

9. Restrictive Covenants

While non-competition agreements are not currently governed by any national law, it is still an area worth examining under Biden's administration. Susan Guerette, co-chair of the firm's Employee Defection and Trade Secrets Practice Group, notes that there have been attempts to regulate such provisions on the federal level over the last few years. "Last year, a bipartisan pair of senators, Todd Young (R-Ind.) and Chris Murphy (D-Conn.), introduced



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the Workforce Mobility Act of 2019. This federal legislation was designed to substantially limit the use of non-compete agreements.” Democrats have typically been more apt to call for limits on the use of restrictive covenants that they perceive as impeding employee mobility, and especially in light of the pandemic and the massive unemployment rate, it would not be surprising to Guerette to see the new Congress and President Biden team up to implement a national approach to non-competition.

However, even if these measures do not gain traction in Washington, D.C., employers can still expect movement in this area in the next four years – at the state level. “If federal restrictions on non-competition agreements do not take hold,” says Guerette, “we are likely to see states continue to consider restrictive covenants and implement laws to limit their use.” She notes that we have recently seen a growing trend of non-compete reform at the state level, including in Maryland, Illinois, Massachusetts, and Oregon. “If the Biden administration does not step into this area, that trend is likely to continue.”

10. Global Immigration

Immigration was no doubt the single highest-profile issue on the docket when Trump was elected in 2016, but things will be different in the Biden administration. The pandemic, social unrest, and the economic downturn have nudged immigration out of the spotlight as the hottest-button topic, says Davis Bae, co-chair of the firm’s Global Immigration Practice Group. Still, he believes immigration will be a major issue in Biden’s presidency, and Bae expects to see an immediate and dramatic reversal of Trump-era hardline immigration restrictions.

Biden’s proposed immigration policies were defined in detail on his campaign website – and they largely seek to reverse most, if not all, of Trump’s immigration policies. According to Bae, this includes reversing the “Muslim Ban” policy, ending “wall” funding and replacing it with technology-based border security, ceasing controversial border policies such as family separation, and reinstating protections for “Dreamers” and those with Temporary Protected Status. We can also expect the Biden administration to review enforcement priorities and actions by federal immigration agencies, create employment options for seasonal and high-skilled workers, address gaps in immigrant visa backlogs, and provide microeconomic immigration support for municipalities.

“We can also expect the Biden administration to work with the new Congress to seek long-awaited comprehensive immigration reform. This would include modernizing immigration policies to end inefficiencies and backlogs, and moving toward a more market-driven immigration system,” says Bae.



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11. Affirmative Action

"I expect there to be some very significant developments for federal contractors under the Biden administration," says Cheryl Behymer, chair of the firm's Affirmative Action and Federal Contract Compliance Practice Group. The most significant? "More reporting requirements," she says. "The new administration will likely resurrect the Blacklist reporting requirements that had been approved under President Obama." Under this program, federal contractors had to voluntarily report workplace law violations so that government contracts would be awarded with full knowledge of a company's compliance history. Behymer cautions that this development will mean that employment law compliance will be more important than ever over the next four years.

She also expects a slew of other developments under the Biden administration. High on his priority list will be placing a higher emphasis on Diversity, Equity, and Inclusion programs, and you can expect him to swiftly strike down the EO 13950 restrictions implemented by President Trump late in 2020. "I wouldn't be surprised to see the new administration modify federal forms to add 'non-binary' to the current male/female gender options," says Behymer. Also, we can expect Biden to reconsider whether health care systems whose only federal "contract" connection is their acceptance of TRICARE are subject to the jurisdiction of the OFCCP. "This issue has been very fluid for about a decade," says Behymer, "and was only very recently settled in favor of non-coverage. But that could easily be reversed with a stroke of Biden's pen."

Conclusion

Fisher Phillips will continue to monitor these developments expected over the next four years and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information.

For further information, contact your Fisher Phillips attorney, or attend our upcoming complimentary webinar: "*Top 11 Workplace Law Developments To Expect Under President Biden*," led by our Government Relations Practice Group, to be presented on November 12, 2020.

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