New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
FRIDAY, DECEMBER 4, 2020

LABOR RELATIONS

Anticipated Labor and Employment Changes Under a Biden Administration

As Inauguration Day approaches, employers are looking ahead to what the next four years may hold. In this edition of their Labor Relations column, David E. Schwartz and Risa M. Salins write that employers should expect a more worker-friendly era via executive orders and rules set by agencies in the new administration.

By David E. Schwartz and Risa M. Salins

President-elect Joe Biden's campaign pledged to "[e]ncourage and incentivize unionization and collective bargaining"; "[e]nsure that workers are treated with dignity and receive the pay, benefits, and workplace protections they deserve"; and "[c]heck the abuse of corporate power over labor and hold corporate executives personally accountable for violations of labor laws." See www.joebiden.com/unions. As Inauguration Day approaches, employers are looking ahead to what the next four years may hold. Employers should expect a more worker-friendly era via executive orders and rules set by agencies in the new administration.

Bias Training

One of President-elect Biden's first official actions likely will be to repeal President Trump's controversial Executive Order 13950, "Combatting Race and Sex Stereotyping." This Executive Order, issued on Sept. 22, 2020, prohibits federal contractors and subcontractors from holding "workplace training that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating." Among the training prohibited by the Executive Order is the concept that "an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously."

In response to recent police killings of Black Americans, including Breonna Taylor and George Floyd, many employers renewed their focus on anti-racism and unconscious bias training. A guidance letter issued by the Office of Management and Budget on Sept. 28, 2020 stated that prohibited trainings might be identified by searching the contents for terms such as "unconscious bias" and "systemic racism." On Oct. 15, 2020, the U.S. Chamber of Commerce and a group of more than 150 business organizations sent a letter to President Trump requesting the Executive Order be withdrawn, contending it hinders the ability of employers to promote diversity and combat discrimination. Advocacy groups filed suit in October to enjoin the Executive Order, arguing it "is an extraordinary and unprecedented act by the Trump administration to undermine efforts to foster diversity and inclusion in the workplace." See *National Urban League v. Trump*, No. 1:20-cv-03121 (D.D.C. Oct. 29, 2020).


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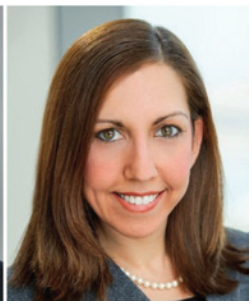
Risa M. Salins

Given President-elect Biden's campaign promises to strengthen equal employment opportunities, it is likely that, once sworn into office, he will act quickly to overturn Executive Order 13950. It remains to be seen what new obligations regarding workplace training, if any,

might be implemented instead by the new administration.

Worker Classification

If, as anticipated, the Trump administration finalizes the Department of Labor's (DOL) proposed independent contractor classification regulations, those regulations are likely to be quickly targeted for reversal by President-elect Biden's administration. The new administration may use rulemaking to simply rescind the rule or to adopt new regulations that would take a more worker-protective interpretation of employee status.

The Trump administration's current proposed regulations, which opened for public comment in September 2020, would alter the "economic realities test" that has for years been used to evaluate independent contractor classifications under the Fair Labor Standards Act (FLSA). See Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 60600 (Sept. 25, 2020). The proposed rule would replace the multi-factor economic realities balancing test with two "core factors": "the nature and degree of the worker's control over the work" and "the worker's opportunity for profit or loss." Should a factfinder decide that these two factors are contradictory or unclear, it may then evaluate the relationship using three "guidepost" factors: the amount of skill required for the work, the permanence of the relationship, and whether the work is part of an integrated unit of production for the employer. The proposed rule's core focus on the worker's control over his or her work would make it easier to establish an independent contractor relationship than the economic realities test, particularly in the "gig economy" where workers often choose their own hours of work.

Under President-elect Biden, the DOL likely will move away from the new proposed rule on classification towards a more restrictive view of independent contractor relationships. In particular, President-elect Biden's platform notes that employer misclassification of "gig economy" workers as independent contractors prevents them from receiving many legal benefits and protections. He has supported the use of a strong three-prong "ABC test" to distinguish employees from independent contractors. The ABC test, which was codified at the state level in California in 2019, presumes that a worker is an employee and not an independent contractor unless three factors are satisfied: the workers is free from the control and direction of the employer in performing work (both contractually and in reality); the worker performs work outside the usual course of the employer's business; and the worker is customarily engaged in an independently established business or trade of the same nature as the work being performed.

It is not clear whether the DOL under President-elect Biden could implement the ABC test through regulatory action alone. In the notice of proposed rulemaking for the current proposed worker classification rule, the DOL discussed the ABC test and concluded it is incompatible with the U.S. Supreme Court's precedents on the FLSA. Without an act of Congress, therefore, adoption of the ABC test at the federal level may be unlikely.

Labor Policy

Changes at the National Labor Relations Board (Board) under President-elect Biden may be slower to manifest. The Board currently has three Republican appointees and one Democratic appointee, plus a vacancy which the President-elect likely will fill with an appointee early in his term (subject to Senate confirmation). A second vacancy will open in August 2021, when member William Emmanuel's term expires, giving the President-elect the opportunity to bring the Board under majority-Democratic control. Even with new members in place, precedents established by President Trump's appointees are not subject to reversal until cases presenting the relevant issues come before the Board.

Still, several controversial decisions handed down by the Board during the Trump administration are expected ultimately to be modified or reversed after Democratic appointees take control of the Board. Among others, these decisions include:

- *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017): This decision established a new two-prong test for evaluating a facially-neutral workplace policy or employee

handbook provision that might potentially interfere with an employee's rights under the National Labor Relations Act (NLRA): (1) the nature and extent of the potential impact on NLRA rights, and (2) legitimate justifications associated with the rule. This reversed the longstanding precedent under *Lutheran Heritage*, 343 NLRB 646 (2004), under which an employer would violate the NLRA by instituting a policy that could have been "reasonably construed" to "chill" employees in the exercise of their NLRA rights. Employers should carefully review their handbooks, policies and employee agreements in anticipation of closer scrutiny under a Biden Board.

• *PCC Structurals*, 65 NLRB No. 160 (Dec. 15, 2017): This decision made it more difficult for unions to organize "micro-units"—smaller units of workers within a workplace. Under the decision, a micro-unit cannot be formed unless the included employees share a community of interest "sufficiently distinct" from the excluded employees. A Biden Board may reinstate *Specialty Healthcare*, 357 NLRB 934 (2011), under which the Board presumes a bargaining unit is appropriate when it is composed of employees that perform the same job at the same facility regardless of whether other employees share a community of interest with that unit. Under this standard, organizing efforts can target a smaller group of employees at a company.

• *Caesars Entertainment*, 368 NLRB No. 143 (Dec. 16, 2019): This decision held that employers may limit employees' use of employer-provided email systems for purposes of communications protected by the NLRA, reasoning that employees had adequate means of communicating outside of the email system. A Biden Board would likely reinstate *Purple Communications*, 361 NLRB 1050 (2014), which held employees had a NLRA-protected right to use their work email accounts for organizing purposes even if the employer prohibited non-work related use of work emails accounts. Reinstatement of this decision would require employers to review their handbooks to make sure their email use rules do not run afoul of Board law.

President-elect Biden also is expected to replace the current pro-employer Board General Counsel, Peter Robb, when his term expires in November 2021 (also subject to Senate confirmation). Under a Biden-appointed General Counsel, it is anticipated that the Board will use its rulemaking authority to roll back recent rules, implemented May 31, 2020, that have the effect of lengthening the union certification election process. This new timeline for elections replaced a more streamlined process that the Board implemented in 2014 under President Obama. Those 2014 rules were characterized by some employers as allowing "ambush elections." Labor advocates in turn criticized the 2020 revisions for undoing the swifter election timeline. A Biden Board likely will move towards once again speeding up the election process by repealing some or all of the 2020 regulations.

Long-Term Outlook

President-elect Biden proposed an ambitious labor and employment agenda during his campaign, with proposals ranging from prohibiting mandatory arbitration, to restricting the use of non-competition and non-solicitation agreements, to adopting a $15 per hour minimum wage and repealing the ability of states to implement right-to-work laws. Most of these proposals would require Congressional approval. Regardless of whether these proposals become law, employers should expect a new, more employee-friendly direction for labor and employment law under President-elect Biden and his administration.

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