

Changes in store for employers under Biden administration

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President Biden has made many proposals that will affect employers, including changes to the federal minimum wage, immigration policies, worker classification and other labor laws. Whether those promises are accomplished through legislation, executive action, rulemaking by labor and employment agencies, or some combination of the three, the possible impacts will be significant.

Below, we highlight some of the key developments, from initial executive orders issued by the president to other actions that employers might expect to see from the Biden administration over the next four years.

STRENGTHENING DIVERSITY

Executive Order 13985, "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government," was one of President Biden's first official actions in office. It revoked Executive Order 13950, "Combating Race and Sex Stereotyping," which President Trump issued on September 22, 2020.

President Biden likely will not pursue a similar crackdown on H-1B visas, although employers should be prepared to respond to new regulatory or legislative changes to the program, including the new rules on prevailing wages.

The prior order broadly prohibited federal contractors from conducting workplace anti-bias training dealing with what the order termed "divisive concepts." A September 2020 guidance letter from the Office of Management and Budget stated that such trainings might be identified by searching for terms such as "unconscious bias" and "systemic racism."

Business and civil rights groups criticized the order for its lack of clarity and its potential effects on workplace initiatives to combat bias, which were stepped up after noteworthy police killings of Black Americans in 2020.

Civil rights groups in December 2020 obtained a preliminary injunction against enforcement of the order from the U.S. District Court for the Northern District of California, in *Santa Cruz Lesbian and Gay Community Center v. Trump*.

President Biden's executive order aims to "advance equity across the Federal Government" and includes an order for federal agencies to identify barriers that underserved communities face in taking advantage of federal contracting opportunities. With President Biden's new order in place, federal contractors may continue to administer anti-bias training to employees in accordance with existing laws.

NEW APPROACH TO IMMIGRATION

President Biden campaigned on a markedly different approach than President Trump on immigration policies, one that highlighted welcoming immigrants, a renewed commitment to assisting asylum seekers and modernizing the immigration system.

For example, President Biden made clear that protection of the Deferred Action for Childhood Arrivals (DACA) program, created under the Obama administration in 2012, is a high priority. DACA allows certain undocumented immigrants known as Dreamers, who entered the United States as minors, to apply for postponement of their deportation in two-year, renewable increments.

Those who qualify are eligible for work permits and other federal benefits, such as Social Security and Medicare. The Trump administration rescinded the program in 2017, but in June 2020 the U.S. Supreme Court held in *Dept. of Homeland Security v. Regents of the University of California* that the rescission was invalid.

In December 2020, in *Batalla Vidal v. Wolf*, a federal judge in the U.S. District Court for the Eastern District of New York ordered the Department of Homeland Security to reinstate the DACA policy that was in effect in 2017, including extending one-year employment authorization documents under DACA to two years.

On his inauguration day, President Biden signed an executive order to preserve DACA, which means that the program will continue to be open to new applicants. The Biden administration also is expected to explore options for extending legal status to the family members of Dreamers. (A program by the Obama administration

that would have protected parents of DACA recipients was blocked by the courts in 2015.)

President Biden supports congressional action that would give Dreamers more permanent protections; with Democrats in control of both Congress and the presidency, such action may now occur.

In addition, the president will likely move to reform the H-1B visa program. The H-1B is a nonimmigrant visa available to skilled workers in specialized occupations who have a bachelor's degree (or equivalent work experience), and it typically is provided to workers in the science and technology industry. The visa is valid for three years, though it is renewable once for a total of six years.

The Trump administration attempted to implement new rules that would have significantly impacted the ability of U.S. employers to sponsor foreign talent in the H-1B visa category.

President Biden's platform pledges a tougher standard for classifying workers as independent contractors and stepped-up enforcement for misclassification.

In October 2020, the Departments of Homeland Security and Labor issued interim final rules that limit the occupations eligible for H-1B visas, require employers to pay a higher prevailing wage to visa holders and step up evidentiary requirements for applicants that result in a slower application process.

In December 2020, a federal judge in the U.S. District Court for the Northern District of California invalidated these rules on procedural grounds in *Chamber of Commerce of the U.S. v. Dept. of Homeland Security*.

In the same month, a second ruling from the U.S. District Court for the District of Columbia, *Purdue University v. Scalia*, similarly invalidated the new rule regarding higher prevailing wages for H-1B workers on procedural grounds.

On January 12, 2021, the Department of Labor (DOL) released a new final rule on prevailing wages for certain visa holders, including H-1B workers, attempting to remedy these procedural defects. The wage increases required by the DOL rule are set to take effect in July 2021.

President Biden likely will not pursue a similar crackdown on H-1B visas, although employers should be prepared to respond to new regulatory or legislative changes to the program, including the new rules on prevailing wages.

The Biden administration's immigration platform calls for enforcement mechanisms to ensure employment-based visas are not used to undermine wages or to disincentivize recruiting U.S. workers for in-demand occupations.

WAGE INCREASES

President Biden has pledged to raise the federal minimum wage to \$15 per hour. A number of states already have enacted minimum wage hikes in recent years, including California, Connecticut, Florida, Maryland, Massachusetts, New Jersey, New York and Washington, among others. Yet the federal minimum wage has remained \$7.25 per hour since 2009.

With Congress under Democratic control for the first time since 2011, legislative proposals to raise the federal minimum wage now are more likely to become law. Even without congressional support, President Biden may use executive orders to achieve wage hikes for some employees.

His campaign promised to reinstitute the Fair Pay and Safe Workplaces order, which President Obama issued in 2014 and Congress revoked in 2017. Among other things, that order allowed federal agencies to consider a prospective federal contractor's history of compliance with labor laws in awarding contracts.

In addition to reinstating the order, President Biden has indicated he would expand it, requiring federal contractors to pay employees at least \$15 per hour and provide family-sustaining benefits. The proposal would also limit the use of mandatory employment arbitration by federal contractors and prohibit contractors from running anti-union campaigns.

These actions could have noticeable ripple effects, since a significant portion of large employers are federal contractors. It would also represent a major shift from the Trump administration's policies, which set the current minimum wage for federal contractors at \$10.95 per hour and supported the repeal of the Fair Pay and Safe Workplaces order.

President Biden made an early move toward increasing the minimum wage for certain workers on January 22, 2021, with "Executive Order on Protecting the Federal Workforce," which directs the federal Office of Personnel Management to provide recommendations to promote a \$15 per hour minimum wage for federal government employees.

TOUGHER STANDARDS ON WORKER CLASSIFICATION

Businesses are awaiting clarity regarding which workers can be classified as independent contractors, particularly those in the gig economy. The Trump administration finalized the DOL's proposed independent contractor classification regulations on January 7, 2021 (which are scheduled to become effective March 8, 2021), but the Biden administration is expected to quickly reverse those rules.

Democrats in Congress may also move to repeal the rules through the Congressional Review Act. In the meantime, a general regulatory freeze put in place through a memorandum on January 20, 2021, means the effective date of the rules may be pushed back.

The Trump administration's proposed regulations would alter the "economic realities test," a fact-specific inquiry examining the economic reliance of a worker on the hiring party, which has for years been used to evaluate independent contractor classifications under the Fair Labor Standards Act.

The proposed rule's core focus on workers' control over their 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.

President Biden's platform pledges a tougher standard for classifying workers as independent contractors and stepped-up enforcement for misclassification. Under his administration, the DOL likely will move away from the new proposed rule on classification toward a more restrictive view of independent contractor relationships.

President Biden has supported the use of the stringent three-prong "ABC test," which was codified at the state level in California in 2019, to distinguish employees from independent contractors. However, given the controversy surrounding the ABC test, which significantly limits the ability to classify workers as contractors, and California voters' recent approval of Proposition 22 – a ballot measure that confirms the independent contractor status of certain rideshare and delivery drivers – it remains to be seen whether the Biden administration will seek to adopt the ABC test at the federal level.

Regardless of what transpires in this area, businesses that use independent contractors should reexamine their level of compliance with laws at the federal and state levels and take steps to minimize misclassification.

NEW REGIME AT NLRB

In another Inauguration Day move, President Biden fired National Labor Relations Board (NLRB) General Counsel Peter Robb, who was generally seen as being friendly to management in his interpretations of labor laws. Mr. Robb's firing is an unprecedented move for a president, as Mr. Robb's four-year term was set to expire in November 2021 and no NLRB general counsel has previously been removed.

The president also nominated Lauren McFerran, the NLRB's sole Democrat, to be the board's chairperson. In August 2021, President Biden will be able to appoint a Democratic majority on the NLRB, which ultimately is expected to restore a number of precedents reversed by the Trump NLRB.

Notably, the Biden NLRB will likely reinstate *Specialty Healthcare* (2011), under which the NLRB 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, sometimes called "micro units." In addition, the Biden NLRB may return to the joint-employer test articulated in the Obama-era decision *Browning-Ferris Industries* (2015).

In that decision, the NLRB expanded the joint-employer standard by holding that an entity's status as a joint employer depends on its reserved right to control employees as well as its indirect control over them, as opposed to having only direct control over the employees in question.

This joint-employer standard would allow employees to assert a right to bargain with both their direct employer and the company that contracted their services, and has the potential to lead to increased bargaining in many industries.

President Biden's proposals for a new direction include significant changes to employment and labor law. The way these changes are implemented, as well as their breadth and permanency, remains to be seen, but employers can expect new questions and challenges in the years ahead.

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