

# Early Changes for Employers and Employees

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A series of employment-related actions in President Biden's first 100 days in office signal the likelihood of additional actions and legislative proposals. Employers should expect a decidedly pro-worker tilt.

## COVID-19

President Biden signed the \$1.9 trillion American Rescue Plan Act of 2021 (ARPA) on March 11, 2021. It includes the following programs impacting employees and former employees:

- **Expanded unemployment.** The APRA extends the following unemployment programs until September 6, 2021: Federal Pandemic Unemployment Compensation (additional \$300 weekly payments on top of state unemployment benefits), Pandemic Emergency Unemployment Compensation (aid to those who exhaust state benefits) and Pandemic Unemployment Assistance (aid to those traditionally ineligible for unemployment assistance, such as independent contractors and self-employed individuals).
- **COBRA subsidies.** The APRA provides up to six months of COBRA health insurance premium subsidies, through September 30, 2021, for qualifying individuals. Employers receive a 100% payroll tax credit for providing this subsidy.
- **Paid leave.** The APRA extends payroll tax credits for qualifying employers who offer their employees emergency paid sick and family leave related to COVID-19.

## Walsh Takes Over at the DOL

Marty Walsh, former mayor of Boston, was confirmed by the Senate as secretary of labor on March 22, 2021. Secretary Walsh served as president of Laborers Union Local 223 prior to becoming mayor. Under his leadership, the Department of Labor (DOL) is expected to pursue more worker-friendly policies than it did under his predecessor, Eugene Scalia.

## Minimum Wage

On April 27, 2021, President Biden issued an executive order that will require federal contractors to pay their employees a \$15 per hour minimum wage. This move represents an increase from the current \$10.95 minimum wage for employees of federal contractors. The executive order also requires that the minimum wage paid by federal contractors rise each year by the rate of inflation. The \$15 hourly wage must be included in all new federal contracts signed on or after March 30, 2022, and must be implemented into any existing federal contract when the parties exercise the option to extend the contract.

## Worker Classification

Toward the end of the Trump administration, the DOL finalized new rules on independent contractor classification. However, the department delayed implementation of the new rules on March 2, 2021, and has since proposed rescinding them. The DOL stated that, from a policy perspective, the rules would result in more individuals being classified as independent contractors and not entitled to the protections of the Fair Labor Standards Act (FLSA), which would hurt low-wage and vulnerable workers. If the DOL's proposal to withdraw the rules becomes final, the Biden administration's next move may be to implement its own regulations, which would likely narrow the circumstances in which workers may be classified as independent contractors.

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## Joint Employer Regulations

The DOL also moved to rescind regulations first issued under the Trump administration that narrowed joint employer status under the FLSA by creating a balancing test to determine whether an employee was acting in the interest of a putative joint employer. Factors considered under this test included the putative joint employer's ability to hire or fire an employee, its control of employee work schedules and pay, and its maintenance of employment records. If two entities are deemed joint employers under the FLSA, they can be held jointly and severally liable for wage-and-hour violations, including with respect to overtime pay.

If the Trump administration's joint employer rule is rescinded, the DOL will likely return to its prior "economic realities" test for evaluating joint employer status, which is easier for employees to satisfy. Evaluations of joint employer status under other federal statutes, such as the National Labor Relations Act (NLRA) and Title VII of the Civil Rights Act, are not expressly affected by the DOL rules.

## Immigration

The Biden administration has taken several steps to walk back Trump-era restrictions with respect to foreign workers. On February 24, 2021, the president revoked Proclamation 10014, which banned new green card holders from moving to the United States. President Biden also allowed Proclamation 10052 — which barred H-1B, H-2B, J and L visa holders from moving into the U.S. — to expire.

In addition, with the Biden administration's support, the House of Representatives passed the American Dream and Promise Act of 2021 on March 18, 2021. That law would grant permanent

residency to "Dreamers," or undocumented immigrants who arrived in the U.S. as children. It would also provide a path to earning a green card for agricultural workers and their spouses and children. The future of the legislation remains unclear.

## NLRB

President Biden fired National Labor Relations Board (NLRB) General Counsel Peter Robb on Inauguration Day and later named Peter Sung Ohr as acting general counsel. Mr. Ohr has taken more pro-worker stances than his predecessor. For example, in a March 31, 2021, memorandum to the board's regional directors, Mr. Ohr directed the agency to "robustly enforc[e]" Section 7 of the NLRA, which protects both unionized and nonunionized workers' rights to engage in concerted activity. On March 12, 2021, the NLRB withdrew a draft rule that would have prevented graduate student employees at private universities from forming labor unions. Mr. Ohr's early actions signal additional pro-labor changes to come at the NLRB. Also, there is currently one vacancy on the board, and member William Emanuel's term expires in August 2021, at which time President Biden will have the opportunity to appoint another new member and give the board a Democratic majority.

The House also took a major pro-labor step by passing the Protecting the Right To Organize (PRO) Act on March 9, 2021. Among other changes, the PRO Act would nullify state-level "right to work" laws, restrict employers' ability to hold mandatory meetings with workers during union-organizing campaigns and extend collective bargaining rights to certain independent contractors. President Biden supports the PRO Act, but the legislation faces an uncertain future in the Senate.