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Employment Law Insider Alert

Labor and Employment Developments Employers Can Expect Under the Biden Administration



By **Bennett Pine** and
James Goodridge

With his first month in office under his belt, and the Trump impeachment proceedings in the rearview mirror, President Joseph Biden can now turn his attention toward domestic policy issues. Foremost on Biden's domestic agenda will be a focus on decidedly pro-employee and pro-union measures, aimed largely at reversing the more pro-corporate policies of the Trump administration.

Key points:

Increased Minimum Wage

Increased Salary Thresholds for Overtime Exemptions

Stricter Worker Classification Standards

Focus on Racial Equity

Advancement of LGBTQ Protections

Strong Pro-Union Philosophy

Increased Minimum Wage

Biden has pledged to raise the federal minimum wage to \$15 per hour. The Biden administration took its first step toward that end on January 22 with the executive order on Protecting the Federal Workforce, which directs the U.S. Office of Personnel Management to provide recommendations to adopt a \$15 minimum wage for federal employees. Biden has also indicated he supports requiring federal contractors to pay a \$15 per hour minimum wage, and has included the proposed increase in his \$1.9 trillion coronavirus relief bill introduced in the House on February 19. The new administration also aims to eliminate reduced minimum wage for tipped employees (i.e., the "tip credit") and may end exceptions to the current



minimum wage standards for certain farm and domestic workers.

The last increase to the minimum wage occurred in 2009, rising from \$6.55 to \$7.25. It will be challenging, however, for the Democratic majority to pass a \$15 per hour minimum wage for private sector employees. To become law in coming months, the increase must be integrated with a larger COVID-19 relief package pursued through the budget reconciliation process to avoid a Senate filibuster. While a handful of Republican senators have indicated possible support for a more limited increase, no Republicans are likely to vote for the larger reconciliation pack-

age, which will therefore likely require all 50 Democratic votes (plus Vice President Kamala Harris's tiebreaking vote) for passage. Democratic Sens. Joe Manchin and Krysten Sinema have said they don't support an increase to \$15 per hour. It is possible that they could be induced to accept the increase as part of the larger relief passage, or that a more limited increase will be included in the larger relief bill.

Increased Salary Thresholds for Overtime Exemptions

Employers should expect the Biden administration to pursue introduction of new overtime rules increasing the threshold salary under which employees qualify for overtime pay and are not subject to white collar "exemptions" under the Fair Labor Standards Act's "salary-level test." The Obama administration previously proposed raising the salary thresholds from \$23,660 to \$47,476, and under Trump, the Labor Department issued a final rule raising the threshold to \$35,568. Any changes from the Biden administration are expected to come through formal rulemaking procedure, including a formal notice and comment period.

Stricter Worker Classification Standards

On his first day in office, Biden instituted a general regulatory freeze on all pending rules. One regulatory scheme subject to that moratorium is the Trump administration's proposed "independent contractor" classification regulations. Released January 7 and originally scheduled to take effect March 8, the Trump administration's regulation sought to alter the "economic reality test," a fact-specific inquiry examining the economic reliance of a worker on the hiring party used to determine whether the worker is an independent contractor. The proposed Trump-backed regulation's

focus on workers' control over their work would have made it easier for employers to establish an independent contractor relationship than the economic realities test, especially in the gig economy, where people tend to work job-to-job and regularly choose their own hours.

Conversely, employers should expect Biden to push for a tougher standard for classifying workers as independent contractors and heightened enforcement and penalties for misclassification by employers. Throughout his campaign, Biden advocated for a three-prong "ABC test." Under that test, a worker is presumed to be an employee and not an independent contractor unless:

- The worker is free from the control and direction of the employer in performing work.
- The worker performs work outside the usual course of the employer's business.
- The worker is customarily engaged in an independently established business or trade of the same nature as the work being performed.

Businesses that use independent contractors should take steps to evaluate their level of compliance with federal and state protocol to eschew misclassification.

Focus on Racial Equity

In another Inauguration Day move, Biden issued Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. The order revoked Trump's Executive Order 13950, which prohibited federal contractors and sub-contractors from providing anti-bias training promulgating what the order defined as "divisive concepts." The U.S. District Court for the Northern District of California previously enjoined enforcement of the

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Trump order in December 2020, following criticism that the order lacked clarity and essentially banned trainings discussing systematic racism or unconscious bias.

Biden's order affirms "[e]qual opportunity is the bedrock of American democracy, and our diversity is one of our country's greatest strengths." The new order also directs the U.S. Office of Management and Budget and executive agencies to identify best practices for assessing equity issues in the federal government and responding to them.

Advancement of LGBTQ Protections

Biden has pledged to make employment protections for LGBTQ workers a top priority in his first 100 days. To further that goal, on January 20 Biden signed an executive order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation. The order indicates that insofar as Title VII prohibits discrimination on the basis of gender identity or sexual orientation — as recently interpreted by the U.S. Supreme Court in *Bostock v. Clayton County* — such discrimination is also prohibited under other federal laws relating to housing, education and immigration. The order further directs the heads of all federal agencies to review existing regulations, orders and guidance to ensure consistency in protection of LGBTQ workers, and take administrative actions to revise such policies where necessary.

Strong Pro-Union Philosophy

In the 1950s, over 30% of all employees were union members. By 2020, the percentage had declined to 6.7% for private sector employees. Early into his presidency, however, Biden is showing signs that he may make good on his election-eve pledge to be "the most pro-union president you have ever seen."

Last month, Biden took his first step in that direction by nominating Boston Mayor Marty Walsh to serve as the next U.S. secretary of labor. The selection of Walsh, a lifelong pro-labor advocate and former leader of Boston's Building and Construction Trades Council, has been widely supported by organized labor, including the AFL-CIO. Walsh's confirmation is expected to clear the Senate, potentially with some Republican support.

The Biden administration also has changes in store for the National Labor Relations Board. While Biden was able to immediately remove General Counsel Peter Robb and nominate Lauren McFerran for chairperson, Biden will not be able to appoint a Democratic majority until August. However, once that majority is in place, we can expect the Biden administration to restore a number of precedents previously reversed under the Trump administration.

For example, a Democrat-controlled NLRB may reinstate the NLRB's decision in *Specialty Healthcare*, where the board found a bargaining unit is appropriate when it is composed of employees who perform the same job at the same facility, irrespective of whether other employees share a community interest with that unit. A return to that standard will allow organizing efforts to target smaller groups, sometimes referred to as "micro units."

Moreover, there may also be a return to *Browning Ferris*, where the NLRB held 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. A return to *Browning Ferris* would allow employees to assert a right to bargain with both their direct employer and the company that contracted their services, and may lead to increased bargaining in many industries.

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Biden has also shared his support for the Protecting the Right to Organize Act, known as the PRO Act. The proposed legislation would significantly strengthen unions by banning employers from holding mandatory “captive audience” group meetings, preempting states’ “right to work” laws, and expanding personal liability for unfair labor practices to corporate directors and officers. The PRO Act also aims to provide a private right for unfair labor practice claims to be brought as civil actions, and would add fines and liquidated damages as penalties for unfair labor practices.

At bottom, employers should expect the Biden administration to make it easier and faster for employees to form a union, through expedited elections and automatic majority designation by card-check without the need for an NLRB-conducted election, among other measures.

Conclusion

In the coming weeks and months, we expect that President Biden will con-

tinue to pursue a decidedly progressive pro-employee and pro-union agenda, designed to reverse many of the policies of the Trump administration.

We will continue to monitor these developments closely. ▲

BENNETT PINE is a shareholder in Anderson Kill's New York and Newark offices and is chair of the firm's employment & labor group. Mr. Pine has broad-based labor and employment law experience and regularly plays a hands-on role offering preventative maintenance advice and counseling to employers in the full range of legal issues affecting the workplace.

bpine@andersonkill.com

(212) 278-1288 (NY)

(973) 642-5006 (Newark)

JAMES GOODRIDGE is an attorney (admission pending) in Anderson Kill's New York office. He focuses his practice on commercial litigation, employment law, and insurance recovery on behalf of Policyholders.

jgoodridge@andersonkill.com

(212) 278-1042

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