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Significant Workplace Changes in Store Under the Biden Administration

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From pay equity to an increased minimum wage, pro-worker and pro-union labor policies, and additional anti-discrimination protections, President-elect Biden has touted support for numerous legislative and regulatory proposals that would significantly change the employment and labor law landscape. Bolstered by Democrat victories in the Georgia Senate runoff elections (and the resulting unified Congress, the first in nine years), employers can expect new and amended workplace laws and rules in 2021. We highlight below several of the initiatives the Biden administration is likely to prioritize.

Equal Employment and Paid Leave

More stringent federal equal pay laws. President-elect Biden has publicly committed to supporting measures aimed at further tackling pay disparity. Indeed, Biden has pledged to sign the Paycheck Fairness Act during his term. Under current law, an employer may, for example, pay a male employee more than a female employee where the reason for the disparity is based on a "factor other than sex." The Paycheck Fairness Act would eliminate this flexibility, limiting such disparities to bona fide factors objective such as education, training, or experience. The act would also prohibit employers from restricting employees from discussing wage information and require companies to report to the EEOC compensation data correlated to employees' race, sex, and national origin. If signed, the bill would make it easier for employees to pursue individual and collective/class actions against their employers, alleging wage discrimination on the basis of race, sex and national origin.

Broader anti-discrimination laws. In its June 2020 decision in *Bostock v. Clayton County, Georgia*, the Supreme Court held that Title VII's prohibition against sex discrimination encompasses and thereby outlaws discrimination on the basis of sexual orientation and gender identity. Notwithstanding that precedent, President-elect Biden has repeatedly stated that he hopes to sign the Equality Act within his first 100 days in office. The Equality Act, which previously passed the House of Representatives, would prohibit discrimination with respect to employment, housing, education, and public accommodation on the basis of sexual orientation and gender identity. Additionally, Biden has expressed support for expanding protections for pregnant, senior, and disabled employees.

Federal paid family leave. President-elect Biden has expressed support for providing employees up to 12 weeks of paid family and medical leave. Biden's camp has indicated that his proposal for paid leave would include provisions similar to those in the Family and Medical Insurance Leave Act (the FAMILY Act), which has previously been introduced in Congress.

Elimination of the "but-for" causation requirement under the ADEA. President-elect Biden has indicated that he intends to protect older Americans against discrimination in the workplace by, among other things, making it easier for such workers to prove that they were victims of age discrimination. Since the Supreme Court's 2009 decision in *Gross v. FML Fin. Servs., Inc.*, plaintiffs alleging discrimination under the federal Age Discrimination in Employment Act have been required to prove that age was the "but-for" cause of the harm they suffered, as opposed to merely a "motivating factor." By contrast, other anti-discrimination laws, such as Title VII, allow a "mixed motive" theory of liability, under which a plaintiff can prevail even if the characteristics protected by the statute are not the only reasons for the employer's action.

Employment-Related Agreements

Elimination of mandatory pre-dispute arbitration. Having regained control of the Senate, Congressional Democrats are expected to pass the Forced Arbitration Injustice Repeal Act, and Biden has indicated his support. The act, which has already passed the House, would invalidate pre-dispute arbitration agreements in the employment, civil rights, consumer, and antitrust contexts, and would require employers to litigate workplace disputes in court.

Elimination of class-action waivers. In its 2018 decision in *Epic Systems v. Lewis*, the Supreme Court expressly upheld class and collective action waivers in the employment context. Employers utilizing such waivers can currently mandate the resolution of employment-related claims on an individual basis in an arbitration proceeding, thereby minimizing their exposure to potential class-wide liability. Notwithstanding *Epic Systems*, President-elect Biden has stated that he would sign legislation prohibiting employers from seeking such waivers.

Increased restrictions on non-compete agreements. President-elect Biden has proposed placing limits on non-compete and no-poaching agreements. More specifically, Biden has stated that he will work with Congress to prohibit non-compete agreements with the exception of those "that are absolutely necessary to protect a narrowly defined category of trade secrets" and to eliminate no-poaching agreements altogether.

Wage and Hour

Minimum wage hikes. The federal minimum wage is currently less than half the highest state minimum wage (for example, it's $15 for large employers in New York City). Over the last few years, state and local governments nationwide have passed laws steadily increasing their minimum wage rates. President-elect Biden has followed their lead, repeatedly calling for raising the federal minimum wage to $15. Biden also supports eliminating the inclusion of tips as part of the minimum wage as well as the subminimum wage for individuals with disabilities. With the Senate now controlled by Democrats, the White House is likely to secure the Congressional support necessary to increase the minimum wage, likely on an incremental basis over the next several years.

Overtime rule changes. We expect the Biden Administration to ask the Department of Labor to implement benchmark-related increases to the minimum salary for overtime exemption, similar to what President Obama's DOL tried to implement in 2016 (those changes were declared invalid by a Texas federal district court prior to implementation); such a change would result in more "white collar" employees being eligible for overtime pay. Under the 2016 rule, the minimum salary for such workers to be exempt from overtime would have doubled from $23,660 to $47,476 and would have further increased every three years. With support from Congressional Democrats, it's likely the White House will seek to implement similar changes to the overtime laws through a combination of legislative and agency rulemaking processes.

Addition of "wage theft" provisions to the FLSA. President-elect Biden also is expected to push for measures that would add "wage theft" provisions to the Fair Labor Standards Act. Following the lead of a number of states, such amendments would enhance pay transparency and would require employers to provide detailed pay statements while expanding the penalties for willful instances of wage theft, record falsification, or retaliation.

Labor/Management Relations

Pro-worker/union legislation. President-elect Biden has promised to sign the Protecting the Right to Organize (PRO) Act, which passed the House in February 2020 but stalled in the Senate. The pro-worker legislation would provide for sweeping changes to the National Labor Relations Act, with the goal of enhancing the ability of unions to organize workers. Its key provisions are as follows:

- imposing financial penalties against employers for interfering with workers' organizing efforts;
- compelling mediation in first contract negotiations where agreement is not reached within 90 days;
- banning employers from holding mandatory meetings with their employees, including "captive audience" meetings;
- reinstating the Obama administration's controversial "persuader rule," which required employers to report the activities of third-party consultants that work behind the scenes to manage employers' campaigns in response to union organizing;
- codifying into law the more expansive *Browning-Ferris* "joint employer" rule and the 2014 representation election rule with shorter union election timelines; and
- permitting workers to engage in secondary boycotts and preventing employers from permanently replacing strikers.

Despite President-elect Biden's support, it is unlikely the PRO Act will become law in its current form to the extent it is subject to a filibuster.

Unionization through card-check authorization. Biden has been an avid proponent of card-check authorization—which would bypass the NLRB's election process and allow unions the right to secure recognition by collecting authorization forms from employees stating that they wish to be represented by the union. The PRO Act also includes a provision that would require employers to recognize a union based on a card-check authorization, but only if the NLRB determines that the employer improperly interfered with the election.

Increased legal and financial security for unions. President-elect Biden has stated that he would ban state "right to work" laws and allow unions to collect dues from all workers who benefit from union representation, regardless of union membership. While the PRO Act would aim to supersede "right to work" laws by allowing employers and unions to bargain for contract provisions that require all workers to pay a "fair share" of the costs of union representation, Biden has said that he would go even further and repeal the provisions of the Taft Hartley Act that allow states to enact "right to work" laws. Additionally, a Democrat-majority NLRB could reverse recent precedent holding that employers are not obligated to adhere to dues-check-off provisions following the expiration of a collective bargaining agreement.

A pro-labor Board. The NLRB is comprised of five members, all of whom are appointed by the President for five-year terms, with the approval of the Senate. With one seat currently vacant and another to be vacated by a Republican in August 2021, the White House will have the ability to secure a Democratic majority on the Board. In addition, upon taking office, President-elect Biden could succumb to the many calls within the Democratic party to terminate NLRB General Counsel Peter Robb before the expiration of his term in November 2021. No incoming president has ever terminated a General Counsel, however, and the legality of such an action is untested. The General Counsel exerts significant influence over the NLRB regions' prosecutorial priorities and agenda.

Reversal of recent precedent-setting NLRB decisions. Under President Trump, the NLRB issued a number of significant decisions aimed at relieving some of the administrative burdens placed on employers by decisions issued by the Obama Board, including with respect to employee access to employer IT systems for organizing activity, employer handbook rules and workplace policies, and unilateral actions by employers concerning mandatory subjects of bargaining. As is the case whenever party affiliation in the White House changes, all of the labor policies implemented in the last four years are susceptible to change or reversal by a Democrat-majority NLRB.

Reversal of regulations enacted by the NLRB in the last few years. Under the Trump Administration, the NLRB adopted an ambitious rulemaking agenda—a departure from the Board's historical practice of setting labor policy through the adjudication of actual cases. Over the last several years, the Board has adopted a more stringent "joint employer" rule, revised its election rules to provide for a more efficient and reasonable pre-election process, and proposed a final rule rejecting the "employee" status of graduate student teachers and research assistants at colleges and universities, among others. The forthcoming Democrat-majority Board could decide to revoke or reverse these rules through additional rulemaking.

Other Anticipated Actions

Freeze on midnight rules and regulations. As President Trump did when he took office in January 2017, we expect Biden will issue a memorandum on Inauguration Day to the heads of all executive departments and agencies temporarily halting all non-emergency rulemaking activities. Among other things, the memorandum is likely to direct the recipients to send no regulation to the Office of the Federal Register (OFR) for publication pending further review and approval; to withdraw all regulations sent to OFR but not yet published; and to postpone the effective date of any regulations already published but which have not yet taken effect.

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Some of the new laws and rule changes expected from the Biden administration won't require a change in practice or strategy for employers in states and cities with existing employment laws considerably broader than their federal counterparts. But in many parts of the country, the landscape of workplace law may change dramatically over the next year.

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