

# Daily Journal

www.dailyjournal.com

THURSDAY, DECEMBER 3, 2020

PERSPECTIVE

## California Dreamin': What the Biden administration may mean for employers

By Anthony J. Oncidi  
and Kate S. Gold

Now that the presidential election has been resolved (more or less), it's not too early to assess the implications of a Biden presidency and potential Democratic control of Congress — should the Democrats win both open U.S. Senate seats in Georgia on Jan. 5.

For employers doing business in California, much will seem familiar as Biden's policy initiatives borrow substantially from many of the employment laws and regulations already on the books here.

### Proposals Affecting All Employers

The wars in California involving **Assembly Bill 5** are waning, resulting in multiple amendments to this unpopular California statute as well as the recent voter passage of Proposition 22 (exempting Uber and Lyft drivers). These developments all were designed to preserve the independent contractor status of broad swaths of workers that otherwise would have been reclassified as employees under state law.

However, the Biden Plan would federalize AB 5's strict "**ABC test**" for all "labor, employment, and tax laws." This means that it will become very difficult for workers everywhere in the country (including California) to be classified as independent contractors if the worker performs services that

are within the usual course of the business of the hiring entity. In short, if a company hires a worker to perform services that are of the type usually offered to the company's clients

**Employers are more focused than ever on diversity and inclusion initiatives and the experience of underrepresented populations in the workplace. The Biden administration would seek to more aggressively hold employers' feet to the fire on these issues.**

or customers, the worker must be classified as an employee and not an independent contractor.

It is unclear how a federal version of the ABC test would affect the many hard-fought exemptions and limitations that have been carved out of the California statute since it was enacted late last year, but more uncertainty is likely to result for employers and employees alike if it does happen.

The Biden Plan also proposes to eliminate **noncompete agreements** in all states. Currently, such provisions are governed by state law. While many states permit these agreements in one form or another, others (like California) only allow them in rare circumstances such as the sale of a business by an owner/ employee. Of course, some employers may welcome greater nationwide uniformity in the area, but the elimination of such agreements could hurt certain companies in highly competitive sectors of the economy. Similarly, Biden would like to eliminate so-called

**"no-poaching agreements"** by which employers agree not to hire employees from one another.

Biden also would **eliminate arbitration agreements** every-

where there are no caps on damages and where sympathetic juries routinely award millions of dollars to plaintiffs in employment disputes. This also will significantly drive up the cost of settling cases pre-litigation if every unresolved dispute will be headed to court rather than a more informal and often less costly arbitration proceeding.

Biden also seeks to **ban class-action waivers** by which employees agree not to lead or participate in a class action for such things as wage and hour disputes — such waivers were approved by the U.S. Supreme Court nearly a decade ago and have significantly reduced the number of frivolous class action lawsuits, which are almost always settled because the cost of defending them is usually quite high regardless of the merits of the case.

Employers are more focused than ever on diversity and inclusion initiatives and the experience of underrepresented populations in the workplace. The Biden administration would seek to more aggressively hold employers' feet to the fire on these issues.

The **Equality Act** would prohibit employment discrimination on the basis of sexual orientation or gender identity. For most employers, the impact of this bill would be significantly less pronounced than it would have been just six months ago, given the U.S. Supreme Court's June 2020 decision in *Bostock v. Clayton County*, outlawing employment discrimination on the

where in the country by way of the Forced Arbitration Injustice Repeal Act. By some estimates, more than 55% of employees in the private sector have signed and are subject to enforceable arbitration agreements. If this becomes law, every employment dispute that otherwise would have been resolved by an arbitrator will have to be tried in court, resulting in a crushing increase in the number of cases filed in state and federal courts across the country. Arbitrators are usually retired judges or practitioners who are mutually selected by both the employer and the employee and who understand that if their rulings are not fair, one side or the other will refrain from choosing them for the next case. Nevertheless, plaintiffs' lawyers almost always prefer to try their cases in front of a jury regardless of how unbiased an arbitrator might be because juries tend to side with employees more often than employers.

This proposal will especially affect employers in California

basis of sexual orientation and gender identity under federal law. (Of course, California and New York employers have operated under these rules for years as each state's anti-discrimination laws already include such protections.)

Biden also would mandate that employers publicize the diversity (or lack thereof) of their senior leadership and overall workforce. While this policy would not expressly require employers to make changes to their leadership or workforce, public pressure brought about by such disclosures could accelerate efforts to actively diversify, especially in senior management positions.

Biden would enact the **Paycheck Fairness Act**, aimed at addressing wage disparity on the basis of sex. This bill would narrow the defenses available to employers to justify pay disparity; prohibit employers from restricting employees from discussing wage information; increase civil penalties for employers that violate equal pay provisions; and require employers to provide compensation data to the EEOC disclosing all employees' race, sex, and national origin. Numerous states, including California and New York, already have enacted pay equity laws encompassing many of the elements of the proposed Paycheck Fairness Act.

Paid sick and family leave have long been the subject of discussion at the national level. The Biden administration would aim to raise minimum benefit levels nationwide by passing the **Healthy Families Act**, which would require employers to

provide paid sick leave, which is already mandatory in California and many of its major cities. Specifically, the bill would require employers with 15 or more employees to provide sick leave for employees to use for themselves and their families, at a rate of one hour of paid leave for every 30 hours worked, and would require employers with fewer than 15 employees to provide either the above rate of paid sick leave or at least 56 hours of unpaid sick leave.

In addition, Biden would raise the **federal minimum wage from \$7.25 to \$15 per hour** nationwide and index the minimum wage to the median hourly wage, which will particularly affect employers in geographic locations with lower costs of living and in industries that employ large numbers of minimum-wage workers such as food services, sales and personal care.

Biden also would enact a **Domestic Workers Bill of Rights Act**, which would create a national labor standards framework for domestic workers, including nannies, household cooks, maids and gardeners.

### Proposals to Strengthen Unions

One of the major policy initiatives promised by the incoming Biden administration is "**The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions**," which is expressly designed to "check the abuse of corporate power over labor." Biden has repeatedly proclaimed, "I'm a union guy." Among other

things, the Biden Plan would:

- Allow unions to use the informal "**card check**" process to unionize a workplace by which union organizers will be permitted to make whatever threats or promises they wish to secure employee signatures in support of a union, thus dispensing with a government-supervised, secret-ballot election, which has been enshrined in federal law since the 1930s.

- Repeal states' authority to enact "right-to-work" laws (27 states have them), prohibiting union security clauses that require all employees to pay union dues as a condition of employment.

- Reinstate and codify the Obama administration's "**Persuader Rule**" (blocked by a federal court in 2016 and later rescinded by the Trump administration), which would require employers to report not only information communicated to employees in opposition to

union organizing, but also the activities of third-party consultants (including lawyers) who help manage employers' "anti-union" campaigns.

- Authorize the National Labor Relations Board to force employers that have engaged in "bad faith" or "surface negotiations" back into collective bargaining and hold executives personally liable for interfering with union organizing, including the imposition of criminal penalties for "intentional interference."

### Conclusion

President-elect Biden is committed to signing these measures into law should they pass both houses of Congress next year. And if that does happen, employers all over the country may soon find themselves "California Dreamin'" because many of the employee-friendly laws of the Golden State are about to go viral! ■

---

**Anthony J. Oncidi** is a partner in and the chair of the West Coast Labor and Employment Department of Proskauer Rose LLP in Los Angeles.



**Kate S. Gold** is a partner in the Labor and Employment Department of Proskauer Rose LLP in Los Angeles.

