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The New Administration and the Workplace

What Employers Can Expect from a Biden Presidency: *Part 2*

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Allan S. Bloom
Partner

Nicole A. Eichberger
Partner

Evandro C. Gigante
Partner

Proskauer

Agenda

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Presidential Memoranda

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Regulatory Freeze Memorandum (86 FR 7424)

- As expected, the White House issued a memorandum to the heads of all executive departments and agencies within the first few hours after President Biden's inauguration on January 20, requesting that they **halt all non-emergency rulemaking** and regulatory activity pending review by the new administration.
- The memo asks the executive agencies to immediately:
  - **propose or issue no rule** in any manner until a department or agency head appointed or designated by President Biden reviews and approves the rule;
  - **withdraw any rules that have already been sent to the Office of the Federal Register (OFR) for publication** but which have not yet been published; and
  - consider **postponing by 60 days the effective date of any such rules already sent to OFR for publication (or otherwise issued) but which have not yet taken effect**, "for the purpose of reviewing any questions of fact, law, and policy the rules may raise."
- The freeze does not apply to rules addressing "emergency situations or other urgent circumstances relating to health, safety, environmental, financial, or national security matters."

Regulatory Freeze: Independent Contractor Rule

- The memo effectively does away with the U.S. Department of Labor's January 7, 2021 Final Rule on independent contractor classification, which would have **reduced the number of primary factors** the agency would consider when determining whether a worker is an independent contractor or an employee to two "**core factors**"—the nature and degree of **control** over the work and the worker's opportunity for **profit or loss** based on initiative and/or investment.
- Under the new DOL test, other factors—including the amount of skill required for the work, the degree of permanence of the working relationship between the worker and the potential employer, and whether the work is part of an "integrated unit of production"—would generally only be considered when the two "core factors" don't point to the same classification.
- The rule was set to take effect on March 8.

Regulatory Freeze: Independent Contractor Rule

- We don't expect the Trump administration's Final Rule to ever see the light of day.
- President Biden has made clear, including in his "Empower Workers" platform, that he intends to:
  - "Aggressively pursue …and put a stop to employers intentionally misclassifying their employees as independent contractors";
  - "[E]nact legislation that makes worker misclassification a substantive violation of law under all federal **labor, employment, and tax laws** with additional penalties beyond those imposed for other violations";
  - "[B]uild on efforts by the Obama-Biden Administration to drive an aggressive, all-hands-on-deck **enforcement effort** that will dramatically reduce worker misclassification";
  - "[D]irect the [DOL] to engage in meaningful, collaborative **enforcement partnerships**, including with the National Labor Relations Board (NLRB), the Equal Employment Opportunity Commission, the Internal Revenue Service, the Justice Department, and **state tax, unemployment insurance, and labor agencies**"; and
  - "[F]und a dramatic increase in the number of investigators in labor and employment enforcement agencies to facilitate a **large anti-misclassification effort**."

Regulatory Freeze: Independent Contractor Rule

- Biden has promised to work with Congress to establish a federal standard for independent contractor classification modeled on the "ABC test" for all labor, employment, and tax laws.
- The ABC test—used as the basis for several states' laws, such as California's AB5 legislation—is the most stringent of various tests used to determine worker status. Under California's test, for example, a worker will be considered an employee unless the company engaging the worker establishes **all** of the following three prongs:
  - the worker is **free from the control and direction of the company** in connection with the performance of the work, both under the contract for the performance of such work and in fact;
  - the worker performs work that is **outside of the "usual course" of the company's business**; and
  - the worker is customarily engaged in an **independently established trade, occupation, or business** that is of the same nature as the type of work performed for the company.
- The DOL's January 7 Final Rule would have made it easier for companies in states without more restrictive laws to classify service providers as independent contractors. It's highly unlikely we'll see another rule like it in the next four years.

Regulatory Freeze: Tip Regulations Final Rule

- The memo is also likely to lead to review and revision of the DOL's December 30, 2020 Final Rule on tipped employees, which would have—among other things—eliminated the "80/20 rule."
- Under the 80/20 rule, an employer can only take a tip credit (*i.e.*, pay a sub-minimum wage) to employees who spend 80% or more of their time performing tipped job duties—which do not include activities that don't produce tips, like cleaning, setting tables, or other "side work."
- Under the Final Rule, an employer may take a tip credit for time that an employee in a tipped occupation performs related non-tipped duties either "contemporaneously with or for a reasonable time immediately before or after performing tipped duties."
- The rule was set to take effect on March 1.

Modernizing Regulatory Review Memorandum (86 FR 7424)

- The White House issued another memorandum to the heads of all executive departments and agencies on January 20, outlining the administration's **general regulatory priorities**.
- Going forward, the "processes and principles that govern regulatory review" should ensure "swift and effective Federal action" to address the nation's "serious challenges, including a **massive global pandemic; a major economic downturn; systemic racial inequality**; and the undeniable reality and accelerating threat of **climate change**."
- The memo directs OMB, in consultation with the executive departments and agencies, to "begin a process with the goal of producing a set of recommendations for **improving and modernizing regulatory review**."
- "These recommendations should provide concrete suggestions on how the regulatory review process can promote public health and safety, economic growth, social welfare, racial justice, environmental stewardship, human dignity, equity, and the interests of future generations," and should include "proposals that would ensure that regulatory review serves as a tool to **affirmatively promote regulations that advance these values**."

Executive Orders Revoked

- President Biden's EO 13985 revoked Trump's EO 3950, which prohibited "divisive concepts" in diversity and inclusion training by the federal government, federal contractors, and federal grantees.
- OFCCP had created a hotline to accept complaints under Executive Order 13950 and has now announced that it will completely shut down the hotline.

- President Biden also revoked three of Trump's EOs that made it easier to fire federal employees and limit union activity.
- President Biden eliminated a prior executive order that created a new job category, called Schedule F, for certain federal employees in confidential, policymaking and policy-advocating positions.

American Rescue Plan

- President Biden has proposed a $1.9 trillion package to address harms caused by the COVID-19 pandemic.
- Proposed package includes:
  - Reinstate FFCRA Emergency Family and Medical Leave expansion
  - $1,400 in direct assistance to individuals
  - Additional funding for COVID-19 vaccination, testing and prevention
  - $15 federal minimum wage
  - Extend and expand unemployment Insurance

Executive Orders: Increasing Minimum Wage

- The federal minimum wage ($7.25)—set by Congress—has not been increased since 2009.
- President Biden issued an EO that directed the Director of Office of Personnel Management to identify federal workers who are earning less than $15 an hour and bring recommendations for promoting the minimum wage.

- They must work quickly to meet Biden's goal of issuing an EO establishing the $15 federal minimum wage within the first 100 days of his administration.

Executive Orders: Gender Identity and Sexual Orientation

- President Biden signed an EO that requires each federal agency, within 100 days, to identify all laws prohibiting sex discrimination that it enforces.
- Federal agencies then have to develop a plan to ensure all of its regulations, guidance, and policies clearly lay out the prohibition against discrimination based on sexual orientation and gender identity.
- Employers should expect guidance, and then regulations, from the US Department of Health and Human Services reinstating the regulations from the Obama administration that employer-sponsored group health plans and health insurance companies must not discriminate in any health coverage or health insurance policy.

Executive Order Leads to OSHA Guidance

- President Biden signed an executive order that required OSHA to issue revised guidance to employers on workplace safety during the COVID-19 pandemic.
- OSHA issued this guidance on January 29, 2021.
- Guidance states employers should:
  - Require workers to wear masks even if vaccinated.
  - Follow social distance practices.
  - Implement COVID-19 Prevention Programs in the workplace.
  - Set up a process for workers to anonymously share any concerns they might have about COVID-19 safety.
- This guidance does not impose legal requirements.

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Agency Action

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DOL's Withdrawal of "PRO Good Guidance" Rule

- One of the first orders of business from DOL post-Inauguration was to scrap the 2020 "PRO Good Guidance Rule," which imposed heightened burdens on the agency in connection with issuing guidance.
- The rule, issued in August 2020, required the DOL to post to an online searchable database any guidance documents on which the agency expected the public to rely.
  - The DOL noted at the time that it had rescinded approximately 3,200 guidance documents in creating the database.
- The rule also required that any future guidance considered "significant" go through a public notice-and-comment process similar to that required for more formal rulemaking.
- In withdrawing the rule, the DOL cited the Biden administration's policy "to use robust regulatory action to address national priorities," noting that the rule "deprives the [DOL] and subordinate agencies of necessary flexibility in determining when and how best to issue public guidance … and unduly restricts the [agency]."

DOL Begins Withdrawal of Trump-Era Opinion Letters

- On January 26, the DOL's Wage and Hour Division withdrew three opinion letters issued in the waning days of the Trump administration (FLSA2021-4, FLSA2021-8, and FLSA2021-9).
- WHD withdrew the opinion letters because they were issued "prematurely … based on rules that have not gone into effect"—namely, the independent contractor and tipped employees Final Rules that were subject to President Biden's January 20 regulatory freeze memo.
- The three withdrawn opinion letters were among thirteen "lame duck" opinion letters issued by WHD following Election Day 2020.
- We expect Biden's DOL—under the leadership of Marty Walsh, pending Senate confirmation—to conduct a thorough review of the 69 other FLSA opinion letters issued under the Trump administration.
- A number of those opinion letters are likely to be withdrawn in the months to come, as WHD aligns itself with the new administration's agenda.

DOL Ends PAID Program

- On January 29, the DOL announced that it was discontinuing the Payroll Audit Independent Determination ("PAID") program, effective immediately.
- Under the program, which began in 2018, employers could self-report wage and hour violations to the DOL with the promise that the agency would supervise a resolution of the violations without seeking liquidated damages or imposing penalties.
- Despite its surface appeal, the program had questionable value for many employers, because it only resolved Fair Labor Standards Act claims—and not state law claims.
- So even after participation in the PAID program, an employer could still be faced with a state law class action for unpaid wages, liquidated damages, and penalties in one of the many states with their own wage and hour laws and enforcement mechanisms.

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Agency Appointments/Terminations

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Agency Changes: New EEOC Leadership

- President Biden has named veteran Democrat Charlotte Burrows Commissioner
  - Burrows has advocated for strong civil rights protections.
- Fellow Democrat Jocelyn Samuels will serve as second-in-command.
- Despite the change in leadership, the EEOC will maintain a Republican majority until at least mid-2022.

Charlotte Burrows

Jocelyn Samuels

Agency Changes: New OFCCP Leadership

- President Biden has appointed Jenny Yang as the new head of the OFCCP.
- Yang was formerly a Commissioner and Chair of the EEOC during the Obama Administration.
- While at the EEOC, Yang championed the notorious EEO-1 "component 2" pay reporting requirement; expanding the information the agency collects on an employer information report to include wage data and hours worked for employees within 12 specified pay bands.
- Yang's past could foreshadow an aggressive early effort to put wage discrimination at the forefront of OFCCP enforcement priorities.

Jenny Yang

Agency Changes: NLRB Firings

- Biden administration fired NLRB general counsel Peter Robb along with deputy general counsel Alice B. Stock.
- Both Robb and Stock refused to resign upon request from the administration.
- This marks the first time a president removed a sitting general counsel of the NLRB.
- Democrats will not have a board majority until at least August, when Republican member Bill Emanuel's term expires.

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Arbitration

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Arbitration

- Biden administration is expected to attempt to eliminate arbitration agreements between all employers and all employees in the United States.
- President Biden has indicated his support for the Forced Arbitration Injustice Repeal (FAIR) Act, legislation that would prohibit employers from requiring employees to sign pre-dispute arbitration agreements as a condition of employment.
- If this were to pass the Senate and be signed by the President, state and federal courts would be inundated with hundreds of thousands of new cases that are being dealt with in the arbitration context privately right now.

Arbitration: The Role of the Senate

- The FAIR Act was originally introduced in 2019 with little chance of passage, given a Republican majority in the Senate and President Donald Trump's vow to veto the measure.
- However, Republicans have not maintained their Senate majority and Democrats now have majority by way of Vice President Harris.
- Therefore, a reintroduced bill is likely to fare better, and President Biden is almost certain to sign such a bill.

Arbitration: Class Action Waivers

- If the Biden administration pursues an expected pro-worker agenda, those shifts may enhance the scope and value of workplace class actions and result in an increase in litigation.
- Employers can expect to see the void of government enforcement litigation filed by private employment-related litigation.
- *Epic Systems Corp. v. Lewis* in 2018 affirmed the enforceability of mandatory workplace arbitration agreements that contain class action waivers.
- Employers should expect the Biden administration to reinvigorate efforts to eliminate class action waivers.

Arbitration: The Role of the Supreme Court

- The current Roberts Court has become more conservative now with six conservative justices that include Justices Gorsuch, Kavanaugh, and Barrett (appointed by Trump).
- However, the arbitration-related pronouncements from the United States Supreme Court have been statutorily based, not constitutionally-based.
- The FAIR Act proposal aims to change the statute such that the Supreme Court would have no say in upholding an arbitration agreement that violates the federal statute being proposed.

Vacancies in U.S. Courts

Court	Authorized Judgeships	Vacancies	Nominees Pending	Nominees Pending for Future Vacancies
US Supreme Court	9	0	0	0
US District Courts (includes territorial courts*)	677	49	1	1
US Court of International Trade	9	1	1	0
US Court of Federal Claims*	16	3	3	0
US Court of Appeals	179	4	1	0
Total	890	57	6	1

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Non-Compete Reform

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Non-Compete Reform

- Nearly all states permit non-compete agreements in some form.
- Exceptions:
  - California has long had an outright ban on employee non-compete agreements.
  - North Dakota and Oklahoma allow them only in narrow circumstances.
- President Biden has proposed a nationwide non-compete ban in his “Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions.”
- Plan aims to eliminate all non-compete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets.
- The plan also includes an outright ban all no-poaching agreements.
- A ban would have a major impact on businesses seeking to protect sensitive business information that does not rise to the level of trade secret, such as information regarding prospective customers and competitive strategies.

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The Filibuster Rule

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The Filibuster Rule: Background

- The Senate ordinarily acts by a simply majority.
- With Vice President Harris casting the tie-breaking vote (*see* U.S. Const., Art. I, § 3), the Senate Republicans are effectively in the minority.
  - Since 1789, Vice Presidents have cast 268 tie-breaking votes in the Senate.
- Under Senate Rule XXII, however, it takes 60 votes to end debate on most bills and proceed to a final vote ("cloture").
- So absent a rule change in the Senate—a constant topic of debate—a minority of 41 Senators can indefinitely block a legislative vote by refusing to vote for cloture, thereby frustrating President Biden's legislative agenda.

The “Nuclear Option”

- Ordinarily, the Senate can only amend one of its rules with a super-majority vote (*i.e.*, 67 Senators).
- Under the so-called “nuclear option,” however, a simple majority of Senators can vote to override a standing rule of the Senate, such as the 60-vote rule to close debate—thereby eliminating the filibuster.
- November 2013: Senate Democrats used the nuclear option to eliminate the filibuster/60-vote rule on executive branch nominations and non-SCOTUS federal judicial appointments.
- April 2017: Senate Republicans extended the nuclear option to SCOTUS Court nominations to end debate on the nomination of Neil Gorsuch.

The “Nuclear Option”

- Senate traditionalists—which include President Biden and a number of other influential Democrats—have been reluctant to invoke the nuclear option and eliminate the filibuster on ordinary legislation.
- The argument against elimination of the filibuster is that it would deny the minority party any meaningful role in Senate action—a fate that both major parties would have to live with in the future.
- For as long as the filibuster rule exists, it can be an impediment to the signature items on President Biden’s legislative agenda.
- The threat of eliminating the filibuster, however, could force Republicans into legislative compromise.

Contacts

Allan S. Bloom
Partner, New York
+1 212 969 3880
abloom@proskauer.com

Nicole A. Eichberger
Partner, New Orleans
+1 504 310 2024
neichberger@proskauer.com

Evandro C. Gigante
Partner, New York
+1 212 969 3132
agigante@proskauer.com

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