

What A Biden Administration Could Mean For Employers

By **Anthony Oncidi** (August 5, 2020)

With the presidential election three months away, it's not too early to begin sizing up the potential implications of a presidency under presumptive Democratic presidential nominee Joe Biden — and the prospect of Democrat control of both houses of Congress.

For employers who know the legal landscape in California, much will seem quite familiar as Biden's policy initiatives would significantly benefit organized labor and materially increase employer mandates.

What follows is a summary of the employment-related proposals from Biden himself, as detailed on his campaign website,[1] as well as the legislative proposals that have passed the U.S. House of Representatives and/or garnered support among a majority of Democrats in the U.S. Senate.



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Importantly, if the filibuster rule is abolished in the Senate, legislation could pass that body with a bare 51-vote majority — in actuality, just 50 votes plus the vice president's tiebreaking vote — compared to a 60-vote threshold as currently required for most Senate action.

Support for abolishing the filibuster rule is growing among Democrats as they consider the implications of a possible electoral sweep in November.[2]

Although Biden said he opposed abolishing the rule earlier this year,[3] he more recently signaled openness to the idea, depending on how "obstreperous" Republican opposition is to his legislative proposals.[4]

Biden Campaign Proposals

Labor Laws and Unions

According to his website, one of the pillars of a Biden administration would be a plan for strengthening worker organization, collective bargaining and unionization. Generally speaking, the plan would seek to enhance the power of unions and employees relative to employers by expanding union membership and curtailing certain counterbalancing powers employers have enjoyed.

It's clear from these proposals that Biden's top priority would be to help organized labor recapture a greater percentage of the American workforce. Currently just over 10% of American workers belong to a union, which consists of 6.2% of the private sector and 33.6% of the public sector.[5]

Biden's plan would reinstate and codify the Obama administration's so-called persuader rule,[6] 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 work behind the scenes to manage employers' anti-union campaigns.

The plan also would authorize the National Labor Relations Board to force employers that have engaged in bad faith or surface negotiations back into collective bargaining.[7] Affected companies would be required to: (1) make workers whole for the time lost in stalled negotiations; and (2) pay an additional penalty. This policy would increase the pressure on employers negotiating with unions to robustly engage so as to avoid charges of so-called surface negotiations.

Next, Biden's plan proposes holding executives personally liable for interfering with union organizing.[8] The penalties could be enhanced to include criminal liability if the interference is intentional.[9] By raising the stakes for not only companies but also individual executives, this policy would make it all the more crucial for executives to make sure they are toeing the line in allowing union organizing to proceed without any interference.

In addition, the plan would repeal states' authority under the Taft-Hartley Act to enact right-to-work laws.[10] Currently, 27 states have right-to-work statutes or constitutional provisions on the books, which generally prohibit union security agreements that require all employees to pay union dues as a condition of employment. Repealing right-to-work laws would greatly increase unions' power, since workers would effectively no longer have the option of abstaining from paying union dues.

Also, Biden's plan would seek to enact the Public Service Freedom to Negotiate Act[11] and the Public Safety Employer-Employee Cooperation Act,[12] both of which would guarantee state and local public employees the right to organize and bargain collectively.[13]

The plan would also seek to enact the Protecting the Right to Organize Act,[14] which would strengthen workers' ability to form a union and collectively bargain.[15] Specifically, the bill, which already has passed the House, would:

- Prevent employers from mandating employee attendance at meetings intended to discourage organizing.[16]
- Prohibit employers from enforcing agreements that would prevent employees from bringing or joining a class action.[17]
- Adopt, on a federal level, California's strict ABC test for determining if a worker is an employee or an independent contractor.[18] Under the ABC test, it is significantly more likely that workers will be deemed the former and not the latter.
- Prohibit employers from permanently replacing or discriminating against striking workers.[19]
- Codify the Browning-Ferris joint employer definition, thus expanding the definition of a joint employer under federal labor law to include companies that have indirect control or mere potential to control, but no actual control, over employees.[20]

Together, the provisions of the Protecting the Right to Organize Act would increase employees' power relative to employers' by expanding the definition of who is eligible to join a union and taking away certain employer powers to prevent unionization.

Next, Biden's plan would allow unions to use the so-called card check process, where cards are collected by union organizers, as an initial option to form a union rather than by a secret ballot election.[21] This would bolster unionization efforts by expanding the number of

methods available for unions to organize the workplace.

Further, the plan would create a Cabinet-level working group focused on protecting the rights of public and private sector unions.[22] Depending on the scope of the working group's authority, this would create a very powerful voice to speak on behalf of unions at Cabinet-level meetings, effectively on the same level as the secretaries of the U.S. Departments of Treasury, Labor and Commerce.

Finally, the plan would seek to enact the Butch Lewis Act,[23] which would create a loan program for underfunded multiemployer defined benefit pension plans and allow sponsors of certain multiemployer pension plans to apply for financial assistance from the Pension Benefit Guaranty Corporation.[24]

This bill could actually be a boon for employers struggling with massive underfunded pension plans, providing them with a lifeline out of simply letting the plans fail. The Rehabilitation for Multiemployer Pensions Act,[25] which incorporates provisions of the Butch Lewis Act, already has passed the House.

Working Conditions

The Biden campaign's overarching plan for the American workplace doesn't stop at the collective bargaining table. The Biden platform also aims to overhaul working conditions for employees more generally.

Among the proposals are a limitation on noncompete agreements only to those that are necessary to protect trade secrets, as well as the complete elimination of no-poach agreements.[26] Since noncompete agreements — and, to a somewhat lesser extent, no-poach agreements — are often used by employers seeking to protect against economic harm caused by departing employees, restricting the availability of these agreements would require employers to find alternative ways to shield against the loss of confidential and proprietary information.

Biden also would reinstate the Obama-era rule to improve workplace injury and illness tracking so that companies would be required to publicly report workplace injuries.[27] This rule would put extra scrutiny and pressure on employers with high-injury workplaces, while adding another layer of regulatory and reporting requirements.

Next, Biden would seek to enact the Protect Our Workers from Exploitation and Retaliation Act,[28] which would expand the availability of U visas to cover unauthorized immigrants who have been victims of labor law violations.[29] U visas are available for victims of certain crimes — most commonly cases of domestic violence, sexual assault, trafficking and other crimes against unauthorized immigrants — typically to assist law enforcement or government officials in the investigation or prosecution of criminal activity.[30]

One goal of this bill would be to reduce the likelihood of exploitation of unauthorized workers based upon the theory that such workers are less likely to report workplace violations or crimes for fear of deportation or other negative consequences.

Finally, Biden would take steps to increase the number of investigators at labor enforcement agencies such as the NLRB, the U.S. Equal Employment Opportunity Commission, the Occupational Safety and Health Administration, and the Mine Safety and Health Administration.[31]

With the goal of reducing the number of complaints that fall through the cracks or face delays due to limitations on enforcement capabilities, a fortified labor enforcement network could result in employers more frequently having to respond to charges and complaints and participate in agency investigations, a process which almost certainly will be more costly and time-consuming for most businesses.

Wages

Paychecks are the quintessential pocketbook issue for many Americans, and the Biden campaign has proposed a number of reforms specifically aimed at these issues.

First, Biden would seek to enact the Paycheck Fairness Act,[32] which would address wage discrimination on the basis of sex.[33] Specifically, this bill, which already has passed the House, would:

- Narrow the "factor other than sex" defense to apply only where the wage disparity is based upon a "bona fide factor other than sex such as education, training, or experience." [34]
- Prohibit employers from restricting employees from discussing wage information.[35]
- Increase civil penalties for employers that violate equal pay provisions.[36]
- Require employers to provide compensation data according to employees' race, sex and national origin to the EEOC.[37]

If enacted, this bill would make it easier for employees to sue their employers for wage discrimination on the basis of sex, and in the process increase employers' incentives to review their pay practices to detect potential inadvertent pay inequities. It is worth noting, however, that numerous states, including California and New York, have already enacted pay equity laws at the state level encompassing many of the elements of the proposed Paycheck Fairness Act.

In addition, Biden would take steps to raise the federal minimum wage from \$7.25 to \$15 per hour, as well as:

- Eliminate the tipped minimum wage, which permits employers of tipped workers to include tips as part of payment of the minimum wage.[38]
- Eliminate the subminimum wage for individuals with disabilities.[39]
- Index the minimum wage to the median hourly wage.[40]

While these proposals would affect employers nationwide, the moves may more significantly impact employers in jurisdictions with lower costs of living by potentially raising the cost of production, especially for employers in food service, retail and other sectors that employ large percentages of minimum-wage workers.

Biden also would seek to enact the Fairness for Farm Workers Act,[41] which would extend overtime pay and minimum wage to agricultural workers on nonfamily farms.[42] That bill would go hand in hand with another Biden proposal to codify the Obama-era U.S. Department of Labor rule extending overtime pay and minimum wage protections to home

care workers.[43] Together, these policies would bring the agriculture and home care sectors into the fold of overtime pay and minimum wage requirements.

Biden also would reinstate the Obama-era rule allowing home care workers to deduct union dues out of their Medicaid-funded paychecks, potentially encouraging unionization within this workforce.[44] While this rule would not itself increase wage costs for employers of home care workers, by easing the path to unionization it could result in these workers bargaining for higher wages down the line.

Finally, Biden would seek to enact the Domestic Workers Bill of Rights Act,[45] which would create a national labor standards framework for domestic workers.[46] This bill would provide domestic workers with the right to overtime pay, paid sick leave, and meal and rest breaks,[47] as well as create a Domestic Worker Wage and Standards Board to make additional recommendations for domestic workplace protections.[48]

Employee Benefits

Paid sick and family leave have long been the subject of significant discussion at the national level. A Biden administration would aim to raise minimum benefit levels nationwide by passing the Healthy Families Act,[49] which would require employers to provide sick leave.[50] 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 sick leave for every 30 hours worked;[51] and
- 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.[52]

Biden also has proposed instituting 12 weeks of paid family and medical leave, though the details of this proposal remain sparse.[53] Along with the Healthy Families Act, this expanded guarantee of paid leave for employees could affect employers by raising costs per employee, depending on the funding mechanisms for benefits ultimately incorporated into any such laws.

Civil Rights

In recent weeks, employers nationwide have been more closely considering issues regarding diversity and underrepresented populations in the workplace. A Biden administration would seek to codify reforms intended to increase workplace diversity and inclusion.

First, Biden would seek to enact the Equality Act,[54] which already has passed the House and would prohibit employment or other kinds of discrimination — including housing, education or public accommodations — on the basis of sexual orientation or gender identity.[55]

For employers, however, the impact of this bill may be significantly less pronounced than it would have been earlier this year, given the U.S. Supreme Court's June decision in *Bostock v. Clayton County, Georgia*,[56] holding that the prohibition of discrimination because of sex under Title VII of the Civil Rights Act includes discrimination on the basis of sexual orientation and gender identity.

Second, Biden would seek to mandate that employers publicize the diversity of their senior leadership and overall workforce.[57] While this policy would not expressly require employers to make any changes to their leadership or workforce, public pressure from the publication of such information could incentivize efforts to actively diversify, especially in senior management positions.

Third, Biden proposes requiring employers to disclose whether they have engaged in an interactive process with workers with disabilities in order to accommodate those workers in the workplace and hiring process.[58] While the details of what this disclosure process would look like are unclear, it could result in greater liability for employers that have failed to fully accommodate employees with claimed or perceived disabilities.

Federal Procurement

The significant portion of the nation's budget allocated for federal contracts makes government procurement an attractive prospect for many companies. A Biden administration would seek to take advantage of this strong private sector interest in federal procurement to encourage labor and employment reforms among prospective contractors.

Among the proposals, Biden would reinstate the Obama administration's executive order on fair pay and safe workplaces, which would consider employers' workplace conditions as a factor when awarding federal contracts.[59] Prospective contractors would be required to disclose to a federal agency all labor law violations from the last three years in order to obtain a contract, including violations in the areas of wages, civil rights, and health and safety.

In addition, employers seeking federal contracts would be required to sign neutrality agreements pledging not to interfere with union organizing. There would be multiyear debarment for employers who engage in wage theft, union-busting or other labor law violations.[60]

Federal contractors also would be required to disclose publicly their recruitment practices for certain underrepresented groups, including women, people of color and people with disabilities.[61] While the proposal does not include express diversity requirements in order to be eligible for a federal contract, the disclosure requirement does suggest that having a more diverse workforce and recruitment process could make a company a more attractive prospect when competing for a contract.

Additionally, federal contractors would be required to pay their employees at least a \$15 minimum wage.[62] As discussed above, the Biden campaign also has announced its intent to implement a \$15 minimum wage nationwide, but even if that proposal does not gain traction, the increased minimum wage requirement for federal contractors could still move forward.

Finally, Biden proposes publicly posting online whenever a federal contractor requests a waiver for foreign-produced goods or components, so that the public and stakeholders — including labor unions — are notified.[63] The public scrutiny that could come along with such posting could negatively impact companies that rely on non-U.S. supply chains.

Workforce Development

The specter of workplace automation continues to loom on the horizon for many American workers, whether it be on the assembly line, in technology or white collar fields including

law. As per the current proposals, a Biden administration would take steps to require employers receiving federal funds to give employees notice of technology changes and automation that affect them.[64] Additionally, covered employers would be required to:

- Offer paid skills training to affected employees.
- Discuss workplace technology and automation with unions as part of collective bargaining.

Biden also would seek to claw back tax benefits and public funding from companies that offshore American jobs.[65] Losing out on certain tax breaks could be a determinative factor for employers considering outsourcing work to lower-cost countries, though this could depend on the scope of the workforce in question versus the extent of the clawback provisions ultimately enacted.

But not all of the proposed Biden administration policies would necessarily increase burdens on employers. Some policies have the potential to help both employees and employers by increasing access to a broader potential workforce population and helping employers retain existing employees.

For example, certain proposals would make it easier for employers to hire and retain immigrant workers in response to labor shortages.[66] Specific proposals include:

- Allowing workers on temporary work visas to change jobs;
- Increasing the cap on employment-based visas, including for high-skilled visas; and
- Eliminating country-based limits on employment visas.

Additionally, a Biden administration would seek to implement a federally funded employment insurance program, allowing employers to keep workers employed at reduced wages or hours, with the federal government making up the difference.[67] This program would benefit employers that are in difficult financial straits but wish to avoid laying off or furloughing employees.

Biden also would aim to enact the Transformation to Competitive Employment Act,[68] which would establish a state grant program for employers to transition their workplaces to integrate and support workers with disabilities.[69] For employers who are interested in creating more work opportunities for individuals with disabilities, this grant program could help in closing the gap in funding necessary to make workplaces properly accessible.

Congressional Democrat Proposals

The Biden campaign isn't the only one making big plans for a potential blue wave in November. Although they are not (yet) expressly included in the official Biden campaign proposals, congressional Democrats have some major legislative priorities of their own in the labor and employment space.

The Forced Arbitration Injustice Repeal Act,[70] which already has passed the House, would invalidate predispute arbitration agreements in the workplace by making such agreements unenforceable as to employment or civil rights disputes — in addition to consumer and antitrust disputes.[71] If enacted, this bill would make it more difficult for employers to prevent legal disputes with employees from ending up in court rather than in arbitration.

The Wage Theft Prevention and Wage Recovery Act,[72] would prevent wage theft by enhancing transparency requirements around compensation, including:

- Requiring employers to provide employees regular pay stubs;[73]
- Establishing a maximum 14-day window to make final payment to employees following termination;[74] and
- Allowing criminal prosecution for willful violations of wage theft, record falsification or retaliation.[75]

If enacted, this bill would make it critical for employers to be diligent about paycheck details, so that even inadvertent slips in providing pay stubs or final payments to departing employees don't result in legal action.

The Protecting Older Workers Against Discrimination Act,[76] which already has passed the House, would make it easier for employees to prove an age discrimination claim against an employer.[77]

The Supreme Court, in 2009, held in *Gross v. FBL Financial Services Inc.*[78] that under the federal Age Discrimination in Employment Act, employees alleging disparate treatment must prove that age discrimination was the but-for cause of an adverse employment action in order to prevail, and that showing that age discrimination was merely one of several motivating factors or a mixed motive in the adverse action was not enough.

If enacted, the Protecting Older Workers Against Discrimination Act would supersede the *Gross* opinion by permitting use of the mixed motive test for establishing unlawful age discrimination in employment, allowing an age discrimination suit to move forward even if age discrimination was not the but-for cause of an adverse employment action.

Finally, the Workplace Violence Prevention for Health Care and Social Service Workers Act,[79] which also already has passed the House, would require health care and social service employers to develop a workplace violence prevention plan.[80]

Conclusion

Of course, circumstances could change between now and Election Day, but it is quite possible that if Biden wins and the Democrats flip just a few more seats in the Senate while maintaining control of the House, many if not most of these measures could become law as soon as early next year.

If that happens, employers all over the country may find themselves "California Dreamin'" next January — but not necessarily in the ways they might have hoped.

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The author would like to thank Laura M. Fant, a senior associate at the firm, and Dixie M. Morrison, a summer associate at the firm, for their assistance in preparing this article.

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[9] Biden, *supra* note 7.

[10] *Id.*

[11] S. 1970/H.R. 3463.

[12] S. 1394/H.R. 1154.

[13] Biden, *supra* note 7; S. 1970, 116th Cong. § 3(b) (2019); S. 1394, 116th Cong. § 4 (2019).

[14] S. 1306/H.R. 2474.

[15] Biden, *supra* note 7.

[16] S. 1306, 116th Cong. § 4(c)(3) (2019).

[17] *Id.* at § 4(c)(4).

[18] *Id.* at § 4(a)(2).

[19] *Id.* at § 4(c)(1).

[20] Biden, *supra* note 7.

[21] *Id.*

[22] *Id.*

[23] S. 2254.

[24] Biden, *supra* note 7; S. 2254, 116th Cong. § 4 (2019).

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[26] Biden, *supra* note 7.

[27] *Id.*

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[42] Biden, *supra* note 7; S. 385, 116th Cong. § 2 (2019).

[43] Biden, *supra* note 33.

[44] *Id.*

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[46] Biden, *supra* note 29.

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[53] Biden, *supra* note 33.

[54] S. 788/H.R. 5.

[55] Biden, *supra* note 33; S. 788, 116th Cong. § 7 (2019).

[56] 140 S. Ct. 1731 (2020).

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[71] S. 610, 116th Cong. § 3(a) (2019).

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[74] *Id.*

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[76] S. 485/H.R. 1230.

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[78] 557 U.S. 167 (2009).

[79] S. 851/H.R. 1309.

[80] S. 851, 116th Cong. § 103 (2019).