



Employment and Labor Impacts from 2020 Elections- How Your Business May Be Affected

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With the country reeling from an unprecedented health crisis, a cratering economy, and historic civil and social unrest, uncertainty permeates the labor and employment policy landscape. The recent national elections only add to that uncertainty. What will Congress and the administration do in the remaining weeks of 2020? What is on the horizon for 2021? Set forth below are some of the recent major policy developments impacting the workplace.

I. Executive Actions

The quickest and easiest way for President Joe Biden to initiate policy changes is by rescinding certain executive orders issued by President Donald Trump and issuing his own executive orders. Revoking myriad Trump executive actions relating to immigration will top the list, including those relating to refugees and asylees, certain COVID-19-related travel restrictions, and the ban on certain nonimmigrant visas (Presidential Proclamation 10052 of June 22, 2020). In turn, Biden is likely to reinstitute the Deferred Action for Childhood Arrivals (DACA) program, as well as the temporary protected status of certain eligible nationals.

In the employment law space, Biden is expected to revoke President Trump's Executive Order on Combating Race and Sex Stereotyping, which is opposed by civil rights groups and the business community. It is very possible Biden may follow this action with a proactive requirement on federal contractors to *require* diversity and inclusion or implicit bias training and programs. Additionally, Biden may also attempt to resuscitate a version of President Barack Obama's Fair Pay and Safe Workplaces executive order.

II. Congress: A More Modest Agenda

Leading up to the election, there was much speculation regarding whether the Democrats would abandon the legislative filibuster in the event they took control of the Senate. Such a move would allow Senators to pass legislation with a simple majority vote (51 votes), rather than the 60 vote threshold that is currently required. Eliminating the filibuster would be a monumental and historic change to the way bills are drafted and passed in Congress. In this scenario, a Senate without the filibuster would enable Democrats to expand the number of seats

on the U.S. Supreme Court, and to pass legislation dealing with the COVID-19 crisis, voting rights, gun control, climate action, LGBTQ rights, and more.

The elections and political aftermath, however, have created a situation in which the filibuster will more than likely survive. At best, the Democrats will have 50 Senators in 2021. A tiebreaking vote by Vice President Harris would, therefore, appear to give the Democrats the necessary votes to scrap the filibuster. But Senator Joe Manchin (D-WV) has already stated that he will not vote to eliminate the filibuster.¹ Thus, with the filibuster likely remaining intact, Republicans will be able to thwart the Democrats' legislative efforts, even if they win both Georgia Senate races. Similarly, if Republicans prevail in one or both of the Georgia races, Senate Democrats will be able to filibuster Republican bills (the White House and House of Representative would also obviously work as a check on the Senate).

Of course, this is not to say that there is no chance of employment related legislation being enacted. If the political winds blow in just the right way, there is a slight possibility that we could see legislative action on COVID-19/economic relief, pregnancy accommodation, a fix of the multiemployer pension plan crisis, as well as legislation eliminating the 7% per-country cap for employment-based immigrant visas.

III. The U.S. Department of Labor.

a. Who Will Be in Charge?

There is a saying in Washington, D.C., that “personnel is policy.” Whomever President-elect Biden nominates to run the various labor and employment related agencies will have an enormous influence on federal labor and employment policy. Democrats may have learned a lesson from President Obama's appointment of Congresswoman Hilda Solis to helm the DOL during his first term. Solis did not come into the job with much labor and employment experience and did not advance Democrats' agenda as quickly as they would have liked. Indeed, DOL's regulatory machine really did not hit its stride until President Obama's second term, when Thomas Perez became Secretary of Labor. Thus, look for Biden to appoint a Secretary of Labor who is aggressive, savvy, and experienced.

The process of taking over functions at the DOL has already begun. President-elect Biden announced his “Agency Review Teams” to begin evaluating agency operations in anticipation of the shift in executive power in January 2021. The labor review team (overseeing Department of Labor, the National Labor Relations Board, and Equal Employment Opportunity Commission, among other agencies) includes many familiar faces from President Obama's administration. Individuals such as Jenny Yang (former EEOC chair), Seth Harris (former DOL Deputy Secretary and Acting Secretary), and Patricia Smith (former DOL Solicitor) join others from organized labor, academia, and progressive think tanks. This group will likely influence the selection of Biden's DOL nominees, and may even be candidates themselves.

¹ <https://thehill.com/homenews/senate/525236-manchin-shoot-down-chance-that-senate-democrats-nix-filibuster-expand-court> . Other Democrats, such as Kyrsten Sinema of Arizona and Jon Tester of Montana have expressed concerns with scrapping the filibuster.

Expect Biden's DOL to be aggressive from the start, in terms of both regulatory actions and enforcement proceedings. Clawing back some of the gains made by the Trump DOL will, of course, be a priority. But beyond that, expect this DOL to go on the offensive with an agenda that is even more progressive than that of President Obama's DOL.

b. Occupational Safety and Health Administration

The ongoing COVID-19 pandemic has thrust OSHA into the spotlight, and workplace safety will likely be *the* priority in a Biden DOL. First and foremost, this likely means offering up a nominee to be Assistant Secretary for OSHA in quick fashion. Additionally, expect OSHA to begin developing a COVID-19-specific Emergency Temporary Standard right away. Enforcement is likely to tick up, too, especially on COVID-19-related complaints. Finally, while it was not abandoned entirely by the current OSHA, a Biden OSHA can be expected to return to a much aggressive "regulation by shaming" campaign through the use of conclusory and embellished press releases.

c. Wage and Hour Division (WHD)

In addition to an aggressive enforcement strategy, the WHD of the DOL will undoubtedly pursue a robust regulatory agenda that could potentially be described as "repeal and replace." The agenda will likely include the following initiatives:

- *Joint employer.* The Trump DOL's joint employer regulation under the Fair Labor Standards Act has been enjoined by a federal court. Whatever the legal status of the regulation, a Biden DOL is expected to "repeal and replace" the rule with a broader more amorphous joint employer standard.
- *Independent contractor.* Similarly, if the Trump administration finalizes an independent contractor regulation, it will quickly be targeted for reversal. Senate Democrats may try to repeal it by using the Congressional Review Act, (though they may not have the votes and doing so would severely limit Democrats' ability to promulgate their own version of an independent contractor regulation). If Congress does not act, the DOL will rescind the regulation via rulemaking. The Biden DOL may then proceed to issue its own version of an independent contractor standard, but the controversy surrounding A.B. 5 in California may give them pause.
- *Overtime.* A federal court ruling in late 2016 blocked the enactment of the Obama administration's overtime rule. Although the Trump DOL finalized their own overtime rule in September 2019 that increased the salary basis threshold, it probably will not satisfy a Biden DOL, which most likely would want it at \$47,000 or higher.
- *Opinion letters.* Opinion letters offer a way for stakeholders to seek assistance from the DOL when confronted with difficult questions as to the application of federal wage and hour law. In 2010, the Obama administration ended the opinion letter process in favor of sweeping Administrator's Interpretations. The opinion letter program was reinstated in the current administration, but may be jettisoned in a Biden DOL.

- *PAID program.* A Biden WHD can expected to do away with the Payroll Audit Independent Determination (PAID) program that encourages employers to self-report wage and hour violations.

d. Office of Federal Contract Compliance Programs

In 2019, OFCCP hauled in a record-breaking \$40 million plus in legal settlements with federal contractors. That figure does not tell the whole story of the OFCCP in the Trump administration, but is indicative of an aggressive enforcement philosophy that carried over from the Obama administration (despite welcome efforts towards compliance assistance and transparency). Expect a Biden OFCCP to push this enforcement posture even further, particularly when it comes to alleged compensation discrimination (though whoever is running OFCCP in 2021 will have to work around a 2020 high profile ruling against OFCCP that calls into question the agency’s statistical analyses).

Additionally, OFCCP will likely pursue the following changes:

- Roll back policies and processes established pursuant to President Trump’s Executive Order on Combating Race and Sex Stereotyping.
- Implement affirmative diversity and inclusion obligations pursuant to a potential executive order.
- Rescind any regulation relating to religious organizations with federal contracts.
- Restart the 2014 compensation data collection tool proposal. This regulation never got off the ground and was overtaken by the 2016 wage and hour data collection changes to the EEO-1 form. In part because the EEOC will have a Republican majority through at least mid-2022, OFCCP may seek to revive this proposal.

IV. National Labor Relations Board

Republicans will maintain a majority at the NLRB at least into the summer of 2021, though Democrat member Lauren McFerran will assuredly be named Chair in early 2021. She could look to slow down case decisions, and especially rulemakings, until reinforcements arrive. Of course, likely Senate Majority Leader Mitch McConnell will have a say in who gets confirmed to the Board and when.

Once Democrats gain a majority, it should come as no surprise that they will seek to roll back current Board policies and return to policies that favor organized labor. Assuming that Congress fails to enact the PRO Act, a Democrat-dominated Board can be expected to enact it administratively, where possible. Other action items for a Democrat-controlled NLRB include:

- *Joint employer.* In February 2020, the Board issued a final rule that reestablished the direct and immediate control standard that existed for decades prior to the 2015 *Browning-Ferris Industries (BFI)* case. A new Board can be expected to undo this rule and issue its own rule that cements BFI via regulation.
- *Election procedures.* A new Board may look to restore all elements of the “ambush” election rules that went into effect in 2015 but which were amended in 2019.

- *Employee choice regulations.* A new Board will reverse 2020 final rule changes to the Board's standards on blocking charges, voluntary recognition, and Section 9(a) bargaining relationships in the construction industry.
- *Other Changes.* Over time, expect a Democrat dominated Board to address the following issues via caselaw or regulation:
 - Fractured bargaining units (*Specialty Healthcare*)
 - Employee use of email (*Purple Communications*)
 - Independent contractors
 - Graduate students
 - Contract bar
 - Secondary activity
 - Employee discipline
 - Dues checkoff
 - Arbitration deferral

V. Equal Employment Opportunity Commission

Recent appointments to the EEOC will give the Commission a Republican majority through at least mid-2022. Further, Republican-appointed General Counsel Sharon Fast Gustafson will remain in office until 2023. But just like at the NLRB, President Biden is expected to name a Democrat Commissioner (likely Charlotte Burrows) as the Chair. A Republican-dominated EEOC will try to maneuver around the Chair to finalize a conciliation regulation, a rule on employer-sponsored wellness programs, and opine on the results of a National Academy of Sciences pending analysis of EEO-1 pay and hours worked data.

Of course, in Democratic hands, the Commission would likely reverse these initiatives. In particular, no matter what the current EEOC might say about the utility of collecting compensation data, a flipped Commission can be expected to explore ways to collect such information from employers. Additionally, a Democrat-controlled Commission could revoke a September 2020 opinion letter clarifying EEOC's interpretation and enforcement of "pattern or practice" litigation under § 707(a) of Title VII of the Civil Rights Act of 1964. The letter confirms that when pursuing § 707 pattern-or-practice cases, the EEOC must follow the same administrative prerequisites as when pursuing § 706 cases on behalf of individual employees, such as the requirement of an underlying charge of discrimination and engaging in conciliation.

VI. Immigration

Chances are that a Biden presidency will be friendlier to business immigration needs than the current administration, but this does not mean that there won't be any challenges for employers that supplement their work forces with high-skilled foreign labor. Biden has a populist/protectionist streak and his campaign website states the following:

Biden will work with Congress to first reform temporary visas to establish a wage-based allocation process and establish enforcement mechanisms to ensure they are aligned with the labor market and not used to undermine wages. Then, Biden will support expanding the number of high-skilled visas and eliminating

the limits on employment-based visas by country, which create unacceptably long backlogs.

Thus, employers should not expect all scrutiny of the high-skilled nonimmigrant visa programs to disappear with a Biden victory. That being said, expect a Biden administration to:

- restore DACA and TPS programs;
- reaffirm the rule allowing employment authorization for certain H-4 spouses of H-1B nonimmigrants.
- rescind (or not defend) the U.S. Department of Homeland Security's rule on Strengthening the H-1B Nonimmigrant Visa Classification Program and accompanying DOL wage rule;
- rescind the Public Charge Ground of Inadmissibility rule;
- evaluate and possibly rescind current travel bans, although the Covid-19 travel bans may be take time to rescind as the situation evolves;
- rescind the proposed "duration of status" rule for nonimmigrant academic students, exchange visitors, and representatives of foreign information media;
- rescind the proposed rule on the collection and use of biometric data in the enforcement and administration of immigration laws; and
