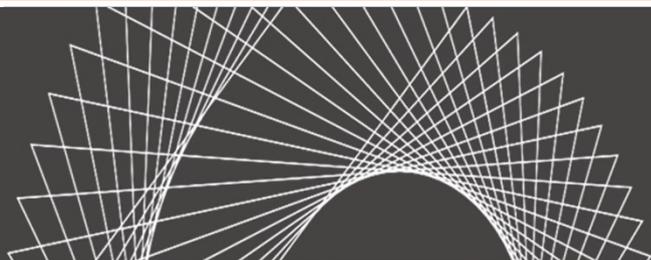


Employment Law Under The Biden Administration



Akin Gump
STRAUSS HAUER & FELD LLP

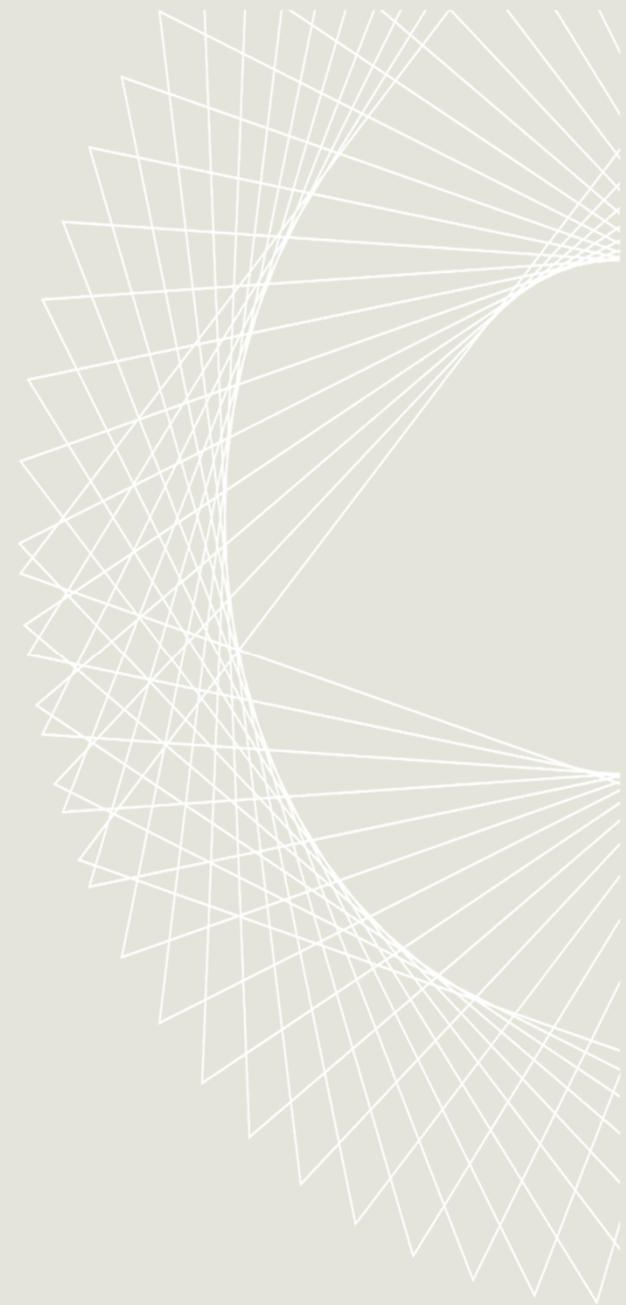
January 26, 2021

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2021 Political Landscape



Unified Democratic Control with Tight Margins

- Transition to a post-Trump world—all trains are running behind schedule.
- Senate: 50/50 with VP Harris breaking ties.
- House: 221 Democrats and 211 Republicans (3 vacancies).



Factors Impacting the 2021 Agenda

COVID, COVID, COVID

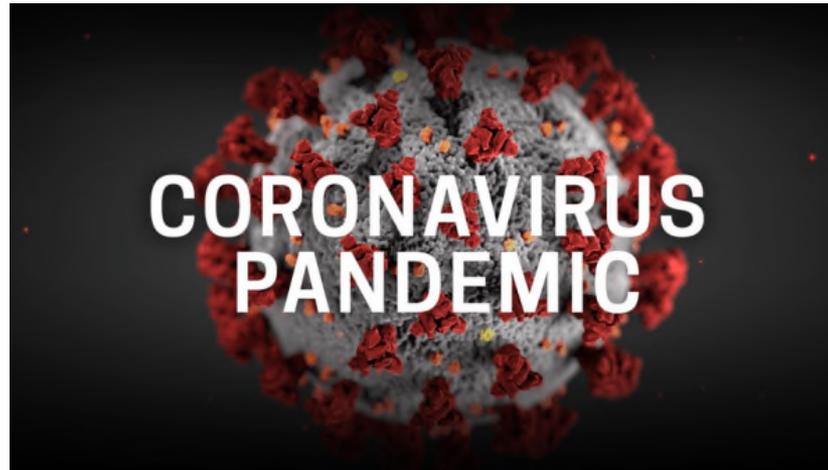
- Success tied to a return to some type of normalcy

Long Term Impact of Pandemic

- Frontline workers
- Racial disparities

Bandwidth Challenges

- Competing priorities



Policy Priorities

- **Robust federal approach to the pandemic rather than a patchwork of state laws.**
- **Biden’s stimulus proposal as an “opening bid” and a potential long road ahead.**
 - Unemployment insurance
 - Frontline worker protections
 - Minimum wage
 - Expand paid leave



Policymaking Tools (in order of exposure)

**Executive Orders/
Congressional Oversight**

Enforcement

Regulatory Action

Legislation

Agency Appointments and Removals

• Department of Labor

– Secretary of Labor: Marty Walsh

- Former mayor of Boston.
- Deep history of work in labor unions.
- But, viewed as a consensus builder.
- Likely focuses: wage and hour, workplace safety.



• NLRB

– Chair: Lauren McFerran

- Current and sole Democratic Board member.



– FIRED: General Counsel Peter Robb & Deputy General Counsel Alice Stock

- Unprecedented —no President has ever removed a sitting GC.
- GC appointed to 4 year term by the Senate in November 2017.



• EEOC

– Chair: Charlotte Burrows

- Former DOJ deputy attorney general.
- Served as Sen. Edward M. Kennedy's top adviser on civil rights.



– Vice Chair: Jocelyn Samuels

- Former top-ranking civil rights official in the Justice and Health and Human Services departments under the Obama administration.



• OSHA

– Deputy Asst. Secretary: Jim Frederick

- Expected to spearhead COVID-19 efforts.



Biden's Busy First Week

- **17 Executive Orders on Inauguration Day**

- Jan. 20 EO: Directs head of each agency to review prior agency actions and consider additional actions to ensure it is implementing the policy of prohibiting discrimination based on sexual orientation or gender identity.



- **Subsequent Executive Orders**

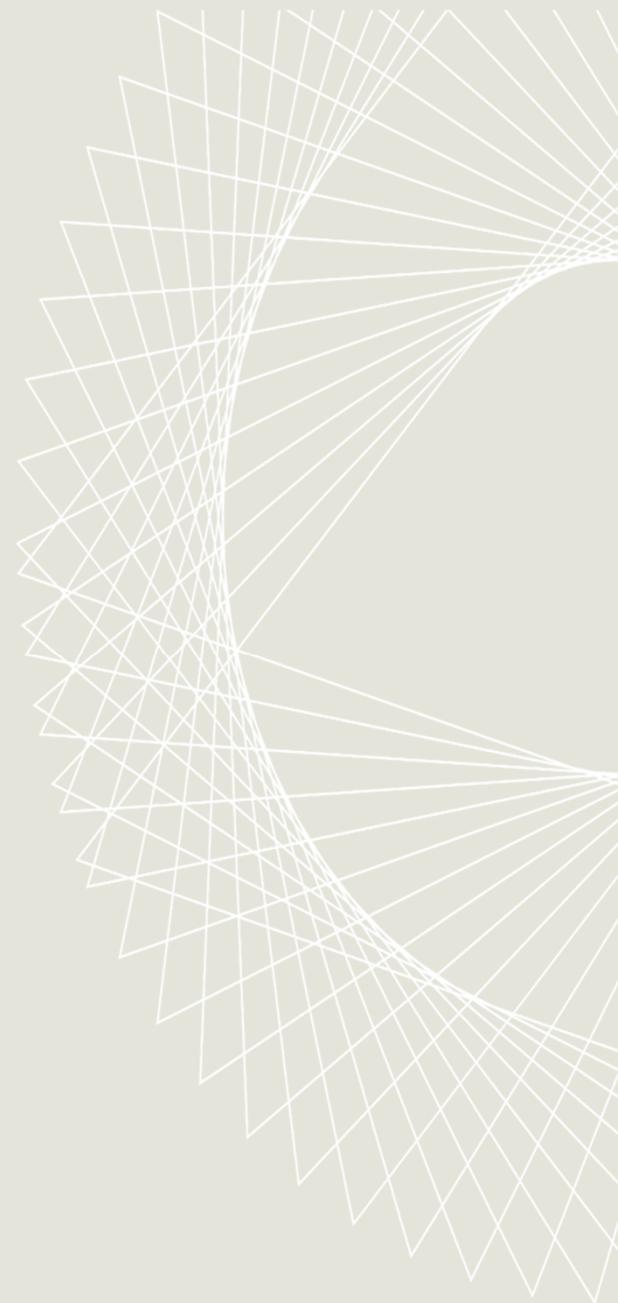
- Jan. 21 EO: Directs OSHA to issue revised guidance to employers on workplace safety during the pandemic.
- Jan. 22 EO: “protecting and empowering federal workers and contractors.”
 - Revoked orders put in place by Trump to restore collective bargaining power for federal workers.
 - Promotes a \$15 minimum wage.
- Jan. 22 EO: Directs the DOL to clarify that workers have a right to refuse employment that will jeopardize their health and if they do so, they will still qualify for unemployment insurance.

Biden Employment Agenda

- Wage & Hour
- Independent Contractors
- Labor Relations
- Equal Employment Opportunity
- Paid Leave
- Arbitration
- Non-Competes
- Worker Safety



Wage & Hour



Minimum Wage

- Current federal minimum wage: \$7.25 per hour (unchanged in 11 years).
- Likely target is \$15 per hour (with potential for automatic increases in future).
 - \$15/hr minimum wage proposed as part of Biden’s \$1.9 trillion coronavirus aid package (“The American Rescue Plan”).
 - Biden signed an executive order to promote \$15 minimum wage for federal workers.
 - Biden say he will require federal contractors to pay \$15.00 minimum wage and provide family-sustaining benefits.
 - Proposes to end tip credit.
- Likely bipartisan support for some increase.
- Many states and localities have already increased minimum wage.
 - Florida minimum wage will increase to \$15 by 2026.
 - CA minimum wage is \$14; will increase to \$15 in 2022.
 - New York City, Long Island, and Westchester minimum wage is \$15; rest of New York state is \$12.50.



Overtime Exemption Salary Threshold

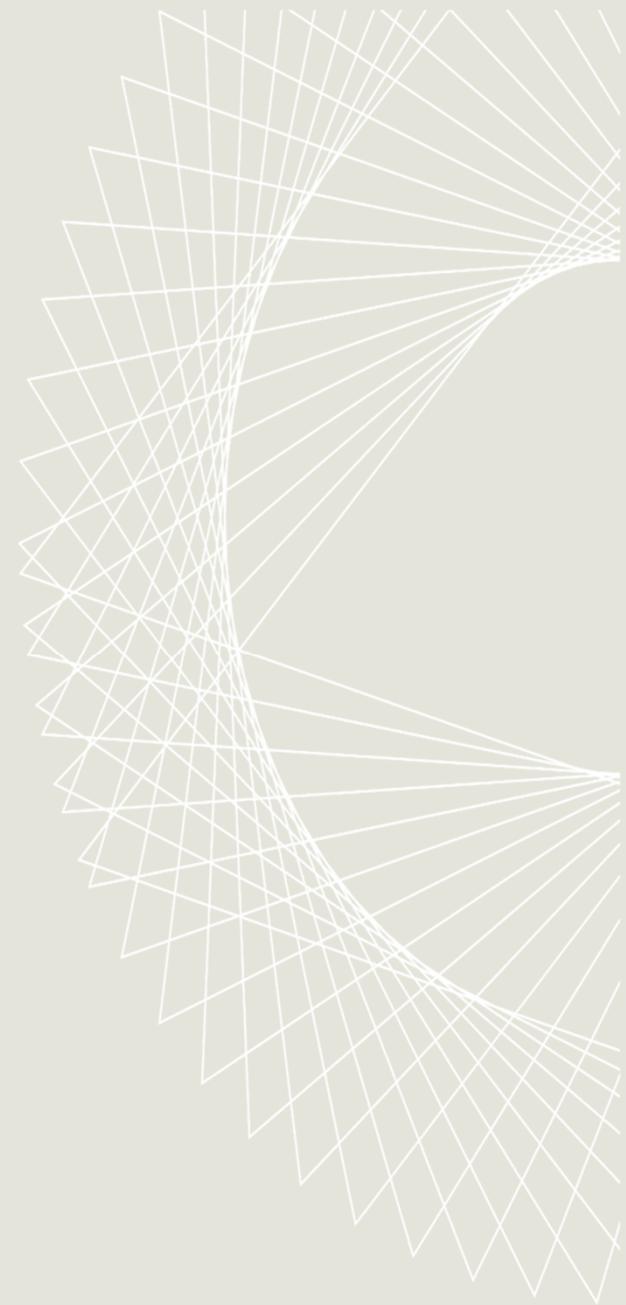
- Biden will likely seek to raise to raise the minimum salary threshold for overtime eligibility under the Fair Labor Standards Act (FLSA).
- In 2016, Biden led the effort to increase the overtime salary exemption threshold from \$23,660 (current threshold) to \$47,476.
 - DOL regulations were set to go into effect in 2017 until being blocked by a federal injunction.
 - Regulation also included an automatic escalator.
- Current threshold is \$35,568, after Trump DOL issued revised rule in 2019 (effective 1/1/2020).
- Possible changes can be accomplished through regulatory action.
 - Higher salary level.
 - Automatic salary adjustment based on inflation.



Joint Employment and Independent Contractors

- Obama administration issued guidance regarding joint employment, independent contractor tests through “Administrator Interpretations.”
 - Attempted to unify approaches to determining joint employment and independent contractor status.
 - Used existing multi-factor framework, but emphasized “economic dependence” and rights to control.
- Trump Administration withdrew AIs in 2017, passed new regulations in 2020-21.
 - Joint Employer Rule (January 2020): Emphasized actual control, not right of control. Voided by federal court in September 2020.
 - Independent Contractor Rule (January 2021): Emphasized two factors above others: (1) Control; and (2) Opportunity for profit and loss. Subject to CRA review.

Independent Contractors



Independent Contractors: DOL Rule

- On January 6, 2021, the DOL finalized a rule clarifying who qualifies as an “independent contractor” under the FLSA.
 - Reaffirms an “economic reality” test to determine whether an individual is an employee or independent contractor.
 - Identifies two “core factors” that are most probative to the question of whether a worker is economically dependent:
 - The nature and degree of control over the work.
 - The worker’s opportunity for profit or loss based on initiative and/or investment.
 - Identifies three other factors to guide the analysis:
 - The amount of skill required for the work.
 - The degree of permanence of the working relationship between the worker and the potential employer.
 - Whether the work is part of an integrated unit of production.
- Rule does not go into effect until March 8. Remains subject to Congressional Review Act.
- Biden DOL may initiate new rulemaking or rescind the DOL rule. If rule is rescinded, existing interpretations of the economic reality test will continue to apply.



Independent Contractors: ABC Test

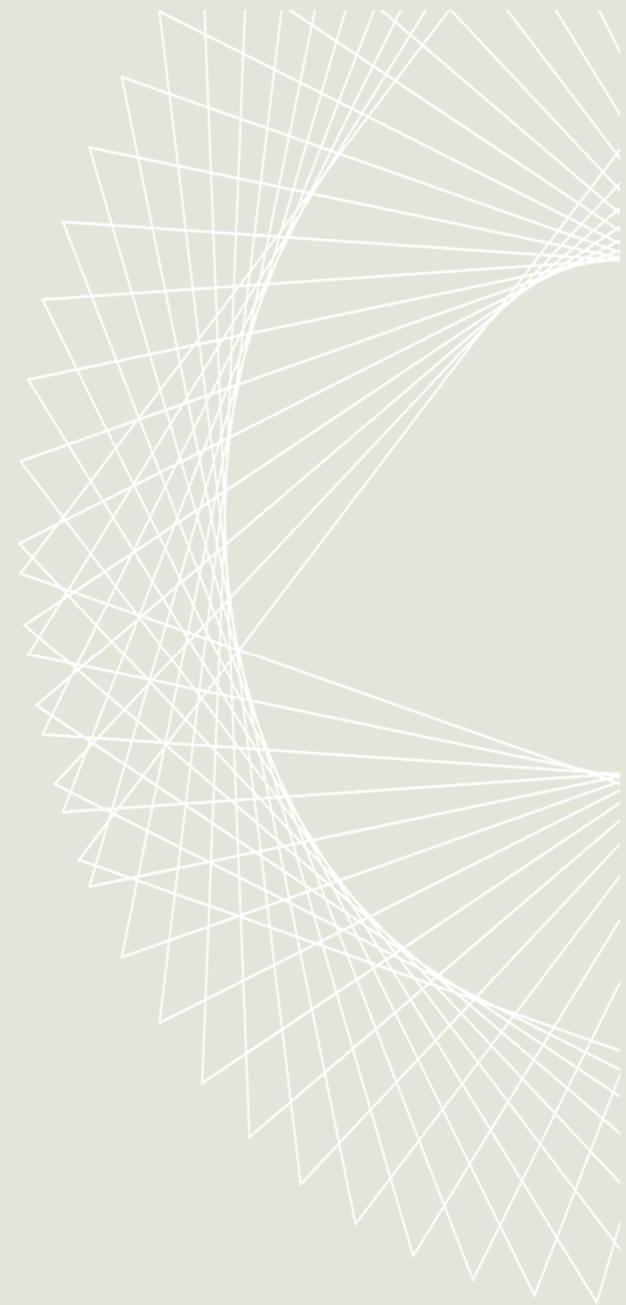
- Target includes, but is not limited to, gig economy.
- Biden has stated his intent to establish a federal standard modeled on the “ABC test” for all labor, employment, and tax laws.
- Under the ABC test, a worker is presumed to be an employee, and can only be classified as an independent contractor if the hiring entity proves **all** three of the following:
 - A. The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
 - B. The worker performs work that is outside the usual course of the hiring entity’s business; and,
 - C. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.
- This test is already used in California (AB-5) and Massachusetts.
- Likely faces substantial hurdles in Congress.
- Amendments to CA AB-5, and passage of CA ballot initiative (Prop 22) for classification of app-based transportation and delivery drivers, may dampen enthusiasm.



Independent Contractors: Enforcement

- Biden has said that he will “build on efforts by the Obama-Biden Administration to drive an aggressive, all-hands-on-deck enforcement effort that will dramatically reduce worker misclassification.”
- He will also direct the DOL “to engage in meaningful, collaborative enforcement partnerships, including with [federal agencies] and state tax, unemployment insurance, and labor agencies.”
 - The Obama administration’s enforcement was accomplished by means of funding to pay for more DOL and IRS investigators. The collaborative enforcement partnerships with federal and state workforce and tax agencies was accomplished in memoranda of understanding between the DOL and as many as 35 state agencies as well as the IRS.
- Biden has also promised to enact 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.
 - Proposal likely modelled on the Employee Misclassification Prevention Act (later reintroduced twice as the Payroll Fraud Prevention Act).

Labor Relations



Labor Relations: Joint Employment & Independent Contractors

- During the Obama-Biden administration, the NLRB issued the landmark *Browning-Ferris Industries* decision.
 - Established a broad definition of joint employer to include companies that do not have direct control over employees, but indirect control or even the mere potential to control those employees.
 - Overruled in during Trump administration.
- Biden has pledged to enact legislation codifying this decision and thereby restoring the broad definition of joint employment.
- Biden proposes amending the National Labor Relations Act to allow organizing and collective bargaining by independent contractors.



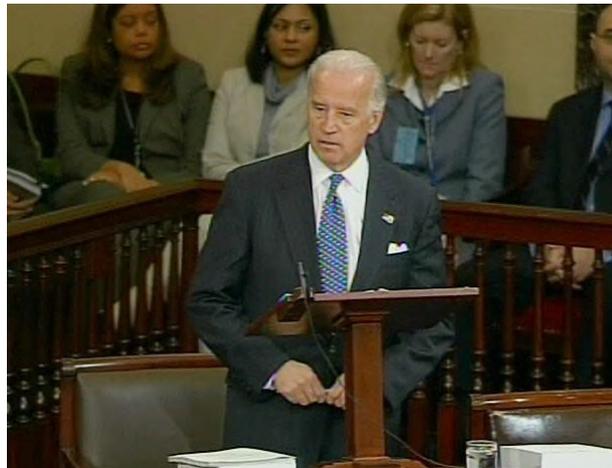
Labor Relations: PRO Act

- Biden supports the **Protecting the Right to Organize (PRO) Act**. The PRO Act passed the House in February 2020.
- The PRO Act would significantly strengthen unions by:
 - Banning employer mandatory “captive audience” group meetings;
 - Requiring mandatory immediate collective bargaining days after a union becomes employees’ representative for 90 days and, if no agreement is reached, binding interest arbitration of contract terms; preempting states “right to work” laws;
 - Allowing “unfair labor practice” claims to be brought as civil actions in court; adding fines and liquidated damages (possibly six figures) as remedies for unfair labor practices; and
 - Adding personal liability for unfair labor practices for corporate directors and officers.
- It would need to be reintroduced in the House (either in its most recent form or in some variation) before confronting the prospect of a filibuster in the Senate.
 - Even if the filibuster is eliminated, it’s uncertain whether all 50 Democratic senators most likely necessary for passage would agree to such sweeping legislation.



Labor Relations: Card Check

- Biden was a co-sponsor of the original 2008 Employee Free Choice Act (EFCA) which allowed workers to choose to form a union if a majority signed union authorization cards, instead of through voting in an NLRB conducted secret ballot election.
- Biden has indicated that he strongly supports card check and will seek to revive EFCA in some form.

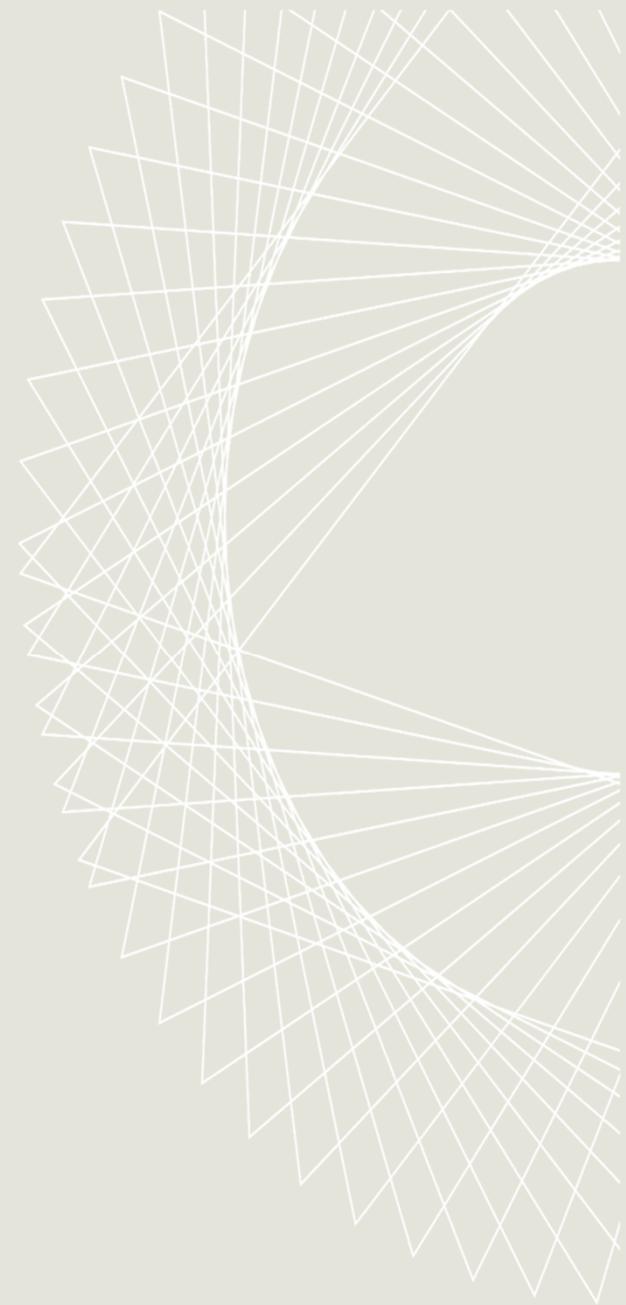


Labor Relations: Reversal of Recent NLRB Decisions

- In 2011, the NLRB issued a decision in *Specialty Healthcare* that opened the door for “micro-unions,” which are small bargaining units within a workplace.
- Through the NLRB’s decisions in *PCC Structural, Inc.* (2017) and *Boeing* (2019) the NLRB effectively rejected *Specialty Healthcare*’s decision.
- Under the Biden administration, the NLRB (i.e., pro-labor Board) is expected to reestablish the return of unions.
- This change can be accomplished through agency action, without legislation.



Equal Employment Opportunity



EEO: Pay Equity

- Pay equity is expected to be a priority for the Biden administration.
- Biden supports the Paycheck Fairness Act, a Congressional bill to address wage discrimination on the basis of sex.
 - Would amend the Equal Pay Act, the first federal pay equity law initially passed in 1963.
 - Significantly narrow employers’ primary defense—that the identified pay disparity is the result of a factor “other than sex.”
 - Expand the type of remedies available to employees to include compensatory and punitive damages.
 - Institute a nationwide ban on requesting that applicants provide their prior salary history and a national pay transparency requirement.
 - The bill passed the House in March 2019 along largely partisan lines, and it has not yet been taken up by the Senate.
- California and New York City already have salary history bans.



EEO: Pay Data Reporting

- Employers can expect to see a Biden administration reinstitute the U.S. Equal Employment Opportunity Commission's pay-data reporting requirements under EEO-1 Component 2.
- California recently enacted SB 973, a new pay data reporting law which mirrors the requirements of EEO-1 Component 2 pay-data reporting.



EEO: LGBTQ Rights (Equality Act)

- Equality Act: Would amend existing law to explicitly prohibit discrimination based upon sexual orientation and gender identity.
 - Practical impact may be limited in light of U.S. Supreme Court's 2020 decision in *Bostock v. Clayton County Georgia*, finding that Title VII prohibits discrimination based on sexual orientation and gender identity.
- Also includes disclosing and reporting requirements
 - Diversity of senior leadership and general workforce.
 - Instances of interactive process with employees with disabilities.
- Biden said he would make enactment a top legislative priority during his first 100 days.



EEO: Other Proposals

- **Pregnant Workers Fairness Act**

- Would require employers to offer employees reasonable accommodations to pregnant employees.

- **Age Discrimination**

- Current law requires more stringent “but-for” causation standard for age discrimination claims, in contrast to “motivating factor” used for most discrimination claims.
 - Biden proposes legislation to adopt the lower “motivating factor” standard for age discrimination.
- Biden also will expand the Earned Income Tax Credit (EITC) to older workers.
 - The EITC helps low-wage workers achieve a living wage, but is not currently available to workers once they turn 65.

- **BE HEARD Act (“Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act”)**

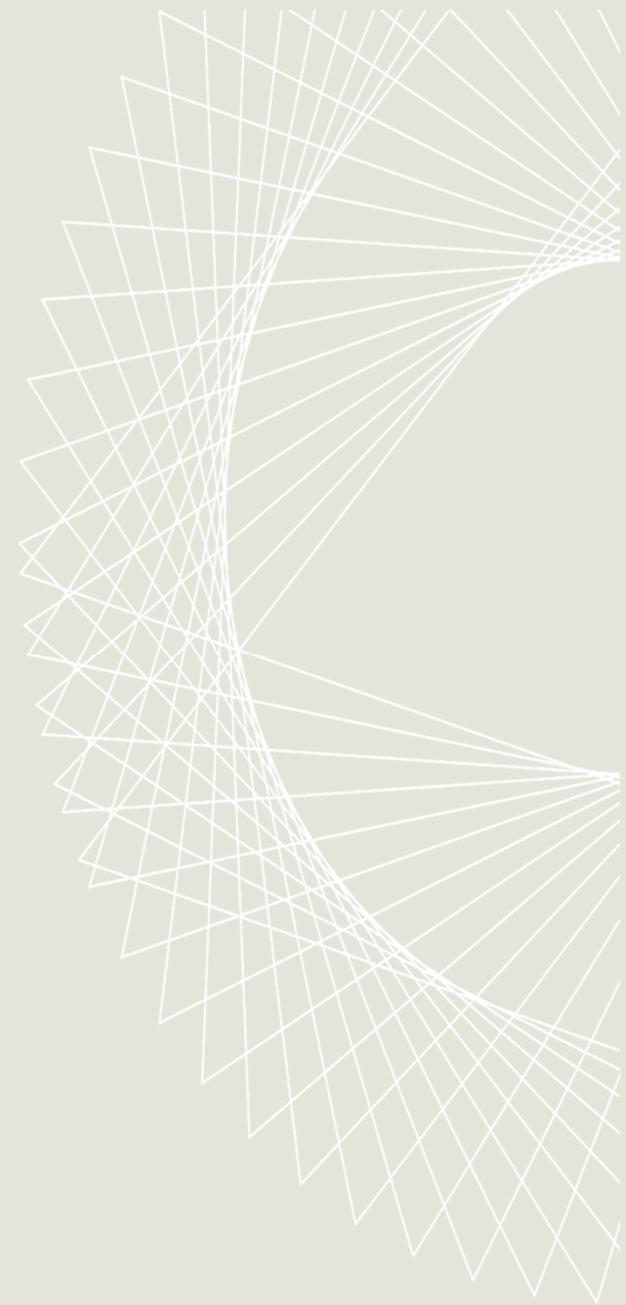
- Extend Title VII protections to all employees, regardless of business size.
- Extend Title VII protections to independent contractors, volunteers, fellows, and trainees.

EEO: Enforcement & EEOC

- EEOC will have Republican majority until July 1, 2022 (when prior Chair Janet Dhillon's term expires).
 - Major changes unlikely until then.
 - Eventual shift to more employee-friendly direction.
- Employers can expect increased enforcement activity.
- Biden has proposed doubling the funding for the EEOC.
- Possibility of renewed emphasis on systemic discrimination and enforcement.
- Increased litigation against employers in general.
- Further law development – novel theories.
- Focus on priorities: pay equity, LGBTQ rights, harassment.



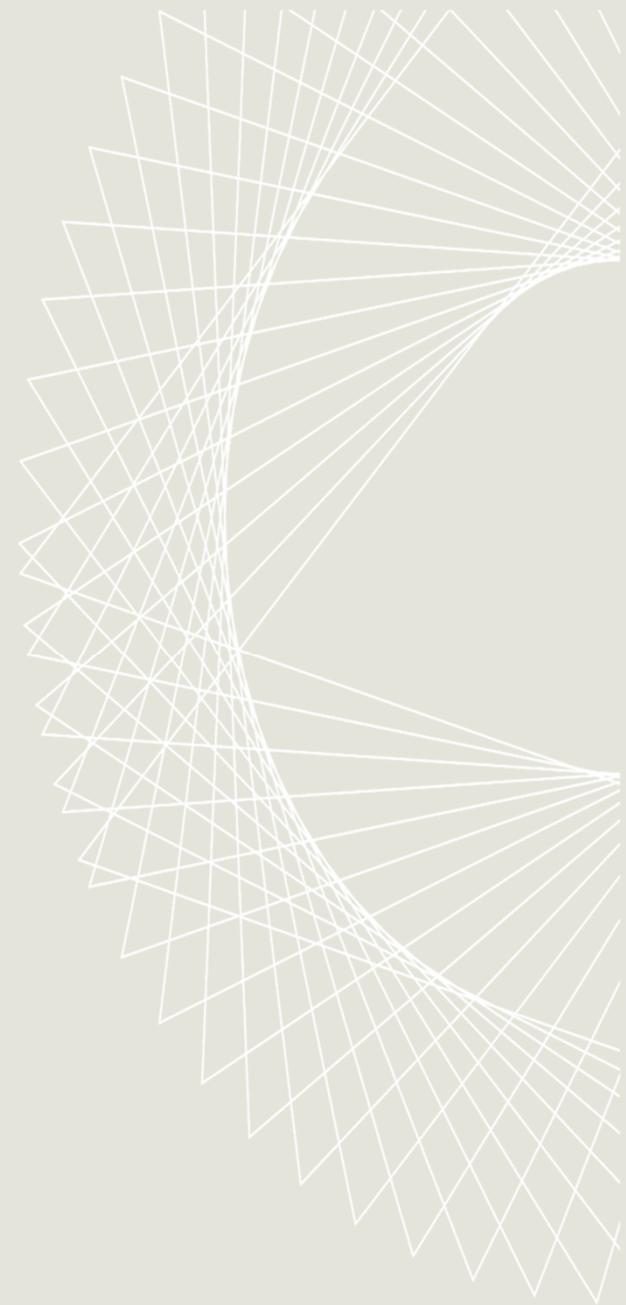
Paid Leave



Paid Leave

- Biden likely to replace the FFCRA (emergency legislation) with a permanent national paid leave plan.
 - The FFCRA’s mandatory paid leave provisions expired on December 31.
- In proposed “American Rescue Plan,” Biden calls for legislation that would:
 - Reinstate requirement that employers provide paid leave to employees (included those with over 500 employees and those with fewer than 50).
 - Expand paid sick leave and family medical leave to 14 weeks for the same reasons included in the FFCRA and for time off to get vaccine.
 - Provide a maximum paid leave benefit of \$1,400 per-week for eligible workers.
 - Reimburse employers with less than 500 employees for the full cost of the leave by extending the tax credits and reimburse state and local governments for the cost of the leave.
 - Extend emergency paid leave measures until September 30, 2021.
- FFCRA paid leave seen as potential prelude to broader, post-COVID paid leave legislation.

Arbitration

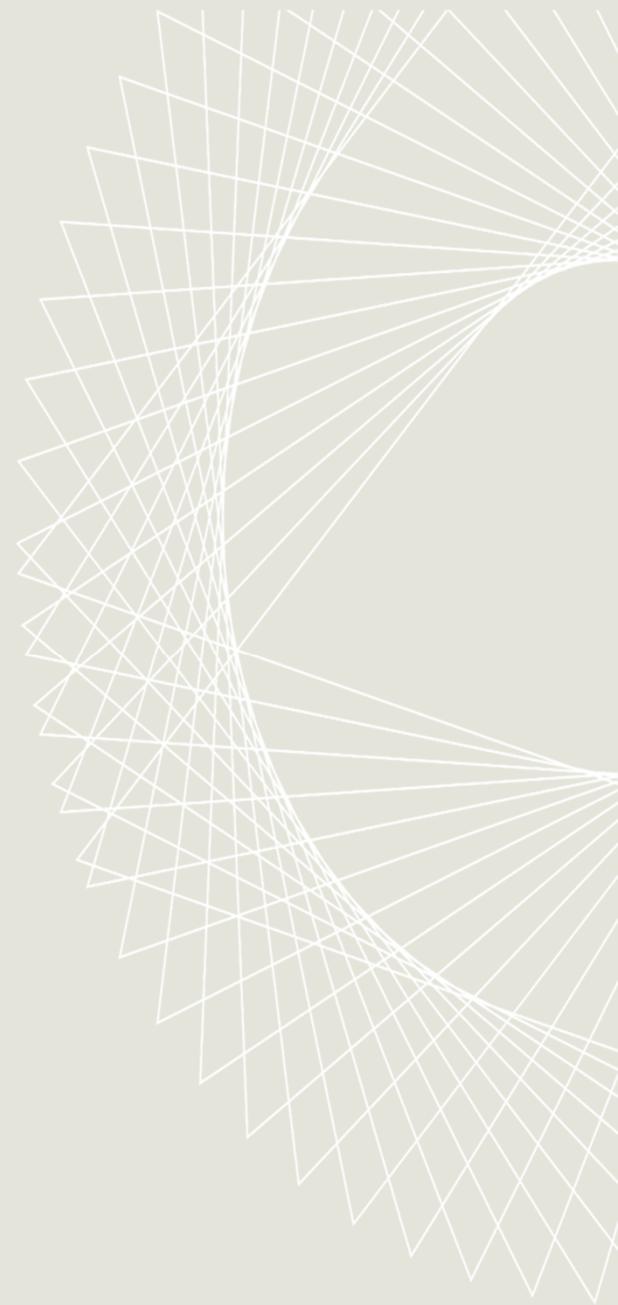


Arbitration

- **Elimination of class action waivers and pre-dispute mandatory arbitration.**
 - Since Supreme Court’s 2018 decision in *Epic Systems*, enforceability of mandatory arbitration with class action waivers has been settled.
 - Biden supports 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.
 - The FAIR Act was passed by the House in 2019, but has since been stalled in the Senate, with the Republican-led Senate refusing to hold any up or down vote.
 - Would substantially increase the risk from class/collective action litigation, under both federal and state law.
 - Potential “game changer” for class actions, but unclear if there is enough Republican support in Senate.



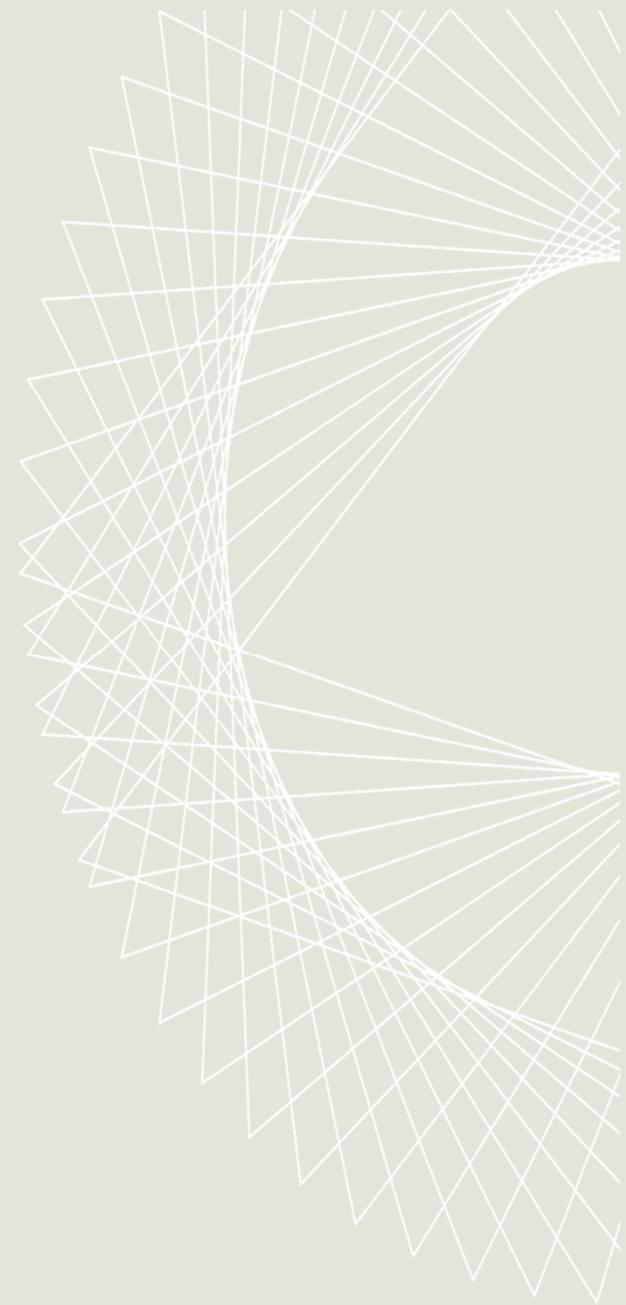
Non-Competes



Non-Competes

- In 2016, the Obama administration issued a “Call to Action” urging states to eliminate or reduce the use of restrictive covenants in employment agreements.
- Biden has promised to take the Call to Action and introduce it as a workplace platform for his presidency.
- Has called for elimination of all non-compete agreements, except as necessary to protect trade secrets, and a ban on all no-poaching agreements.
- Limiting non-competes to high-level or highly-paid employees, and/or restricting duration, may be more likely than a broad ban (like California).
- Many states have already taken similar action.
 - Washington: Limited to employees earning more than \$100,000/yr.
 - Colorado: Prohibiting non-competes, with exception for executives/management and their professional staff.
 - Maryland: Non-competes unenforceable for employees earning \$15/hr or less.
- Several Congressional efforts in recent years, some with bipartisan support.

Worker Safety/OSHA

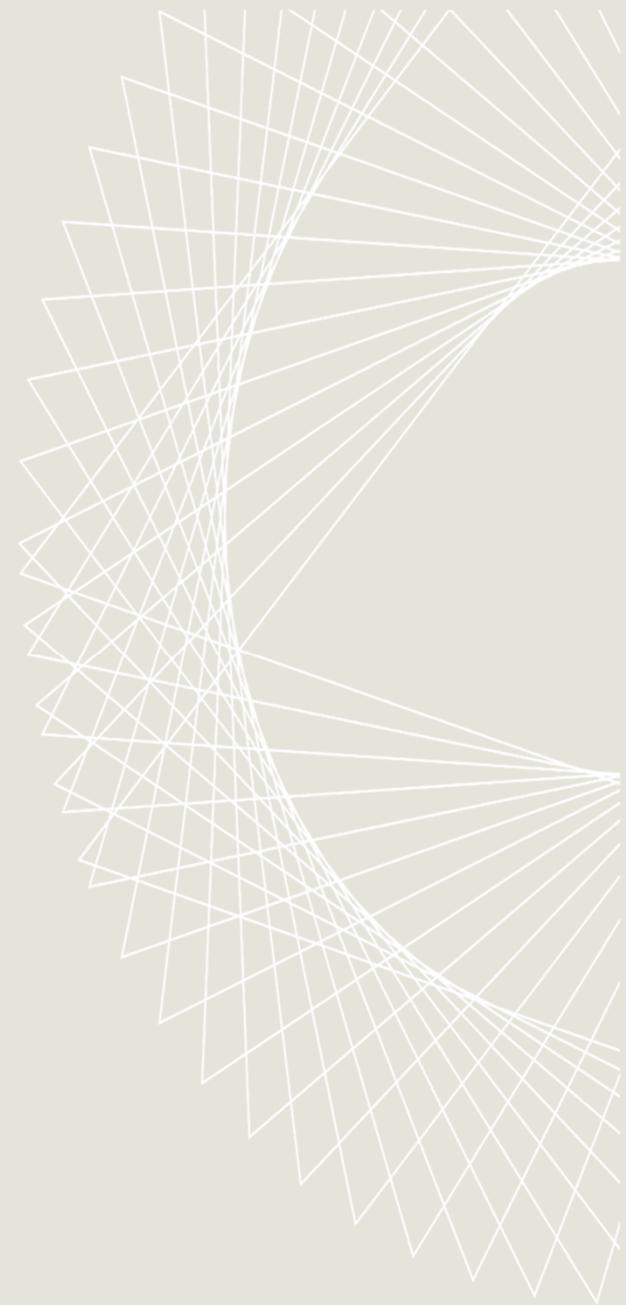


OSHA

- **Emergency Temporary Standard for COVID-19**
 - OSHA is authorized to set emergency temporary standards that take effect immediately and are in effect until superseded by a permanent standard.
- **Greater enforcement**
 - Increased number of OSHA investigators.
 - Fines.
 - Policy of deterrence.



What Can Employers Do Now?



What can employers do now?

- ✓ Review independent contractor practices.
- ✓ Audit classification of exempt employees.
- ✓ Review system capabilities for pay data reporting.
- ✓ Assess non-competes and restrictive covenants.
- ✓ Update Illness and Injury Protection Program (IIPP).



Questions?

