

What Will the Biden Administration Bring for Employers?

Labor & Employment Law Update

By Beverly Alfon on January 12, 2021

They say that the only constant in life is change. Here is a quick overview of the shift that we expect to see in the realm of labor and employment after President-elect Joe Biden takes office.

National Labor Relations Board (NLRB)

The NLRB is expected to have a Democratic majority as early as August 2021. The five-member Board currently has three Republican members, one Democrat, and one vacancy. The expectation is that the Biden administration will move quickly to fill the vacancy. In addition, the term of William Emmanuel, a Trump appointee, will expire in August 2021 – opening the door to a third Democrat.

The current NLRB General Counsel, Peter Robb – who has pushed a strong pro-employer stance in his role as prosecutor of unfair labor practice charges – will see his term expire in November 2021. There is some speculation that due to pressures from organized labor, President-elect Biden will find a way to terminate Robb's terms prior to that.

As with prior administration changes, the expectation is that a Democratic Board majority and new General Counsel will lead the Board's policy and enforcement priorities will go back to a pro-labor agenda. With this expected change will likely come easier roads to organizing, broadening of joint-employer liability, a return to post-contract continuation of union dues, and stricter restrictions on an employer's ability to exercise discretion even when contract language provides for it. Not all changes will be immediate, of course, as case precedents established by President Trump's appointees are not subject to reversal until cases presenting the relevant issues come before the Board.

We will be keeping an eye out for components of (or the entirety of) the Protecting the Right to Organize Act (PRO Act), which passed in the House in early 2020 with a vote of 224 to 194, largely along party lines. The legislation went nowhere in the Senate in 2020, but it is 2021. The results of the Georgia runoff elections have changed the political landscape. Among other things, the PRO Act was aimed at giving workers more equal footing during disputes at work, prohibiting employers from permanently replacing economic strikers, creating a

private cause of action for unfair labor practices, authorizing the NLRB to add penalties for employers who retaliate against workers who organize, and allowing for secondary boycotts. President-elect Biden is a strong supporter of the PRO Act provisions, making clear that significant, pro-labor changes will be made through and within the NLRB.

Equal Employment Opportunity Commission (EEOC)

The EEOC enforces federal laws that prohibit employment discrimination, such as the Americans with Disabilities Act, the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964. The EEOC will have a Republican majority until July 2022. The EEOC's current Strategic Enforcement Plan, which establishes the EEOC's enforcement priorities, will also be in place until 2022. Therefore, changes to the agency initiatives will be even less immediate than at the NLRB, but the expectation is that the EEOC will return to its aggressive enforcement of these federal employment laws against employers, likely focused on workplace harassment, equal pay, and LGBT discrimination/harassment claims (especially in light of the June 2020 U.S. Supreme Court decision in *Bostock*, which holds that an employer who fires an individual merely for being gay or transgender violates Title VII).

U.S. Department of Labor

President-Elect Joe Biden has formally nominated Boston Mayor, Marty Walsh for Secretary of Labor. In response to the announcement of his nomination, Walsh tweeted, "Working people, labor unions, and those fighting every day for their shot at the middle class are the backbone of our economy and of this country. As Secretary of Labor, I'll work just as hard for you as you do for your families and livelihoods." Some media outlets are reporting that Walsh, like Biden, is more moderate than meets the eye, willing to reach across the aisle in order to make things happen. However, there is no question that unions expect robust support from Walsh due to his strong ties to organized labor, including a role as head of the Boston Building and Construction Trades Council. If confirmed by the Senate (which is very likely in light of the results of the Georgia runoff elections), Walsh would be the first union member to serve in this role in almost 50 years.

With Walsh at the helm, we expect that federal minimum wage and paid sick leave benefits will be top priorities. Walsh was a strong supporter of the state-wide Massachusetts law requiring paid family and medical leave benefits, and the forthcoming state minimum wage requirement of \$15 an hour. We also anticipate that the DOL will revisit overtime standards, rules dealing with pay entitlement for off-the-clock work (especially in this time of widespread remote work), and the joint employer standard. It is also very likely that the DOL's recently issued independent contractor classification regulations will be rescinded or superseded by new regulations that would be more worker-friendly. Enforcement will likely be aggressive, especially in industries like food manufacturing, fast food, and construction, which are priorities for organized

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labor, especially in terms of wages and workplace safety (especially, COVID-19-related complaints). Indeed, there is some expectation that this DOL will be even more aggressive and progressive than that of the Obama administration.

BOTTOM LINE

Employers must be focused on compliance. While we cannot specifically predict what will come over the next few months and years, it is imperative for employers to anticipate the pendulum swing and assume stricter enforcement of rules and regulations against employers, sooner rather than later.

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