

The Biden Administration: What May Be Ahead and Already Is Happening

Labor & Employment Workforce Watch

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Biden-Harris Administration changes in labor and employment laws, regulations and executive orders of course cannot be predicted with certainty. But significant actions already have occurred and there are indications suggesting numerous probabilities to come.

On January 21, President Biden signed an executive order calling on the Occupational Safety and Health Administration (OSHA), within two weeks, among other things, to release revised guidance on COVID-19 safety for workers and consider whether an emergency temporary standard on COVID-19 is needed. Another executive order impacting employees requires mask-wearing on various forms of transportation and in all federal facilities.

On Friday, January 22, President Biden directed the U.S. Office of Personnel Management to come up with recommendations for raising the minimum wage for federal employees to \$15/hour. He also issued an executive order “Preventing and Combatting Discrimination on the Basis of Gender Identity and Sexual Orientation. That order calls upon federal agencies to interpret all federal anti-bias laws referencing sex discrimination by using the Supreme Court’s reading in *Bostock v. Clayton County*, which found that LGBTQ workers are protected under the “because of ... sex” language in Title VII of the Civil Rights Act of 1964.

More executive orders and agency rules effecting employers and employees are likely to come soon. Legislative enactments will be more challenging, even though Democrats now “control” the Senate.

One would expect the **Office of Federal Contract Compliance (OFCCP)** to gravitate toward aggressive enforcement of affirmative action obligations consistent with past Democratic administrations. Those probabilities include revocation of Executive Order 13950, Combatting Race and Sex Stereotyping (of course, federal contractors should nonetheless continue to comply with Title VII and Executive Order 11246) and the Pre-Determination Notice rule, which requires the OFCCP to follow certain procedures before seeking enforcement.

The majority of the **Equal Employment Opportunity Commission (EEOC)** will change in July 2022, when Commissioner Janet Dhillon’s term ends. The Biden-Harris administration already has replaced her as Chair of the Commission with Charlotte A. Burrows, a Democrat, and replaced the Vice Chair with Commissioner Jocelyn Samuels, also a Democrat. These changes likely presage a more employee-friendly agency, with more aggressive enforcement actions and a return to a focus on litigation involving allegations of systemic discrimination, workplace harassment, and equal pay issues. The agency also is likely to emphasize concerns about gender identity and sexual orientation matters. It also may modify current COVID-19 guidance, rescind or revise the 2021 rule regarding conciliation procedures, and revive the collection of EEO-1 Component 2 compensation data.

With regard to **employee benefits matters**, one would expect the new administration to attempt to terminate up-front tax breaks for employees contributing to 401(k) plans. Its alternative may be a flat-tax credit providing more equal benefits to all classes of income. The administration also may pursue legislation permitting automatic enrollment in 401(k) plans.

Regarding **welfare plans**, the Biden Administration may re-emphasize compliance with the Affordable Care Act, issuing new regulations and guidance. During the presidential campaign, then-candidate Biden articulated a desire to see less costly and more universal health care, including perhaps a public option.

The Biden-Harris administration already has initiated steps to reverse much of the former administration's approach to **immigration**, including reinstatement of the Obama administration's DACA program and termination of the "Muslim travel ban." The new administration may seek to re-visit the proposed H-1B lottery rule and attempt to undo the interim final rule elevating the wage threshold for H-1B applicants. More broadly, the new administration also may pursue comprehensive law immigration reform.

With regard to **traditional labor and controversial employment law issues**, little action is expected soon. The 5-member National Labor Relations Board has 3 Republicans and just 1 vacancy. President Biden has appointed Lauren McFerran as Chair replacing John Ring. One Republican seat expires in August, at which point the Democrats can create a 3-2 majority. Once that occurs, one would expect the Board to rescind a number of memoranda issued by the NLRB's general counsel.

It is expected that the new administration will seek to relax or eliminate restrictions on forced recognition and membership; expand the application of joint employer status; amend restrictions on employer discretion, permanent striker replacement rules and binding first agreement arbitrations; erase employer rights to participate in representation and decertification cases; do away with class and collective action waivers; rescind or revise DOL rules regarding the tipped employee minimum wage; aggressively investigate and pursue areas of "wage theft"; seek to impose individual liability and liquidated damages awards; attempt to raise the federal minimum wage; address the ability of "gig workers" to perform services as independent contractors rather than employees; and revisit changes to the DOL "Persuader Rule."

OSHA likely will return to focus on enforcement, including COVID-19 related issues, and is expected to aggressively impose utilize the General Duty clause. OSHA also may place more emphasis on recordkeeping requirements.

The new administration likely also will focus on a number of Fair Labor Standards Act matters. It could well attempt to increase the white-collar exemptions from overtime provisions, change independent contractor prerequisites, and review tip credit/tip pooling rules.

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