

Publications

Eye on the Horizon: Top Five Labor and Employment Law Changes to Watch from the Biden Administration

Related Professionals

Nelson D. Cary

Related Services

Labor and Employment

Workplace Safety and Workers'
Compensation

Related Industries

Financial Institutions

AUTHORED ARTICLE | Spring 2021

By Nelson D. Cary and Eric E. Leist

(Published in the Spring 2021 issue of *The Bankers' Statement*)

On January 20, 2021, President Joe Biden was sworn in as the 46th President of the United States. Although every administration brings change, the groundwork may be in place for President Biden to begin implementing desired policy changes more quickly and more significantly than most Presidents. This is because his tenure will begin with a Democratic majority in the U.S. House of Representatives and an even split in the U.S. Senate with Vice President Kamala Harris having the ability to resolve ties in the president's favor.

With this in mind, there are several labor and employment law changes that employers should watch for in the coming months. Below, we have summarized the "Top 5" for employers to keep an eye on:

1. Raise the Federal Minimum Wage

An increase in the federal minimum wage from its current \$7.25 per hour to \$15 per hour has been a popular progressive policy item in recent years. President Biden has already proposed legislation to this effect—included in his draft of the American Rescue Plan Act of 2021 was a provision that would raise the federal minimum wage to \$15 per hour gradually over the next five years. Meanwhile, Sen. Bernie Sanders of Vermont has also introduced a separate, standalone bill that would mandate the same gradual increase.

Whether an increase to \$15 per hour can be passed remains to be seen, as it faces staunch opposition in Congress from Republicans and even some Democrats. Nevertheless, the strong momentum behind raising the minimum wage will likely cause employers and employees to see some sort of increase to it in the near future.

2. Toughen Criteria for "Independent Contractor" Designation

Several of President Biden's major campaign promises addressed independent contractors, particularly (but not exclusively) in the context of "gig" workers. Accordingly, employers can likely expect to see changes to the law that make it harder to classify individuals as independent contractors (as opposed to employees).

For example, President Biden's Department of Labor (DOL) has already proposed rescinding two sets of rules enacted during the Trump administration. The first set of rules made it easier to classify workers as independent contractors, and the second (which has already been struck down in federal court) made it harder for employees to claim they are jointly employed by multiple entities.

3. Changing Diversity-Related Expectations for Federal Contractors

On his first day in office, President Biden overturned the Trump Administration's controversial executive order banning "divisive" diversity training. Federal contractors can expect the Biden administration to follow-up with additional endeavors to promote gender and racial equity (as well as other diversity efforts). For example, during the Obama administration, the DOL promulgated rules requiring medium and large employers to collect and disclose compensation information by race, gender, and ethnicity to the federal government (called "Component 2" of employers' annual EEO-1 report). The stated purpose of this data collection was to provide the DOL with additional insight into pay disparities among protected classes and help it focus its enforcement efforts. Although the Trump administration removed this data collection requirement, President Biden is expected to reinstitute it.

4. Enhance Workplace Safety Monitoring

Yet another major campaign promise of President Biden addressed improving workplace safety and health. Much of the work here will focus on short-term protections for essential workers who have been hit hard by the COVID-19 pandemic, but other changes will be more long-lasting. Specifically, President Biden is expected to reinstitute Obama-era regulations that enhance the reporting requirements for workplace incidents. Many commentators have also suggested that the new administration will likely increase the amount of workplace safety investigators at the Occupational Safety and Health Administration.

5. Empower Organized Labor

Perhaps President Biden's biggest focus in the labor and employment arena during his campaign was on promoting and enhancing the rights of organized labor. While many of his campaign promises in this area likely will not affect financial institutions, there are nevertheless several possible changes that could affect non-unionized employers. For one, the new administration has promised to make it easier for employees to organize into unions. A Biden National Labor Relations Board (NLRB) could bring back the so-called "quickie election" rules from the Obama-era NLRB to make it easier for unions to organize unrepresented employees. These rules were substantially revised by the Trump NLRB.

Another possible change affecting non-unionized employers is a return to the Obama-era NLRB's approach to employee handbooks. That approach held that if a rule or policy had a "chilling effect" on an employee's rights with respect to wages, benefits, terms and conditions of employment, and protected concerted activity, the NLRB would find that the employer had violated the National Labor Relations Act. This stance, which was widely criticized by employers and employer-side advocates, applied to all employers, regardless of whether they were unionized, and was particularly harmful for entities whose policies and practices are often intertwined with practices designed to protect customers (financial

institutions could fall within this group) and promote positive workplace environments. This approach also led to employers being routinely charged with unfair labor practices for policies as simple as requiring employees to treat each other with respect or not use foul language. It is unclear if the Biden NLRB will return to this approach, but employers should be wary nonetheless.

Whether President Biden is able to implement all, or even just some, of these changes will be an interesting item to look for over the next few years. Financial institutions with questions on how these changes may impact their operations should contact qualified labor and employment law counsel.