

Gauging the Impact on Employers of the 2020 Presidential Election: Part Two

November 12, 2020

Since our September 30, 2020, webinar, [“Gauging the Impact on Employers of the 2020 Presidential Election,”](#) former Vice President Joe Biden has secured more than 270 electoral votes, and is on track to become the 46th president of the United States, with Senator Kamala Harris of California serving as the first Black and female vice president in American history.

There were several “wild card” issues and potential roadblocks we predicted would or could await President Trump upon reelection or greet a President Biden upon assuming office. In addition to the ongoing impact of the COVID-19 pandemic, just a few weeks prior to the election, we experienced the death of U.S. Supreme Court Justice Ruth Bader Ginsburg followed by the swift nomination and confirmation of then-federal appeals court Judge Amy Coney Barrett to replace her. Those events were preceded by a summer of racial justice protests and police reform activism, as well as violent counter-protests, across the nation.

This backdrop and context is important, as it invariably will influence the federal policy priorities of an incoming Biden Administration—from tackling the ongoing coronavirus pandemic, to addressing criminal justice reform, anti-discrimination enforcement, and other issues it believes were insufficiently prioritized by the outgoing Trump Administration. Complicating matters is the uncertain outcome of key U.S. Senate races in Georgia, which appear headed for a run-off election in January.

How might that dynamic impact federal labor and employment policy?

On the one hand, if Republicans retain their Senate majority, that will increase the likelihood of ongoing gridlock on Capitol Hill—and make it more difficult for Biden to govern. On the other hand, if Democrats regain a majority in the Senate, then we may see an effort to advance a wide range of

pro-labor and pro-employee measures aimed to counter the pro-business actions of the Trump Administration.

As a candidate, Biden ran on a progressive labor policy platform anchored by three overarching stated objectives: to (1) “check the abuse of corporate power over labor” and hold corporate executives “personally accountable for violations of labor laws”; (2) “encourage and incentivize unionization and collective bargaining”; and (3) ensure that workers “are treated with dignity and receive the pay, benefits, and workplace protections they deserve.” To advance these objectives, Biden expressed support for, among other things:

- establishing a federal \$15 minimum hourly wage
- cracking down on “wage theft” through employer misclassification of workers (either as exempt and therefore not eligible for statutory overtime pay, or as independent contractors rather than employees)
- outlawing mandatory arbitration
- barring the use of no-poach and non-compete agreements
- making it easier to organize and bargain collectively (i.e., form a union)
- imposing new and/or restoring Obama-era requirements on federal government contractors, including reinstating Executive Order 13673, Fair Pay and Safe Workplaces (“blacklisting” rules).

How does Biden intend to accomplish these objectives?

One way is through federal agency action. For example, with respect to the issue of worker misclassification, the [Biden campaign platform](#) provides that:

[Biden] 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 direct the U.S. Department of Labor to engage in meaningful, collaborative enforcement partnerships, including with the National Labor Relations Board (NLRB), the Equal Employment Opportunity Commission, the Internal Revenue Service, the Justice Department, and state tax, unemployment insurance, and labor agencies. And, while Trump has weakened enforcement by sabotaging the enforcement agencies and slashing their investigator corps, Biden will fund a dramatic increase in the number of investigators in labor and employment enforcement agencies to facilitate a large anti-misclassification effort.

This may be easier said than done, given the current composition of the key federal workplace enforcement agencies and the process of nominating and confirming new agency heads.

For example, the U.S. Department of Labor is an executive branch agency led by a Cabinet-level secretary who is nominated by the president and confirmed by the Senate. Unlike the members of independent agencies like the Equal Employment Opportunity Commission (EEOC) and National Labor Relations Board (NLRB) who have fixed terms, executive branch appointments typically don't continue from one administration to another.

Biden's choice of labor secretary may be impacted by what happens in the Senate. As noted above, if the Republicans retain control, then any Biden cabinet appointee, including labor secretary, will have to garner enough bipartisan support to be confirmed by the full Senate. That, in turn, will impact the appointment of other important agency officials, such as at DOL's Wage and Hour Division and Office of Federal Contract Compliance Programs (OFCCP). While appointment of a Wage and Hour administrator requires Senate confirmation, selection of an OFCCP director does not. Assuming Biden's labor secretary pick is not confirmed right away, the expectation is that OFCCP's day-to-day management would fall to career staff. Thus, while we may not see much in the way of formal, new enforcement policy, audits will continue to be scheduled and conducted as usual.

The same is not true at independent agencies like the EEOC or NLRB. While members of both agencies are nominated by the president and are subject to Senate confirmation, they each serve fixed terms that may, and often do, overlap presidential administrations.

The EEOC, for instance, is made up of five commissioners who serve staggered, five-year terms. Although the sitting president gets to designate its chair, the Commission itself is bipartisan by statutory design, and cannot have more than three members of the same political party serving at any one time. The majority party typically aligns with the party in office, but not always.

Case in point: the current chair of the EEOC is Janet Dhillon, a Trump-appointed Republican whose five-year term does not expire until July 1, 2022. The names, political affiliation, and terms of the other commissioners are as follows:

- Keith Sonderling (R), Vice Chair (term expiring July 1, 2024)
- Charlotte Burrows (D), Commissioner (term expiring July 1, 2023)
- Jocelyn Samuels (D), Commissioner (term expiring July 1, 2021)
- Andrea Lucas (R), Commissioner (term expiring July 1, 2025)

Thus, Biden will have to wait until next summer to nominate an individual to replace Commissioner Samuels, whose current term expires on July 1, 2021. Even then, and assuming none of the current

Republican commissioners step down before their terms are up, he will still have to contend with a Republican EEOC majority at least through July 1, 2022.

The bottom line as a practical matter is that a Biden Administration EEOC will be unable to enact any major regulations—such as reinstatement of the controversial EEO-1 “Component 2” pay data collection—or effectuate major policy changes in the absence of bipartisan consensus. Indeed, it is unlikely that Commissioner Dhillon would vote to roll back the pro-business policy changes she put in place as EEOC chair.

Also nominated by the president and confirmed by the Senate (but to a four-year term), the EEOC’s general counsel is responsible for managing the agency’s litigation. The EEOC’s current general counsel, Sharon Fast Gustafson, was nominated by President Trump and confirmed in 2019 to a term expiring in 2023. Assuming she stays on through the remainder of her term, she could have a real impact on the types and frequency of discrimination litigation the agency pursues in the public interest.

The situation is strikingly similar at the NLRB, the agency charged with enforcing the National Labor Relations Act, which protects the rights of employees to bargain collectively and to engage in other concerted activity for the benefit of workers. A large part of the Biden labor policy agenda centers around boosting worker rights and making it easier to form and join unions. Those efforts are likely to be slowed considerably given the current Republican majority on the board:

- John Ring (R), Chair (term ending December 16, 2022)
- Marvin Kaplan (R) (term ending August 27, 2025)
- William Emanuel (R) (term ending August 27, 2021)
- Lauren McFerran (D) (term ending December 16, 2024)

There is a very important caveat to all of this, and it goes to the question of money. While nominations to these agencies are subject to Senate advice and consent, both chambers of Congress play a role in federal agency appropriations—the process by which spending and budgets are approved. Funding bills are introduced and voted on in both the House and Senate, then a conference committee is appointed to reconcile differences and produce a final bill to be voted on and sent to the president for his signature. By its very nature, that process will require cooperation from Democrats and Republicans alike, with additional leverage of a potential presidential veto.

So, what’s the upshot for employers?

Don’t expect federal labor and employment policy—or enforcement—to change significantly overnight. As is often the case, it may take months for a Biden Administration to install a labor

secretary and make other key agency appointments that will enable major changes in labor policy, especially as the nation continues to grapple with an ongoing pandemic and economic challenges stemming from it.

Do prepare for what is in store if and when we do have a new labor secretary, new OFCCP director, and/or leadership changes at the EEOC and/or NLRB. Consider conducting proactive audits of your employment policies and practices, and addressing any areas that could increase EEO liability risk.

Don't count out the possibility of aggressive legislative action should the Democrats take control of the Senate, which could include a number of measures supported by Biden and/or that were even sponsored or co-sponsored by Harris during her time in the Senate.

Do look for possible undoing of low-hanging fruit via executive action, such as President Trump's controversial Executive Order 13950 banning "divisive" diversity training by federal contractors and federal fund recipients.

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