

Blog Post

Workplace Changes to Expect Under a Biden Administration: Part I

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The networks have called the Presidential election for Joe Biden. Assuming those results are certified and President Trump's legal challenges fail, what should employers expect under the new administration? In Part I of this two-part series, let's explore what changes we might see in the workplace from the employment law perspective. In Part II, we will look at changes in the world of traditional labor and union campaigns.

Raising the Federal Minimum Wage

Biden has pledged to increase the federal minimum wage from \$7.25 to \$15.00 an hour. He also supports indexing the federal minimum wage to the cost of living, which varies from region to region.

In addition to raising the federal minimum wage, Biden also has pledged to end tipped minimum wages, which is common in the hospitality and restaurant industries. The tipped minimum wage is an alternative method of paying certain employees under the Fair Labor Standards Act. Specifically, tipped employees under federal law are paid a minimum wage of \$2.13 an hour (in lieu of \$7.25) with the expectation that they will make up the \$5.12 difference in tips. Employers get to credit the tips toward that minimum wage, so long as they ensure employees make at least the minimum wage. (Note, that many states have a higher minimum wage – and thus a higher tipped minimum wage – and some

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states do not permit tips to count toward minimum wage.) The Biden campaign has stated that the tip credit has contributed to the economic inequities adversely impacting women and people of color, who make up the majority of tipped employees. As a result, Biden has supported ending the tip credit, and requiring all employers to pay non-exempt employees \$15 an hour. The impact of ending use of the tip credit can be significant, especially if a Biden administration (and a Democrat-controlled Congress) do not change the current law established by the Congressional Omnibus Act enacted in 2018, which forbids employers from retaining any tips. **In other words, if a President Biden is able to increase the federal minimum wage and end use of the tip credit, employers in industries that typically take advantage of the tip credit will face substantially higher labor costs.**

Eliminating Pay Disparity

According to the data relied on by the Biden campaign, “wage gaps are exacerbated for women of color with Native Hawaiian and Pacific Islander women earning 68 cents, Black women earning 62 cents, Native women earning 57 cents, and Latinas earning 54 cents for every dollar a white man earns, adds up, on average, to roughly \$1 million over a lifetime career...” To address this pay disparity, Biden has committed to signing the **Paycheck Fairness Act** into law. This proposed law, which has already passed the House, purports to tackle wage discrimination on the basis of gender. In particular, this Act would substantially limit the ability of employers to justify paying women less than men. Currently, an employer is permitted to pay a male employee a higher wage than a female employee so long as the reason is a “factor other than sex.” Under the Paycheck Fairness Act, however, an employer can only justify such disparities on limited grounds: education, training, or experience. Moreover, if this Act is signed into law, employers would not be permitted to use salary history to set wages or make hiring decisions. Note that several jurisdictions already preclude the use of salary history to set

wages. According to the Biden campaign, the use of salary history has been used by employers as a “false justification for under-paying women and people of color.” By limiting the ability to justify these disparities, this proposed legislation will likely make it easier for employees to sue employers for perceived or actual wage disparities. This Act also makes it unlawful for employers to prohibit employees from discussing wage information, although arguably such a restriction is already unlawful under the National Labor Relations Act.

Ending Discrimination in the Workplace

In addition to pay disparities, the Biden campaign has pledged to continue fighting discrimination and harassment in the workplace. Some of Biden’s major proposals in this respect are as follows:

- Biden promises to sign into law the **Pregnant Workers Fairness Act**, which would require employers to offer employees reasonable work accommodations when their abilities are limited by pregnancy, childbirth, or a related condition. This proposed federal legislation parallels other existing state laws that require employers to make such accommodations. Under this proposed law, reasonable accommodations likely include granting short breaks for employees to express breast milk (already required under federal law) or even temporarily modifying job duties.
- Biden has also thrown his support behind the **Equality Act**, a bill that has already passed the House and would prohibit employers from discrimination on the basis of sexual orientation and gender identity. While the impact of this proposed Bill is likely be minimal due to the U.S. Supreme Court’s decision this past summer in *Bostock v. Clayton County Georgia*, where the majority of the Justices determined that Title VII prohibits discrimination based on sexual orientation and gender identity, the Equality Act also contains new disclosure and reporting requirements. Specifically, the Act would mandate

that businesses publicize the diversity (or lack thereof) of their senior leadership and general workforce. The idea would be to increase public pressure for employers to actively recruit and hire more diverse candidates in senior management positions. Additionally, employers would be required to disclose instances where they engaged in the interactive process with employees with disabilities—though details of this reporting requirement remain unclear.

- The Biden campaign has pledged to ensure more federal oversight of discrimination. According to a 2017 survey cited by the Biden campaign, one in three Latinos, one in four Asian Americans, one in three Native Americans, and more than half of African Americans have experienced racial discrimination in the workplace. In this regard, he has proposed doubling the funding for the Equal Employment Opportunity Commission (EEOC) so that the agency can “fulfill its mission and address workplace discrimination.” Therefore, under a Biden Administration, employers can expect an increase EEOC activity.

Decreased Enforceability of Non-Compete Clauses and No-Poaching Agreements

While serving as Vice President in 2016, Biden stated, “[workers] can’t reach their true potential without freedom to negotiate for a high wage with a new company, or to find another job after they’ve been laid off,” after hearing from workers who stated they were restricted from taking certain jobs due to non-compete agreements with their former employers.

According to statistics provided by the Biden campaign from a 2016 report from the United States Treasury Department, approximately 40 percent of American workers are subject to non-compete clauses and approximately 5 percent to 10 percent (\$2,000 to \$4,000) of earnings are lost by a worker who is restricted from moving from one job to another. Biden has stated that his administration

would take an aggressive approach to non-compete agreements. Specifically, Biden has stated that he would support federal legislation that would eliminate non-compete agreements and would only allow non-compete agreements “that are absolutely necessary to protect a narrowly defined category of trade secrets.” Biden has not provided any specifics as to what that narrowly defined category of trade secrets would entail, nor how such legislation would mesh with the widely varying state laws that currently govern non-competes. Additionally, Biden has also indicated that he supports an outright ban on all no-poaching agreements. Note that the Department of Justice (DOJ) Antitrust Division already takes the position that such agreements – where companies agree not to hire or recruit one another’s employees – are generally unlawful; the DOJ with the Federal Trade Commission issued joint Antitrust Guidance for HR Professionals on this topic in October 2016.

Should non-competes be limited by a Biden administration, employers would have to consider new ways to protect their customer relationships, financial investments, business goodwill and confidential information.

Provision of Paid Family Leave

Biden has stated that he supports providing up to 12 weeks of paid family and medical leave but has not provided any specifics regarding the leave and the how those benefits would be funded. Additionally, it is not clear if Biden would support Congressional Democrats’ proposed Family and Medical Insurance Leave Act (the FAMILY Act) which would require employers to provide paid sick leave to their workforces.

The FAMILY Act, if passed, would provide employees with up to 12 weeks of partial income for taking time off for:

- Their own serious health conditions, pregnancy, and recovery from childbirth;
- The serious health condition of a child, parent spouse, or domestic partner;
- The birth or adoption of a child; or
- Particular military caregiving and leave purposes.

The FAMILY Act would apply to employers of all sizes and would also apply to part-time employees. The FAMILY Act would require employees and employers to both contribute to a fund and the fund would provide a certain percentage of the employee's compensation if the employee was unable to work due to one of the qualified reasons.

Notably, some states and localities already require paid family and/or sick leave for employees.

Expanded Coverage/Protection

The Biden campaign has also proposed policies that would impact how employees pursue employment-related claims, or conversely, how employers can defend themselves against such claims.

- **Age Discrimination Claims:** A Biden Administration would reject the current standard set by the U.S. Supreme Court requiring that a plaintiff bringing an age discrimination claim must show that *but for* his/her age, he/she would not have suffered the adverse employment action. This “but for” causation standard is a higher standard than required in most other discrimination claims. Biden has indicated that he supports legislation that would allow age discrimination cases to use the same lower standard as claims alleging discrimination under Title VII, in other words that the protected characteristic was “a motivating factor” in the adverse action, rather than a “but for” reason. Practically speaking, this change would make it easier for employees to prove age discrimination

claims and make it more difficult for employers to defend against them.

- **BE HEARD ACT**: Similarly, Biden has committed to signing the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act (BE HEARD ACT), which would significantly expand the applicability of the anti-discrimination provisions of Title VII of the Civil Rights Act. Currently, the prohibition against employment discrimination under Title VII only applies to businesses with 15 or more employees, but not to individuals who work alone, or in small workplaces. This law would extend those protections to all employees regardless of business size, as well as to those individuals who do not fall under the category of “employee,” including independent contractors, volunteers, interns, fellows, and trainees. These changes could significantly increase the number of claims submitted to the EEOC and those litigated in federal court, since employers would no longer be able to dismiss such claims on the ground that they did not have the requisite number of employees or that the aggrieved individual was not an employee. Employers would likely need to develop new policies and training for contractors and vendors.

Expansion of Short Time Compensation State Programs

Currently, 27 states have enacted “short-time” compensation programs (STC)—also known as “shared work” or “work sharing” programs—that are designed to avoid mass lay-offs or unemployment. By participating in these programs, employers experiencing a temporary slowdown can keep workers employed by reducing work hours, while the state governments make up the difference in wages. These programs have become increasingly popular in light of the COVID-19 pandemic. Unfortunately, states with STC programs usually disqualify employers from participating in this program if they reduce employee work hours by

more than 50 percent or 60 percent, which can be the case during severe economic downturns. Due to the wave of unemployment currently sweeping the country, Biden has been supportive of modeling Germany's short-time work programs used in times of recessions. With this mind, he proposes several ideas to "scale up" short-time compensation programs across all 50 states, D.C., Puerto Rico, and the Virgin Islands, including:

- creating a tax credit to small businesses to help them cover the costs of their workers' benefits as well as other overhead costs;
- waiving any increase in employment taxes for employers who decide to participate in STC programs;
- establishing 100 percent federal financing for these programs, instead of relying on state funds that are likely running low due to the current pandemic;
- raising caps on employer work reductions in current STC programs to allow employers who need to reduce up to 80% of work hours to participate in these programs;
- launching a major awareness campaign to improve business participation rates; and
- building automatic triggers to enhance STC programs and unemployment insurance benefits based on current economic and public health conditions.

Under a Biden administration, employers who have been forced to furlough or lay off employees due to temporary shutdowns caused by COVID-19 could get some help.

Conclusion

We will know the final outcome of the Presidential election soon. Stay tuned.

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