

Workplace Changes and Developments to Expect Under President Biden

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Introduction

- Shift in Balance of Power
- Slim Margins in Congress
 - 221 (D) -211 (R) with 3 vacancies in the House.
 - 50-50 in Senate with Harris as the tie breaker.
 - Probably won't see “radical” changes.
 - 2022 elections are just around the corner.

OSHA Changes

- Implement a federal Emergency Temporary Standard for COVID-19 (*American Fed. Of Teachers v. OSHA*, 9th Cir.)
- Double the number of OSHA inspectors, which is at a record low
 - Very little inspection activity for financial or office and white collar sectors

OSHA Changes

- Adopt the all-but-completed Obama-era OSHA regulations on infectious disease:
 - Coverage issues: Health Care Workers?
 - Based in part on CA aerosol transmissible disease standard
 - Written Worker Infection Control Plan; annual updates; solicit non-managerial input; point person

Vaccines?

- “100 million doses in 100 days.”
- Employer can require vaccine
 - Religious Exemption
 - Exemption for disability
 - Even if employee has valid reason not to take the vaccine, and employer has good cause to exclude from the workplace, EEOC demands an interactive discussion to see if there is another reasonable accommodation (telework?)

Vaccine resistance

- A poll in late June by researchers at the University of Miami found that 22 percent of white and Latino respondents and 42 percent of Black respondents said they agreed with this statement: “The coronavirus is being used to force a dangerous and unnecessary vaccine on Americans.”

» New York Times, September 1, 2020

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Vaccinations

- Title VII and ADA: coronavirus pandemic poses a direct threat— how do we balance these?
- Would an employer be liable for side effects if it mandated vaccine?
- Public education: polio vaccine rates surged after Elvis Presley got the vaccine on “The Ed Sullivan Show” in 1956

President Biden and Executive Orders

- Revoked E.O. 13950, which banned race and sexual “stereotyping” and “scapegoating” for federal employees and contractors. 1.20.21
 - Return of Diversity and Inclusion Training.
- Revoked E.O. 13958, which established President’s Advisory 1776 Commission. 1.20.21.
- Requiring federal agencies to advance equity among underserved communities and provide an action plan within 200 days to address inequities in policies and programs. 1.20.21.

President Biden and Executive Orders

- Requiring the use of masks and social distancing in federal buildings and lands and by federal employees and contractors on duty. 1.20.21
- Enforcing prohibitions on employment discrimination in federal government based on sexual orientation and gender identity. 1.20.21
- Numerous immigration orders.
- Direct OSHA to update safety recommendations and consider whether emergency temporary standards, with enforcement provisions, are necessary. Prior administration had weak guidance.
- Additional E.O.'s scheduled for 2 pm today.

Congressional Review Act

- Enacted in 1997, CRA used to repeal rules issued at the end of an administration.
- Used in 2017 to repeal 16 regulations previously issued under Obama.
- Grants Congress power 1) to review, through an expedited process, new federal “rules” issued by federal agencies, and 2) to overrule a rule by passing a joint resolution.
- If a regulation is repealed this way, the CRA prohibits reissuing a regulation in substantially the same form or issuing a new regulation that is substantially the same.
- 60 legislative day lookback window to disapprove of a rule by simple majority vote; or the rule goes into effect at the end of that period. Rules issued after August 21, 2020 subject to CRA.

How Congress Might Use CRA

- Repeal Independent Contractor Final Rule under the FLSA issued January 7, 2021, which essentially expanded who would be an independent contractor.
- Repeal the EEOC's Guidance on Religious Discrimination, issued January 15, 2021, which some perceive as having a "Christian slant" and making it easier to discriminate on the basis of religion.

Union (yes, union) issues

- Effort to ban right-to-work state laws (VA)
- New focus on allowing employee communications for collective action and organization (remember the Obama-era fuss about social media policies?)
- PRO Act (Protecting the Right to Organize)
 - Personal, and perhaps criminal, liability against managers who commit ULPs

Related Labor Issues

- Limit or eliminate non-compete clauses
 - DC Jan. 11, 2021: ban on noncompetes; cannot prohibit moonlighting; civil penalties and private right of action. Unlawful even to ask for one. No new agreement after effective date
 - Virginia July 2020: ban on noncompetes for employees making less than average weekly wage (\$62,608)
 - Maryland October 2019: ban for individuals making under \$31,200 or \$15.00/hour

Related Labor Issues

- Eliminate employee arbitration provisions
 - Used to limit class actions and runaway jury awards
 - Sea change in the law, given the deference the Supreme Court has given to arbitration provisions
 - Possibly the single most important employee-employer issue

Wage and Hour Issues

- More investigators
- More vigorous enforcement
- Interagency cooperation
- Legislation on misclassification of employees (like the Virginia Misclassification statute?)
- Pledge to increase the federal minimum wage to \$15/hr.

Wage and Hour Issues

- Revisit the Salary Basis Threshold for Exempt Employees
- Rework the Duties Tests for White Collar Exemptions

Push for Paid Leave

- Paid FMLA
- FAMILY Act

EEO Initiatives

- Make-up of EEOC will not change
- Administration will focus on some traditional EEO issues
- Equality Act
 - Makes Gender Identity, Sexual Orientation, Sexual Stereotyping, part of the text of Title VII (and Title IX)
 - Fair Housing Act and Equal Credit Opportunity Act
 - Religious Freedom Restoration Act not a defense

EEO Initiatives

- ADEA Causation Requirement
- Pregnant Workers Fairness Act
 - Requires reasonable accommodation
- EEO-1 pay data reporting
- Paycheck Fairness Act
- Religious Discrimination Guidance

EEO Initiatives

- Mandatory pre-dispute arbitration
 - Forced Arbitration Injustice Repeal Act
- Be Heard Act

Questions?

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