

THE CRYSTAL BALL SAYS THESE 6 ISSUES WILL DEMAND THE ATTENTION OF HEALTHCARE EMPLOYERS DURING BIDEN ADMINISTRATION'S FIRST YEAR

Insights
Nov 16, 2020

We have already taken a [broad look at workplace law developments likely to emerge](#) under Joe Biden's administration, unless the political landscape shifts suddenly and dramatically. The healthcare industry is of course already unique and challenging, especially as the COVID-19 pandemic continues. After all, reports of increased demands for staff, personal protective equipment (PPE), supplies, and treatment have been in the headlines throughout the crisis. The Centers for Disease Control and Prevention (CDC) has premised much of its fundamental guidance on its efforts to safeguard the capacity of the nation's healthcare system. This is a primary reason the CDC has repeatedly stated that getting flu shots is [more important this year than ever](#). When a COVID-19 vaccine becomes available, that will obviously be another [huge development](#).

With this background in mind, here are our predictions – in order of likelihood and potential significance – regarding the six biggest workplace issues that are likely to be especially important to healthcare employers under President Biden's administration.

WORKPLACE SAFETY

Safety in the workplace has always been a core issue in healthcare, and it will receive even more and immediate consideration under the new administration, including attention from the Occupation Safety and Health Administration (OSHA). [We therefore expect considerable activity](#), including the issuance of an emergency standard to

Related People



A. Kevin Troutman

Senior Counsel

[713.292.5602](tel:713.292.5602)

Service Focus

[Employee Leaves and Accommodations](#)

[Government Contracting, Compliance, and Reporting](#)

[Labor Relations](#)

[Privacy and Cyber](#)

[Wage and Hour](#)

[Workplace Safety](#)

deal with the pandemic, increased inspection activity, and reporting requirements, to name a few. This means that employers will probably need to perform even more detailed hazard assessments, create more documentation, and fulfill additional training requirements. An increase in investigations, enforcement activities, and penalties also seem likely.

OSHA's whistleblower protections will continue to demand close attention, as "complaints" about safety protocols or shortages of supplies, staff, or PPE almost always constitute protected activity. Once an employee has engaged in protected activity, that makes it especially important to avoid even the *appearance* of retaliation, especially when it comes to disciplinary action, terminations, or other adverse actions toward the employee who complained.

Complicating this issue, it is often difficult to distinguish a complaint from a simple question or request for clarification. This makes it much easier for a disgruntled or apprehensive employee to state a colorable claim of retaliation. Indeed, in such a highly regulated industry, supervisors and human resources (HR) leaders can never afford to ignore the potential for whistleblower and retaliation claims, even under the most pressure-packed circumstances.

EMPLOYEE LEAVES

In healthcare, where 24/7 services are often the norm, managing employee attendance and leaves presents continual challenges. This task may become even more complicated, especially if Biden throws his support behind a push for expanded leave rights. While there is some disagreement within the president-elect's own party about whether a new law should *require* 12 weeks or two weeks of paid leave and under precisely what circumstances, it seems likely that some form of a paid leave mandate will emerge early in his administration.

In the wake of this year's lockdowns, there appears to be bipartisan support for some new legal protections for employees who need time away from work. Although the vast majority of healthcare employers already provide various forms of paid leave, they will likely have to learn and comply with anticipated new compliance and tracking requirements.

LABOR RELATIONS

Another area of workplace law almost sure to see significant changes that will impact the healthcare industry is the labor relations field. The changes could in fact be monumental, for several reasons.

First, high-profile news reports of staffing and supply shortage have already dovetailed with a wave of new litigation and organizing activity in healthcare. Second, a Democrat majority at the National Labor Relations Board (NLRB) – which may not be achieved until at least August 2021 due to existing member board terms – is likely to roll back many pro-business decisions issued during the past four years. Many of these changes will affect *both* union and non-union workplaces. For example, we will almost certainly see changes that again affect employers' handbook policies. The definition of protected concerted activity, another cornerstone issue, is also likely to be expanded after being narrowed under the current Board.

Third, and possibly most important, if even a portion of the "PRO Act" legislation that passed the House this year and for which the new administration has expressed support becomes law, it would represent the greatest shift in labor relations law since the Taft-Hartley Act of 1947. The PRO Act contains a veritable "wish list" of provisions that drastically favor big labor.

WAGE AND HOUR LAW

In an industry that employs such a wide range of workers and always operates under tight financial constraints, likely changes in wage and hour law will also demand attention. A renewed push for a \$15 minimum wage on a national level could result in a costly ripple effect throughout healthcare systems.

If this effort does not succeed on a federal level, activity will almost certainly continue in various states and municipalities. The Department of Labor will also be poised to issue enhanced penalties and enforcement actions to employers who violate wage hour laws.

AFFIRMATIVE ACTION

Affirmative action and federal contract compliance is another important area for healthcare employers to watch. This includes heightened attention to the question of coverage of healthcare system whose only federal "contract" is [acceptance of TRICARE](#), a healthcare program for uniformed service members, retirees, and their families.

The Office of Federal Contract Compliance Programs (OFCCP) has set its sights on this issue in the past. Covered employers can expect more reporting requirements and greater emphasis on Diversity, Equity and Inclusion programs. No matter how these details shake out, they will demand attention.

EMPLOYEE PRIVACY AND DATA SECURITY

Long a vital issue in healthcare, [privacy and security concerns will likely receive further attention](#) in form of a push for more rules favoring consumer rights. Democrats have favored creating a new private right of action to combat alleged violations. However these discussions turn out, healthcare entities will likely have to update and tighten their data handling and transparency systems.

How serious is this issue? One sign is that when she was California's Attorney General, Vice President-Elect Kamala Harris made consumer privacy a cornerstone of her efforts. She is not expected to abandon that issue.

CONCLUSION

The twists and turns of the COVID-19 pandemic, [including the emergence of an approved vaccination](#), will also undoubtedly continue to command attention and adjustments to existing practices. As we have learned, that path is very difficult to predict with accuracy.

Nevertheless, while other workplace laws and practices will also attract attention, it seems certain those listed above are on the short list of issues likely to generate attention, activity and changes under a new administration.

Fisher Phillips will continue to monitor these and other developments and provide updates when appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information,

contact your Fisher Phillips attorney or any member of [our Healthcare Industry Practice Group](#).

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.