



Trump v. Biden: A Workplace Law Preview

Insights

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Either incumbent Donald Trump or challenger Joe Biden will be inaugurated as president on January 20, 2021 – and the impact on workplace law will be significant. Each candidate has provided us with clues (some subtle, some very blunt) relating to the ways they would approach labor and employment law issues, and there is the potential for massive change. While campaign promises are not always kept and each candidate reserves the right to alter course once in office, we can offer some general ideas about what the next four years could look like under a second Trump term or a new day under President Biden.

COVID-19 Action

One of the first major challenges facing either candidate in the new year will be the continued need for workplace relief as a result of the continuing pandemic. Some of Biden's announced plans in response to the COVID-19 crisis include an emergency paid leave plan for workers impacted by the illness (including gig economy workers) that would cover 100% of weekly salaries or average weekly earnings, capped at \$1,400 a week, and an interest-free small business loan program to companies impacted by COVID-19.

President Trump is calling for a massive economic relief bill and another round of \$1,200 stimulus payments. He has expressed support for a \$1.5 trillion plan unveiled by the bipartisan Problem Solvers House Caucus. He has not yet announced whether he supports an extension of the paid leave program that is set to expire on December 31.

Wage And Hour

A Biden administration would seek to increase federal minimum wage to \$15 per hour by 2026 and put an end to the tipped minimum wage. This aligns with the findings of a July 2019 Pew Research poll indicating that two-thirds of Americans believe the minimum wage should be boosted to that level, and is supported by research indicating that a several-year increase to \$15 per hour would not result in a loss of low-income jobs. Other research, however, predicts that such an increase could result in reduced hours, fewer jobs created, and loss of jobs.

Given that the Republican Party did not release an updated platform for the 2020 election, and Trump's website does not include specific plans for a second term, it is difficult to gauge his vision for a second term when it comes to specific issues. Examining his tweets and statements to the press, however, we can see that Trump has sent mixed signals about a federal minimum wage boost. Last year, he said he was "looking into" supporting a plan to raise the rate to \$15 per hour,

and then indicated that he was set to make a “major statement” about the issue but didn’t follow through.

Regardless of who is elected at the federal level, we can expect to see an increasing number of states and local governments implementing their own minimum wage increases. The majority of states now have minimum wage laws well above the federal \$7.25 per hour rate – last increased in 2009 – and numerous counties and cities have enacted similar measures.

Labor Relations

Regardless of who is elected, we can expect to see an increase in union organizing activity over the next four years. The effects of the pandemic and the emphasis on workplace safety has renewed worker focus on collective rights, and the climate seems readymade for union organizing efforts.

Biden has thrown his support behind federal legislation that would strengthen organizing capabilities. The PRO Act would usher in sweeping reforms to federal labor laws, including the resurrection of “card check” organizing, the reimplementation of “quickie” elections, permitting secondary boycotts, prohibit permanent replacements, and eliminate right-to-work laws, among other things. Trump has vowed to veto the PRO Act should it reach his desk, claiming that it would harm jobs, violate privacy, restrict worker freedoms, and roll back his ambitious deregulatory agenda.

Leave Laws

Our nation had never had a paid federal leave law program in place – but the world turned upside down once the pandemic hit in March, leading to the Families First Coronavirus Response Act (FFCRA). The paid leave provisions of this new law will expire at the end of the year unless Congress and the president take action. Regardless of the fate of the FFCRA, however, it is possible that the genie cannot be put back in the bottle. Now that the workforce has gotten a taste of federal leave, it appears worker advocates will push for an advance in this area. It therefore seems increasingly likely that some form of non-COVID-19 paid leave will be passed at the federal level in the next four years. What that might look like depends on who wins in November.

Trump took a big step by approving a law permitting federal employees to take paid parental leave that took effect on October 1, 2020. He indicated during the State of the Union address that he hoped this would serve as a “model for the rest of the country,” while indicating support for a proposed bill that would let parents borrow money against future earnings to fund a paid leave program.

Biden’s paid leave program calls for legislation that would provide 12 weeks of paid leave for all workers for their own or a family member’s serious health condition. However, he has thus far stopped short of fully endorsing a Democratic-sponsored proposal – the FAMILY Act – that would require paid leave for a broader list of situations.

Similar to the minimum wage, this is an area where many employers are already facing a multitude of local and state requirements. If the federal response to paid leave falls short in any respect.

expect to see an increase in the number of jurisdictions that will impose a paid leave requirement on businesses operating in their area.

Health Care

The fate of the Affordable Care Act (ACA) may rest in the hands of the next president – if it is not taken away from either of them by the Supreme Court. A pivotal case that could decide the future of the federal healthcare law is set to be argued in front of the SCOTUS a week after the election, and we could have a decision on the law's future by early 2021. Regardless of whether the law remains intact after Supreme Court review, the next president has vowed further healthcare reform.

Biden has pledged to protect and strengthen the ACA. He has released plans for health insurance that include a public, government-run health insurance option similar to Medicare. However, he has refused to support a Medicare-for-all option touted by some of his Democratic rivals. Trump, on the other hand, has repeatedly tried to snuff out the ACA, and has indicated that his own healthcare proposal will soon be released. He recently stated that he will sign a series of executive orders that would protect people with preexisting conditions, which is one of the more popular aspects of the Obama-era healthcare law.

Joint Employment, Gig Economy, And Misclassification

Biden's platform touts that he will put a stop to employers intentionally misclassifying their employees as independent contractors. His administration would drive an “aggressive, all-hands-on-deck” enforcement effort to curb misclassification, in part by harnessing the power of multiple federal agencies (NLRB, EEOC, IRS, and DOJ) to work in tandem with state tax, employment, and labor agencies to identify and address disputes. He has indicated that he is in favor of a California-like ABC test to be implemented on a national level. Biden also notes that he would extend the right to organize and bargain collectively to independent contractors by modernizing antitrust law.

The Trump Department of Labor has been aggressive in proposing regulations to make it harder for workers to claim they are joint employees of multiple organizations and easier for hiring entities to classify workers as independent contractors. However, the joint employer regulation now stands overturned by a federal court and is facing an uncertain fate, while the misclassification rule is almost certain to be challenged in court before taking effect. Moreover, the effect of the misclassification rule is severely diminished by the fact that many states have enacted their own legal standards (such as California's ABC test) that stand untouched by federal law. This is yet one more battle that will be primarily fought at the state level and remain somewhat blunted by the next administration.

Conclusion

And now, a caveat: the ambitious agendas outlined by both candidates could face resistance in Congress. Even if Biden prevails and takes control of the White House, the balance of the Senate could easily remain in control of the GOP. And even if a Democratic majority emerges in the Senate in January 2020, we cannot be sure that Biden will fall in line with progressive causes touted by the liberal wing of the party. He has sought to characterize himself as a restrained “bridge building”

liberal wing of the party. He has sought to characterize himself as a restrained "bridge building" candidate that can be tolerated by centrist Democrats and moderate Republicans. Meanwhile, if Trump wins again, he will almost certainly face another two years (at least) with a House controlled by Democrats and therefore will find it difficult to unleash a spate of business-friendly legislative actions.

Therefore, it is likely that whichever candidate is elected will use executive orders to accomplish some portion of his agenda. The limits of this presidential power continue to be tested in the courts, and no doubt that will continue in 2021 and beyond.

The bottom line is that whether we have another four years of President Trump or a new day with President Biden, you can be sure that workplace law will see some substantial changes over the next four years. Fisher Phillips will be there to keep you up to speed no matter who is elected. Make sure you are signed up for our Legal Alerts to receive a detailed report once the election results are finalized and further updates throughout the next administration.

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Richard R. Meneghello
Chief Content Officer
503.205.8044
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