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WHAT'S NEXT FOR HOTELS AND RESTAURANTS: THE 5 THINGS HOSPITALITY EMPLOYERS CAN EXPECT UNDER THE BIDEN ADMINISTRATION

Insights
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The pandemic and government shutdowns/restrictions continue to have a devastating effect on hospitality employers after a catastrophic 2020. As the industry works to recover in 2021, it looks increasingly likely that hospitality employers will have to navigate further challenges in the new year as the Biden administration takes charge. Many of his positions could adversely affect hospitality employers in unique ways. Below are descriptions of some of the top five issues we can expect from a new administration.

1. **Increased Safety Enforcement By OSHA**
   Hospitality employers can expect the Biden Administration to focus its safety enforcement efforts much more on the industry than his predecessor. From kitchens to server floors and from lobbies to guest rooms, the industry can except a much more active OSHA. While there are many strategies OSHA is expected to take on during the Biden administration, hospitality employers can expect two issues to specifically affect their workplaces.

   Creating An Emergency Temporary Standard For COVID-19
   Top of the list is COVID-19. Biden has urged President Trump to "immediately release and enforce an Emergency Temporary Standard to give employers and frontline employees specific, enforceable guidance on what to do to reduce the spread of COVID." Trump has resisted these calls in 2020, but it appears likely that this standard will be put into place in 2021. For those that have been

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watching what is happening with California's OSHA emergency regulations regarding COVID-19, this could be unwelcome news.

Doubling The Number Of OSHA Inspectors
Biden has previously called for a doubling of the number of OSHA investigators and there does not appear to be anything standing in his way. Given this aggressive approach to workplace safety enforcement, Biden likely will increase the number of investigators in OSHA. Increasing the number of inspectors will undoubtedly lead to more inspections of your hotels and restaurants, so your safety compliance protocols will remain as important as ever in 2021.

2. **Revisiting Wage And Hour Law**
   The hospitality industry will likely immediately have to contend with a congressional effort to increase the federal minimum wage. One of Biden's campaign promises called for an increase to $15 by the year 2026, and we'll have to see whether the new Congress supports his push.

   In addition, we are expecting Biden to attempt to get rid of the tip credit rule under the FLSA. In addition, the new administration is also likely to take steps to limit mandatory arbitration and class action waivers in workplace settings, which will have the most dramatic impact in the wage and hour context.

3. **Boosting Pay Equity Efforts**
   The U.S. House passed the Paycheck Fairness Act in 2019, with the stated purpose of addressing wage discrimination on the basis of sex and reduce the gender pay gap. However, the Senate took no action on the bill. Depending on the balance of power in the Senate, this issue will likely be debated and could pass as early as 2021. Biden supports passage of the Paycheck Fairness Act and has vowed to sign it into law if it comes before his desk once he becomes president.

   Many hospitality employees are paid very similar hourly wages. However, in the kitchen and management positions, wages can vary widely. Hospitality employers will need to look at their systems across the board to

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ensure there are legitimate reasons, such as geography or experience, that explain differences in pay. And many courts will not permit employers to justify pay disparities based on prior salary history, as that could be seen as a way to perpetuate systematic inequities. Employers will need to guard against pay differences that you can only explain away by the decisionmaker contending something along the lines of: "He was a tougher negotiator than she was when I hired them."

4. **Labor Relations Will Likely Take A 180-Degree Turn**
   The Biden presidency will bring surely changes to the way the National Labor Relations Act is interpreted – it just might take a bit of time for the changes to take root. The NLRA is enforced by the National Labor Relations Board, a quasi-judicial body comprised of a General Counsel and a five-member board, each of whom are appointed by the president with the consent of the Senate.

   The new president can be expected to return the Board to a Democratic majority, possibly as early as next summer. At that point, the agency is likely to overturn a number of decisions and regulations that have swung back and forth like a pendulum dating back to the 1990s. Among those issues that hospitality employers care about are the recent rollback of accelerated "quickie election" procedures and timetables that had made it easier for unions to organize, rigid standards regulating handbook rules governing social media, electronic communication systems and workplace conduct, and agency doctrine invalidating class waivers within binding arbitration agreements.

   In addition, hospitality employers should keep their eye on two key NLRB doctrines that are vulnerable to reversal by a Biden-appointed Board: (1) the joint employer rule and (2) union access.

   Joint Employer Rule
   Earlier this year, the NLRB issued its final rule on the standard for determining joint employer status under the NLRA, specifically whether a business is a joint employer of employees directly employed by another employer. In hospitality settings, this usually arises in the context of the franchise relationship.

The Board's final rule reversed a key decision from 2015 (the *Browning-Ferris* case) and established that a company will not necessarily be deemed a joint employer of the contractor's employees where the company has no actual control over the essential terms and conditions of employment for those employees, merely has indirect influence over the contractor employer's employees, or only retains contractual rights with respect to the contractor's employees' essential terms and conditions of. This is significant for franchisor and franchisees attempting to maintain their separateness.

Prior to the Board's final rule, joint employer status was determined pursuant to the former Board standard established in *Browning-Ferris*. Under that standard, a company could be deemed a joint employer of a contractor's employees if the company exercised direct control, indirect control, or had the contractual right to exercise to control – even if never exercised – of the essential terms and conditions of employment for the contractor's employees. This loose standard made it much more likely that companies could be held responsible for the conduct and/or obligations of their contractors, with respect to their employees. It would not be surprising to see an eventual return to this broader standard at some point during Biden's tenure as president.

Union Access

The Board also recently reversed precedent concerning access to employers' public cafeterias by non-employee union organizers engaged in organizing activities. Under prior precedent, employers were required to permit non-employees to engage in promotional or organizational activity in restaurants and hotels absent evidence of inaccessibility or activity-based discrimination. For example, if an employer permitted access to non-employee third parties engaged in non-work-related activity, that employer could not lawfully ban union-organizers access for the purposes of engaging in organizing activity.

However, in a 2019 decision, the Board reversed that precedent in a case involving a hospital where union organizers stationed themselves inside the hospital's public cafeteria and engaged in organizing activity. The

Board held that "an employer does not have a duty to allow the use of its facility by nonemployees for promotional or organizational activity. The fact that a cafeteria located on the employer's private property is open to the public does not mean that an employer must allow any nonemployee access for any purpose." If this decision is overturned, as is likely at some point in the next four years, hospitality employers will see an increase in non-employee union organizing activity in their restaurants.

5. **Increased Employee Leaves**
   Regarding employee leaves of absence, Biden has a history of supporting family and medical leaves for employees. The paid leave program supported by Biden during his campaign calls for legislation that would provide 12 weeks of paid leave for workers' own or their family member's serious health condition. Now that Congress approved the country's first paid leave program – although on a limited and temporary basis to help stem the immediate tides of the COVID-19 crisis – it is possible that public sentiment may lead lawmakers to consider a broader paid leave program in 2021.

   A federal paid employee leave law could add enormous costs to hospitality employers if they operate in states or localities that don't yet have a paid leave law system in place. This could be especially daunting during a time when they are trying to recover from the devastating government restrictions and economic fallout of 2020.

Conclusion

The COVID-19 pandemic and the corresponding governmental shutdowns/restrictions have wreaked havoc on the hospitality industry. As the industry attempts to recover in 2021, it will have to contend with an administration that may very well put the interests of workers before the interests of businesses in most cases.

While the new administration's path to achieving its campaign promises is difficult to predict with accuracy, hospitality employers should begin to prepare for how they will deal with these issues operationally. While other workplace laws and practices will also attract attention, it seems certain the issues listed above are on the short list of

issues affecting hospitality employers that are likely to be pushed under a new administration.