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A Look at Employment Protections in the Upcoming Biden Administration

A new administration will be poised to implement sweeping policy changes, including greater protections for workers, unions and independent contractors. In this column, we will take a look at what the employment law world can expect from a Biden/Harris administration.

By **Jeffrey Campolongo** | November 30, 2020



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After a fiercely contentious, chaos-inducing, and at times, dystopian run up to the 2020 presidential election, it now appears clear that Joe Biden will be sworn in as our 46th president on Jan. 20, 2021. A new administration will be poised to implement sweeping policy changes, including greater protections for

workers, unions and independent contractors. In this column, we will take a look at what the employment law world can expect from a Biden/Harris administration. Details on the Biden/Harris plan can be found at <https://joebiden.com/empowerworkers/#> (<https://joebiden.com/empowerworkers/>).

Increasing the Federal Minimum Wage to \$15

One of the major issues that Biden ran on, in terms of protecting workers, was to increase the federal minimum wage to \$15. While some states have increased the minimum wage in their respective states (Pennsylvania has not), many farmworkers who grow our food and domestic workers who care for the aging and sick and those with disabilities are not even earning the minimum wage. Moreover, Biden supports eliminating the tipped minimum wage. Tipped workers, who are primarily women, are being left behind. The federal tipped minimum wage has not budged from just \$2.13 an hour in 25 years. Federal law and all but seven states allow employers to pay a lower tipped minimum wage to workers who earn tips.

Protecting And Strengthening Labor Unions

The Biden/Harris administrative has also sounded the alarm for organized labor, announcing tremendous support for empowering our nation's unions, increasing employment investigations and passing portions of the Protecting the Right to Organize Act (PRO Act). Biden has announced support for financial penalties against employers that interfere with organizing efforts, which would include personal liability for company executives (and potential criminal liability for intentional conduct). Biden also proposed banning state right-to-work laws and would require employees to pay union dues even if they are not part of a union. Biden also wants to eliminate secret ballot voting for unions and would implement the "card check" process under which votes would be public.

The Biden/Harris platform also seeks to direct the Department of Labor to work with the National Labor Relations Board, the Equal Employment Opportunity Commission, the Internal Revenue Service, the Justice Department, and state labor agencies to "aggressively pursue employers who violate labor laws." This agency initiative would also increase the number of investigators in these federal agencies, something these agencies have not seen in quite some time and would be a welcome relief to often overburdened federal employees.

Eliminating Mandatory Arbitration Clauses, Noncompete Clauses and No-Poaching Agreements

In the same vein, Biden is looking to end mandatory arbitration clauses imposed by employers on workers, also called for in the PRO Act. An estimated 60 million workers have been forced to sign contracts waiving their rights to sue their employer and nearly 25 million have been forced to waive their right to bring class action lawsuits or joint arbitration. Biden intends to support legislation to ban employers from requiring their employees to agree to mandatory individual arbitration and forcing employees to relinquish their right to class action lawsuits or collective litigation. A new administration may also bring about an end to overreaching noncompete clauses and no-poaching agreements that hinder the ability of employees to seek higher wages, better benefits, and working conditions by changing employers. The Biden team plans to work with Congress to eliminate all noncompete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets, and outright ban all no-poaching agreements. Few acts will bring more relief to plaintiff's employment lawyers than to see the complete elimination of restrictive covenants and mandatory arbitration agreements.

Ending Wage Theft and Worker Misclassification

Biden and Harris are also poised to put an end to wage theft and implement measures to protect workers in the “gig economy.” According to the nonpartisan think tank Economic Policy Institute (EPI), in 2016, the Department of Labor (DOL) strengthened regulations requiring employers to pay workers overtime when they work more than 40 hours a week. The DOL’s attempt to restore lost pay to American workers was blocked in the courts by business interests, and on Oct. 31, 2017, the Trump administration made clear in legal proceedings that it would not defend the rule. As president, Biden has pledged to reimplement the overtime and salary regulations to ensure workers are paid fairly for the long hours they work and get the overtime they have earned.

Independent contractors and those working in the “gig economy” can also expect to see more protection from a Biden/Harris administration. Misclassification of workers as independent contractors deprives these workers of legally mandated benefits and protections, such as unemployment insurance, workers’ compensation, health and welfare benefits, and Social Security contributions. The worker misclassification problem is made possible by ambiguous legal tests that give too much discretion to employers, too little protection to workers, and too little direction to government agencies and courts. Biden has said that he would “work with Congress to establish a federal standard modeled on the ABC test for all labor, employment, and tax laws.” A federal “ABC test” would be modeled after California’s ABC test which makes it much more difficult for employers to classify workers as independent contractors.

Enforcing Prevailing Wages, Increasing Workplace Safety Measures and Protecting Undocumented Workers

Among other initiatives sought by the incoming administration, Biden and Harris intend to invest in communities by widely applying and strictly enforcing prevailing wages; put an end to unnecessary occupational licensing requirements; increase workplace safety and health by directing OSHA, the U.S. Department of Agriculture, Mine Safety Health and Administration, and other relevant agencies to develop comprehensive strategies for addressing the most dangerous hazards workers encounter in the modern workplace. There will also be expanded protections for undocumented immigrants who report labor violations and become the targets of serious crimes. Biden would reinstate the U Visa program to certain workplace crimes and extend these protections to victims of any workplace violations of federal, state, or local labor law by securing passage of the POWER Act.

Without a doubt, the employment landscape will change quite a bit with a new administration. Some may suggest that more regulation, an increased minimum wage and additional protection will stunt growth and hurt businesses. To this, I say nonsense. Every successful business owner will say that the number-one asset to the business, bar none, is its workers. Investing in your employees is good business. Protecting your workers is good business. The two concepts are not mutually exclusive. I believe the platforms laid out by the Biden/Harris team will allow workers to flourish, and increase wages and productivity, while also protecting them from unnecessary harm or public safety risks. I look forward to a reinvestment in the American workforce.

Jeffrey Campolongo *is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters.*
