



**COALITION OF FRANCHISEE ASSOCIATIONS**



# The Biden Administration: Anticipated Changes in Labor and Employment Law

Presented by:  
Robert T. Bernstein  
Laner Muchin, Ltd.  
(312) 467-9800  
(312) 342-7778 (cell)  
[rbernstein@lanermuchin.com](mailto:rbernstein@lanermuchin.com)  
January 26, 2021

# Today's agenda

- ✓ COVID-19 Response
- ✓ OSHA
- ✓ Paid Leave
- ✓ Minimum Wage
- ✓ Arbitration
- ✓ Labor
  - The Department of Labor
  - The Joint Employer Standard
  - The National Labor Relations Board
  - Independent Contractor Test
- ✓ Diversity and Inclusion

# A Dramatic Shift

President Biden and the Democrats, in general, have leaned strongly in favor of employees and employee rights.

The House and Senate now have democratic majorities, which will make it easier for President Biden to make changes.

We can expect two major types of changes:

1. Changes rolling back Trump Administration actions
2. Employee-friendly changes, akin to those during the Obama Administration

# The Federal Government's Response to COVID-19: Currently

The current state of affairs: The Trump Administration passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act and the Families First Coronavirus Response Act (FFCRA).

- ▶ The CARES Act was extended through March 14, 2021
- ▶ The FFCRA was extended through March 31, 2021 (on an elective basis for employers)
  - ❖ The FFCRA previously mandated that employers provide paid leave to employees for qualifying reasons due to COVID-19 and provided a tax break to employers who provided such leave
  - ❖ Now, employers can choose to provide such leave, but are not required to do so. They will still receive a tax break for providing such leave through March 31, 2021

# The Federal Government's Response to COVID-19: The Biden Administration

President Biden's COVID-19 response plan is 200 pages long and outlines a federal response to COVID-19, including new face covering and quarantine requirements. President Biden's COVID-19 response is expected to be much more science- and prevention-driven.

- President Biden has appointed a COVID-19 Advisory Board and has made Jeff Zients the new coordinator of the COVID-19 task force
- Congress will likely pass a new, more generous COVID-19 stimulus package
- The Biden Administration will likely seek to renew and extend employers' obligations to provide paid leave for reasons related to COVID-19

# COVID-19 Vaccinations: Currently

The current state of affairs: ???

- There has been very little federal action in this area
- The Trump Administration essentially left COVID-19 vaccination distribution and administration to the Biden administration
- The EEOC has weighed in on the issue of COVID-19 vaccinations in the workplace, but, otherwise, there has been very little information or guidance from the federal government

# COVID-19 Vaccination: The EEOC's stance

In short, the EEOC allows employers to mandate that their employees receive the vaccine, with certain exceptions.

To be compliant with federal antidiscrimination laws, employers must meet the following:

the employee receives the vaccine at a third-party healthcare provider or pharmacy that does not have a contract with the employer to administer the vaccine; and

the employer must make accommodations for religious- and/or disability-related objections under Title VII and/or the ADA.



# COVID-19 Vaccinations: The Biden Administration

The Biden Administration is already working to set up a federal distribution plan for COVID-19 vaccines.

President Biden has targeted the provision of 150 million COVID-19 vaccinations in the first 100 days of his presidency. This means that at least 75 million people could receive both doses (the real number may be closer to 90 to 95 million, as some already have their first dose).

# The Occupational Safety and Health Administration: Currently

The current state of affairs: OSHA has yet to release specific guidance on many issues related to COVID-19 in the workplace. OSHA has been investigating complaints that employers have not protected employees from COVID-19 and has issued some citations.

Despite this, there had been little enforcement of workplace safety regulations.

# The Occupational Safety and Health Administration: The Biden Administration

- President Biden signed an executive order on 1/21 ordering OSHA to “immediately release clear guidance for employers to help keep workers safe from COVID-19 exposure.” The order requires OSHA to do this within the following two weeks.
- The executive order also directs OSHA to “enforce worker health and safety requirements, targeting the worst violators.”
- Biden has chosen James S. Frederick, a Pittsburgh-area workplace safety advocate who spent 25 years with the United Steelworkers (who pressed the Trump Administration for emergency temporary safety standards last summer), to lead OSHA.
- We expect that there will be heightened enforcement of safety regulations.

# Paid Leave: Currently

The current state of affairs: While many state laws require employers to provide paid leave for various qualifying reasons, there are currently no federal laws that require private employers to provide any form of paid leave to their employees.

- The FFCRA previously mandated that employers provide paid leave for qualifying reasons related to COVID-19. This is now optional, and employers may only receive a tax credit for providing such leave through March 31, 2021.

# Paid Leave: The Biden Administration

President Biden has long been an advocate of paid family and medical leave and will likely seek up to twelve weeks of mandated paid leave for qualifying reasons under the FMLA.

Biden has also voiced support for federally-mandated paid sick leave and his administration may pursue this.

# Minimum Wage: Currently

The current state of affairs: The federal minimum wage is a mere \$7.25. Assuming that the average full-time worker works 2,080 hours per year, that is a salary of only \$15,080 per year.

While a handful of states are slowly moving towards a \$15.00 per hour state-wide minimum wage, no state has gotten there yet.

# Minimum Wage: The Biden Administration

President Biden has long been an advocate of a \$15.00 per hour minimum wage. We may see movement towards raising the minimum wage gradually towards the \$15.00 mark.

- Along with this, we may see movement towards eliminating the lower minimum wage for tipped employees.
- Additionally, the Biden Administration will likely seek to increase the minimum salary to qualify as an exempt employee under the FLSA.
- We can also expect the Biden Administration to pass more stringent equal pay laws.

# Arbitration: Currently

The current state of affairs: The Forced Arbitration Injustice Repeal (FAIR) Act, an Act that would prohibit employers from requiring employees to sign pre-dispute arbitration agreements, was introduced to Congress in 2019. This bill had little chance of success under the employer-friendly Trump Administration.

As of right now, some states have laws that restrict an employer's ability to enter into arbitration agreements with employees and/or limit the terms an employer may ask an employee to agree to. However, there is no such federal legislation.



# Arbitration: The Biden Administration

President Biden has indicated support for the FAIR Act. With Biden in office and a democratic Congress, it is likely that this Act will pass. This Act will dramatically change the viability and scope of arbitration agreements between employers and employees.

# Labor - The Department of Labor: Currently

The current state of affairs: During the Trump Administration, the Department of Labor passed multiple employer-friendly regulations concerning overtime, wages, the independent contractor test, and the joint-employer standard.

# Labor - The Department of Labor: The Biden Administration

President Biden has chosen Marty Walsh (the current mayor of Boston, MA) for U.S. Secretary of Labor. Walsh has an extensive union background and is a large supporter of organized labor.

This will likely lead to more employee- and union-friendly action, policies, and regulation by the DOL when compared with the Trump DOL. However, Walsh is also known as being willing to engage with the management side.

Additionally, it is likely that the DOL will receive an increase in both funding and staffing under the Biden Administration.

# Labor - The Joint Employer Standard: Currently

The current state of affairs: In 2019, the DOL proposed a new joint employer standard that would narrow the standard by which a company could be deemed a “joint employer” of an employee for the purposes of establishing liability.

- The proposed standard involves a four-part balancing test which examines whether the potential joint employer:
  1. Hires or fires the employee;
  2. Supervises and controls the employee’s work schedule or conditions of employment to a substantial degree;
  3. Determines the employee’s rate and method of payment; and
  4. Maintains the employee’s employment records.

# Labor - The Joint Employer Standard: The Biden Administration

Under the Biden administration, the Board will likely ultimately return to Obama era joint employer rules.

Under this standard, which was first introduced in the NLRB's 2015 decision in *Browning-Ferris Industries*, joint employment could be found when an entity directly or indirectly controls, or reserves the authority to control, the essential terms and conditions of employment of another entity's workers.

# Labor - The National Labor Relations Board: Currently

The current state of affairs: The NLRB is currently made up of one democratic Board Member and three republican Board Members. There is currently one seat open.

The Trump Administration era NLRB released a large number of very employer-friendly decisions, representing a complete departure from Obama era NLRB leanings.

As a result, labor organizations and employees lost many rights and protections they enjoyed during the Obama era.

# Labor - The National Labor Relations Board: The Biden Administration

President Biden may immediately fill one vacant seat on the NLRB and may fill another seat in August of 2021 when the term of William Emmanuel expires.

After these spots are filled, the NLRB will likely have a 3-2 democratic majority.

Biden has already appointed democrat Lauren McFerran as NLRB Chair.

This will most likely lead to more employee-friendly decisions by the NLRB, similar to those during the Obama Administration, and the overturning of many employer-friendly Trump Administration era NLRB decisions.

# Labor - The Independent Contractor Test: Currently

The current state of affairs: The Trump Administration NLRB reversed the Obama era independent contractor standard (focusing on the individual's economic dependence on the business) and reinstated the traditional 10-factor common law test viewed through the prism of "entrepreneurial opportunity."

This meant that multiple classes of workers, including graduate students and gig economy workers (such as ride-share drivers), were considered independent contractors instead of employees. These individuals were no longer under the jurisdiction of the NLRB or protected by the NLRA.



# Labor - The Independent Contractor Test: The Biden Administration

The Biden Administration is expected to impose an employee-friendly standard to determine whether an individual is an independent contractor or an employee.

Legislation in this area is expected to be similar to California's "ABC" test and impose a heightened test for a worker's independence from the employer.

Under such a test, it is likely that more people (including gig workers) will be considered employees and will, therefore, be subject to NLRB jurisdiction and the protections of the NLRA

# Diversity and Inclusion: Currently

The current state of affairs: The Trump Administration made controversial decisions in this area, such as President Trump's Executive Order 13950, "Combatting Race and Sex Stereotyping." This order prevented federal contractors and subcontractors from holding workplace trainings that "inculcate" "any form of race or sex stereotyping or any form of race or sex scapegoating."

This necessarily limited their ability to hold workplace trainings on diversity and inclusion and preventing discrimination and harassment.

# Diversity and Inclusion: The Biden Administration

The Biden Administration has multiple plans geared towards diversity and inclusion:

- The Plan to Build Back Better by Advancing Racial Equity Across the American Economy, which focuses on racial equality and narrowing historic wealth gaps and discriminatory wage practices
- President Biden has repealed Trump's Executive Order 13950
- President Biden has also promised to prioritize employment protections for LGBTQ workers in his first 100 days (Biden has already reversed Trump's ban preventing transgender individuals from serving in the military)
- President Biden has also indicated that he would like to eliminate the "but-for" causation requirement in the Age Discrimination in Employment Act, making it easier for workers to prove they were victims of age discrimination



# LANER MUCHIN

## FIRM OVERVIEW

Founded in 1945, Laner Muchin is one of the oldest and largest law firms in the country dedicated exclusively to the representation of employers in the areas of labor and employment law, employment litigation, business immigration and employee benefits. The firm prides itself on staffing cases very efficiently and on being bottom line sensitive. A key to the firm's client loyalty has always been its dedication to client service as exemplified by its unique *Two Hour Commitment*, whereby the firm guarantees that every client phone call or email received during business hours will be returned within two hours or less.

### **We know your BUSINESS**

Many of our clients have been with us for decades due to our unparalleled responsiveness and loyalty as well our zealous representation of their interests.

### **We represent MANAGEMENT**

Laner Muchin exclusively represents management in employment-related litigation, labor relations, employment law counseling, employee benefits, executive compensation and business immigration matters.

### **We champion DIVERSITY**

Laner Muchin is a recipient of the Thomas Sager Award, an annual award given by the Minority Corporate Counsel Association to firms "that have demonstrated sustained commitment to improve the hiring, retention and promotion of minority attorneys." The firm is also an annual sponsor of the ABA Diversity Reception.

### **We are prominently REPRESENTED**

Laner Muchin attorneys are prominently represented among the ranks of Fellows of the College of Labor and Employment Lawyers, Illinois Leading Lawyers, Illinois Super Lawyers and Best Lawyers.





Robert T. Bernstein  
rbernstein@lanermuchin.com

[www.lanermuchin.com](http://www.lanermuchin.com)  
312.467.9800 (Office)  
312.342.7778 (Cell)



# QUESTIONS