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Will The Biden Administration Upend Workplace Law?

By **Vin Gurrieri**

Law360 (November 8, 2020, 5:21 PM EST) -- Joe Biden's ascendance to the presidency not only spells doom for many of the Trump administration's business-friendly employment policies, it also puts key tenets of federal labor law that have been in place for more than a half-century on the chopping block, experts say.

Biden **won the presidential race** Saturday with his apparent victory in the key battleground state of Pennsylvania, and though President Donald Trump is **fighting the results in court**, the former vice president said he was moving forward with his transition plans.

Biden will bring with him to the White House an ambitious pro-labor platform aimed at giving workers and unions a leg up after four years in which the Trump administration moved the legal needle sharply in employers' direction. That includes his stated support for passing the Protecting the Right to Organize Act, a sweeping overhaul of federal labor law that Cameron Fox of Paul Hastings LLP said "will be the biggest change in labor law that we've seen in more than 75 years" if Democrats are able to get it passed.

But Biden's platform during the campaign went well beyond just the PRO Act, with the president-elect having advocated for a wide range of policies that would turn an array of Trump's policies on their heads, including what workers' advocates have perceived to be lax enforcement of workplace safety rules as the coronavirus has spread.

"The Trump administration has made numerous changes in the employment and labor law space that have largely favored employers — including the federal government — by rolling back Obama-era rules and by implementing policies and enforcement priorities that have limited protections for workers," said Michael Filoromo, a partner at plaintiffs firm Katz Marshall & Banks LLP. "Among other things, a Biden administration would almost certainly seek to reestablish Obama-era, pro-worker rules while expanding employer liability for unsafe working conditions as the pandemic continues."

Here are four areas that labor and employment lawyers should be keeping an eye on after Biden moves into 1600 Pennsylvania Ave.

The Gig Economy

One of the Biden administration's biggest priorities will likely be to stymie the Trump administration's push to make it easier for businesses that operate in the so-called gig economy to classify their workers as independent contractors who enjoy fewer legal protections and benefits than employees.

Just weeks before the election, the Trump Labor Department issued **a long-awaited proposed rule** that offers an expansive view of independent contracting under the Fair Labor Standards Act.

The U.S. Department of Labor's proposal, which is still a long way from being finalized, reshuffled the existing worker classification test to emphasize employer control and worker entrepreneurship. Given that the rule came so late in the last year of Trump's term, it could be a prime target for the incoming Biden administration and congressional Democrats who may seek to impose a tougher classification standard either through the regulatory process or through legislation.

"I would suspect ... they'll pursue it via regulation immediately to try to effectuate some change or at

the very least withdraw some of the pronouncements that have been out there by the DOL," said Ron Holland, a California-based partner at McDermott Will & Emery LLP.

The Trump administration's rule stands in stark contrast to a law passed last year in California known as A.B. 5, which enshrined a stringent legal standard for assessing whether workers in the Golden State are employees or independent contractors, known as the ABC test. The law has drawn intense scorn from the gig economy companies, which backed a **successful ballot measure** to overturn it. Independent contractors generally aren't protected by wage, discrimination and other laws that apply to employees.

"California is ... often on the cutting edge — at least from the plaintiffs' perspective — of employment protections," Filoromo of Katz Marshall said, highlighting the Golden State's efforts to rein in independent contractor misclassification as a notable example.

Seizing on California's move and in response to the DOL's proposal, Democrats in Congress **introduced expansive legislation** during the Trump administration that would codify a version of the ABC test into federal law — a goal Biden has supported during his campaign — and have it apply to a wide swath of employment laws on top of the FLSA.

Those legislative efforts may be kicked into overdrive after Inauguration Day passes, depending on the final makeup of Congress. As of Friday, two Senate races in Georgia appear headed for a runoff election that may determine which party controls the upper chamber.

"If independent contractors are going to become employees because of the ABC test, you should see a spike in union organizing and you should see a bump in the percentage of organized labor from where we are now," Holland said, but cautioned that he believes "there'll be constitutional challenges" to the new laws should they pass.

About-Face at the NLRB

On the labor law side of the ledger, the Biden administration will have a chance to quickly remake the National Labor Relations Board, an agency that is known for engaging in dramatic policy shifts depending on which party controls the White House.

Under Trump, the board's Republican majority wiped out dozens of Obama-era decisions and initiatives, both through cases that came before it and through regulation. Among its moves, the Trump board issued regulations rewriting how affiliated businesses **can be deemed joint employers** of the same workers under the National Labor Relations Act and sought to **overturn parts** of an Obama-era rule meant to streamline the union election process.

The Trump NLRB has also **proposed a rule** that limits unions' access to worker contact information and makes college teaching assistants **ineligible to form unions**, while also issuing decisions that made it easier for employers to **limit access** to their property and made it simpler to fire workers for **offensive or profane** outbursts.

Early in his term, Biden will have an opportunity to nominate a new NLRB general counsel, a key role in which the officeholder functions as the agency's prosecutor, oversees its nationwide network of regional offices, and handles day-to-day financial and personnel matters. The president-elect may also quickly tap someone to fill an existing vacancy on the five-person labor board, and he will be able to create a Democratic majority on the board when Trump appointee William Emanuel's term expires in August 2021.

"There has been a strong effort under the Trump administration to return federal labor law to what it looked like before the Obama administration had come in and, in many ways, changed labor law in favor of workers," said Fox, the Paul Hastings attorney, whose practice includes a heavy focus on traditional labor law. "That is a top priority for the Democrats to remedy if they take power. So traditional labor issues will be, I think, top of the list of issues that they want to address quickly."

Beyond just reconstituting the NLRB so that it takes a more worker-friendly approach to key issues, the Biden administration's backing of the PRO Act signals that key tenets of labor law that have been in place in the post-World War II era may be up for revision, according to Fox.

The bill, which **cleared** the House of Representatives nearly a year ago and enjoys widespread Democratic support, would make it easier for workers to form unions, defang states' so-called right-to-work laws, outlaw the use of class action waivers in arbitration agreements and codify into federal law a more worker-friendly joint employer test than what the Trump NLRB adopted through regulation.

Biden has touted the PRO Act as a central pillar of his labor and employment agenda and has indicated in campaign literature that he'd support provisions that go even further than what is included in the current bill.

"If the PRO Act passes the Senate, it will very quickly usher in a new era that changes the balance ... very strongly for unions and worker protections in a way that we've never seen," Fox said.

Narrowing the Pay Gap

A tertiary effect of the Trump administration having pursued a range of policies perceived as being favorable to employers is that Democratic states and municipalities became even more aggressive in addressing workplace issues that received short shrift on the federal level.

One of those areas was pay discrimination, where states like California and New York were among the leaders in making fair pay laws "more robust," according to Felicia Davis of Paul Hastings.

With Biden winning the White House and if Democrats ultimately obtain a majority in the Senate, Davis said she expects the Biden administration to seek to strengthen federal fair pay laws, either through new legislation or through regulatory actions.

"I would expect a Biden administration to certainly focus on pay issues," Davis said. "It's in the forefront of a lot of people's minds."

Exactly how those efforts will work, however, "is an open question," according to Davis, who noted that Vice President-elect Kamala Harris floated an "aggressive pay equity proposal" when she sought the Democratic nomination that would have penalized employers who didn't make progress on the issue.

"I don't know if she or Biden would attempt to push more legislation if elected, but I certainly would expect that under a Biden administration, pay equity would again become a focus of the federal agencies as well," Davis added.

Diversity Training: A 'Minute One' Priority

Another move that Trump made late in the game that will likely draw a quick rebuke from Biden was his executive order banning federal contractors from conducting certain types of diversity training that the outgoing president deemed to be "anti-American."

The controversial executive order **issued Sept. 22** said federal contractors couldn't conduct any workplace training that "inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating," such as trainings that espouse views that "an individual, by virtue of his or her race or sex, is inherently racist, sexist or oppressive, whether consciously or unconsciously."

The DOL's Office of Federal Contract Compliance Programs, which was **tasked with enforcing** the mandate, asked contractors in October for information about diversity training programs that may run afoul of Trump's directive.

Business groups, however, quickly urged the Trump administration to roll back the executive order, arguing that the restrictions are unclear and will sow confusion into what diversity programs contractors are allowed to implement.

Holland, for one, said the incoming Biden administration will see the executive order as low-hanging fruit that can be quickly discarded as soon as the new administration officially takes power.

"I don't know that Biden needs to issue his own identical executive order or opposite executive order, but the Trump executive order regarding training ... is going to be withdrawn," Holland said. "It wouldn't surprise me if that was withdrawn minute one by a Biden administration."

--Additional reporting by Jon Steingart, Anne Cullen and Braden Campbell. Editing by Abbie Sarfo.

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