

JacksonLewis



Legal Update

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Overview

- The Biden Administration
- New York State and City Developments
- Other State Law Trends and Considerations
- Future Considerations

But First Let's Digress

This program is not focused on COVID related issues but of course the continuing impact of COVID on the workplace remains the primary HR issue

- Return to work strategy
- Vaccine strategy
- Expectations of future of workplace
- Lack of clarity on impact of vaccination on safety standards

Potential federal COVID standard is coming – *but now delayed*

The Biden Administration



Biden Agenda

- Diametrically different view of government than trump administration
- Return to enhanced regulation
- Belief in the power of the federal government
- Significant reversals of views and positions



What we simply do not know?

- Certain initiatives are dependent on congressional action
- Will slim democratic majority provide enough votes?
- Will filibuster remain?
- 2022 election cycle
- 2024 election cycle

Likely Need Congressional Action

- **FAIR** Act
- **PRO** Act
- **Paycheck Fairness** Act
- **Recovery** Act potentially unique due to various circumstances – *reminder of COBRA subsidy and other provisions*

FAIR Act

- According to Rep. Hank Johnson (D-Ga.), who introduced the FAIR Act, the Forced Arbitration Injustice Repeal Act, with 155 co-sponsors, “Forced arbitration is an underhanded maneuver that corporations use to trick consumers, workers, and small businesses out of their right to go to court and seek damages from a jury of their peers.”
- It is possible that some narrowed version could find support (*i.e.*, a ban on mandatory arbitration for sexual harassment claims similar to the Franken Amendment) but anything broader unlikely.

PRO Act

- Would impose drastically expanded damages, fines, and civil penalties under NLRA—in some cases imposing personal liability on company officers and directors.
- Other provision include:
 1. Allowing parties to negotiate collective bargaining agreement provisions requiring employees to pay union dues or face termination, even in right-to-work states;
 2. Prohibiting employers from permanently replacing strikers and locking out employees in certain strike situations;
 3. Expanding the definition of “joint employer” to find joint liability where an entity’s “control” over employees is indirect and/or reserved; and
 4. Narrowing the definition of a “supervisor” under the NLRA, making it more difficult for an employer to classify its front-line supervisors and management as exempt from unionization.

Prediction

- While it is unlikely that FAIR or the PRO Act (which has been passed by the House) will become law because of the filibuster (and equally unlikely that the filibuster rules will change, and because they are not good candidates for passage through budget reconciliation, significant changes may come through administrative rulemaking.
- But the more likely route for changes, is rulemaking. For example, there is a reasonable possibility that agencies controlled by Biden appointees will make rules that outlaw class waivers in any forum. Such a rule would potentially not be inconsistent with *Epic Systems*.



Executive Branch Actions

- Regulatory freeze – among first actions of this administration
- Federal agencies' return to use of informal guidance documents
- Numerous executive orders reversing positions of prior administration

Sampling Of Executive Orders – *To Date*

- Launch an initiative to advance racial equity, end 1776 commission
- Revoke order that aims to exclude undocumented immigrants from census
- Preserve/fortify DACA, helps dreamers
- Reverse travel ban targeting primarily Muslim countries
- Combat discrimination on the basis of sexual orientation, gender identity
- Revoke certain executive orders concerning federal regulation – *as mentioned*
- Freeze any new or pending regulations – *as mentioned*
- Reopen Obamacare marketplace, lower recent barriers to joining Medicaid
- Eliminating the training ban for federal contractors – *previously enjoined*



- No more PAID program
- Expect return to liquidated damages as a matter of course
- Former union member confirmed as secretary of labor
- Expansion of UI rights –
Workers receiving unemployment benefits who had their continued regular unemployment benefits' claims denied after they refused to work or accept an offer of work at a worksite not in compliance with COVID-19 health and safety standards.
Workers laid off or who have had their work hours reduced as a direct result of the pandemic.
- Creation of federal UI fraud hotline



- Withdrawn opinion letters
- Joint employer regulations – notice of proposed rulemaking issued to withdraw regulation – goal appears to be to issue a new regulation with more expansive post-employee standard – *note that some provisions were previously enjoined – caveat now due to court decision*
- Independent contractor regulations – notice of proposed rulemaking issued to withdraw regulation (which is not yet effective) – *goal appears to be to limit businesses ability to classify service providers as contractors*
- Status of tip rule – *limited impact in NYS due to state law*



- Commission in republican control into 2021
- However, democrat named chair and vice-chair and new general counsel
- How will new religious guidance be enforced?
- Under new standard for approving litigation, will republican commissioners take position contrary to administration goals?
- Harassment guidance back as possibility?
- How will Revised Conciliation Rule be applied?
- Retaliation claims still most prevalent



- Still in republican control until at least mid-year
- New general counsel however is an indication of change of tone/approach
- Prior GC guidance already being withdrawn
- New directive on scope of concerted activity



- Potential changes in jurisprudence in the following areas – *reflecting that the NLRB has become the biggest yo yo reflection of changes in executive branch*
- Expansion of protected concerted activity
- Potential return to attacking employer policies
- Enhanced organizing rights
- Modified election rules
- E-mail access



- Joint Employer Standard
- Independent Contractor Standard
- Property Rights
- Confidentiality of Investigations
- Weingarten Rights

Miscellaneous

- Expanded immigration program
- More aggressive agency actions related to enforcement and litigation
- Enhanced ACA protections – *of course somewhat dependent on Supreme Court's decision in California vs. Texas*
- Impact of members of judiciary nominated by this administration

Potential Upcoming Federal Actions

- Paid family leave
- Increased minimum wage
- Revised standard for white collar exemptions
- Potential national wage theft protection act
- Limitations on non-competition agreements
- Mandatory E-verify

Potential Upcoming Federal Actions

- Organizing rights for contractors
- Persuader rule
- Repealing Taft-Hartley provisions that allow states to enact right to work laws
- More agency collaboration on issues to punish employers
- Enhanced privacy protections
- **But expect any regulation to be challenged in court** – possibly before judges confirmed during prior administration

New York State and City Developments

New York State and City Actions

- **Implementation of paid sick leave**
 - 100 employee count
 - Revised NYC notice
 - New NYC paystub requirement
 - Carryover under state law
- **Paid family leave**
 - Now fully implemented re time and dollars

New York State and City Actions

- **Legalized Marijuana**
 - Impact on Workplace Testing and Discipline
 - Amendments to NYS Legal Activities Law
 - **NYS WARN Amendment**
 - Just Modifies To Whom Notice Is Sent
 - **Pay For Vaccine**
 - **Returning To Work Following Childbirth**
 - **Gender Neutral Single Occupancy Bathrooms**

New York State and City Actions

- **New York City Fair Chance Act amendments**
 - Obligations unequivocally will apply to both applicants and employees
 - Obligations unequivocally will apply to both convictions and arrests pending disposition
- **New York City Fair Workweek amendments**
 - Only applicable to covered fast food establishments
 - But scary to all as abrogation of at-will employment standard and management freedom to operate business
- **No cash only**

Other State Law Trends and Considerations

State Law Trends NYS and NYC Generally at Forefront

- Minimum wage increases
- Higher exempt salary minimums
- More paid family leave – *i.e.* Colorado
- More pregnancy discrimination protections/accommodation obligations
- More protections for criminal background – *i.e.* Illinois and Philadelphia

State Law Trends NYS and NYC Generally at Forefront

- More CROWN acts
- More marijuana legislation
- More privacy protections
- Restrictions on non-competition agreements
- Settlement agreement considerations
- Harassment policy requirements

State Law Trends Some Specific Unusual Legislation of Note

- California Pay Reporting – and Illinois in future
- Colorado Pay Transparency
- DC Non Compete Law
- State COVID Standards – Virginia, Michigan, Oregon and California
- Minneapolis Freelance Worker Protection
- Puerto Rico Bullying
- Washington Proposed PAGA Type Legislation

Future Considerations

Future Considerations

- For now, continuing to manage COVID and related laws and obligations
- Return to work strategy
- Reacclimation
- Reacclimation
- Reacclimation and connection
- Developing policy for a potentially modified workplace
- Training managers to manage effectively in a potentially changed workplace

Future Considerations

- Remote worker considerations
- Safety considerations
- Potential increased union organizing
- Potential more pro-employee legislation at federal and in some cases at the state and local level

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Thank you.