

Biden's victory could have major impacts on employers



It appears that Joe Biden will be inaugurated the 46th president of the United States on January 20, 2021. The United States Senate will maintain a Republican majority unless Democrats win two runoff elections in Georgia. If they do, there will be a 50-50 split Senate where vice-president-elect Kamala Harris would act as the tie-breaking vote. If this happens, employers should expect an avalanche of legislative initiatives offering more worker protections.

Elections, as they say, have consequences. First, employers should expect to see both immediate and long-term actions taken to manage the COVID-19 pandemic and its economic impacts. Second, a total overhaul of leadership at the U.S. Department of Labor (DOL) and major federal agencies will happen quickly with almost immediate enforcement consequences. Third, Biden is expected to overturn the Trump administration's executive orders on immigration. Finally, expect lots of legislative initiatives from the House of Representatives, which remains in Democrats' control. If the 50-50 Senate split materializes, many of these will become law.

Biden administration will move quickly on COVID

Expect the immediate launch of a coordinated federal effort on pandemic control by the transition team and the announcement of a COVID-19 task force. Some current pandemic task force members, like Dr. Anthony Fauci from the NIH, will likely remain and gain influence under a Biden administration. In addition, an immediate attempt at a nationwide mask mandate is likely, despite resistance from some governors.

The Biden administration is expected to rapidly issue binding OSHA and CDC pandemic rules in addition to the mask mandate. These will include rules for workplace exposure prevention, testing, isolation, and temporary closures. Most likely, this will be accomplished by shifting many of the Trump administration's existing recommendations to mandates. Employers should review those existing recommendations now with an eye towards implementing them quickly should a mandate be issued.

In addition, it's widely expected that some form of targeted shutdowns are likely in COVID-19 hot spots. Employers should ready their emergency contingency plans, including telework options, remote work security, and proper building shutdown processes.

More pandemic support is expected

Longer-term, expect the Biden administration to push Congress for recovery legislation. You can expect to see support for the unemployed, state and local governments, as well as schools and education. There may also be additional financial support for struggling small to mid-size businesses which could include expanded Paycheck Protection Act eligibility. Finally, significant support for infrastructure improvements and major industries like airlines and cruise lines may follow.

Already, Senate Majority Leader Mitch McConnell (who was re-elected) has said he expects the Senate to approve significant recovery legislation. This may even happen during the 'lame duck' session before the inauguration. In fact, major stimulus legislation could end up attached to a funding bill that must pass before December 11 to avoid another government shutdown.

Some regulatory agencies will transition faster than others

Biden's transition team is already selecting potential candidates to head federal agencies like the Department of Labor. This includes identifying individuals to fill mid-level positions that do not require Senate approval. That way, even if the nominees to head the agencies are held up in the Senate, work can begin on January 20. For employers, this means that enforcement priorities under President Trump could change quickly once Biden is inaugurated.

However, some agencies will not see leadership changes as quickly. That's because they're run by boards composed of appointees with staggered terms. Typically, it takes at least a year after a change in administration before seeing a significant change in leadership at these agencies. For example, the U.S. Equal Employment Opportunity Commission (EEOC) is a bipartisan commission currently chaired by Janet Dhillon, who serves until July 1, 2022. The first opening at the EEOC is not until July 1, 2021. With all current members having been nominated or re-nominated by President Donald Trump, the EEOC will be slow to change under a new administration.

Similarly, the National Labor Relations Board (NLRB) has one vacancy with three Republicans and one Democrat filling the other four seats. However, a rolling schedule of term expirations prevents wholesale change. Most likely, Biden would elevate the lone Democrat on the Board, Lauren McFarren, to Board Chairwoman upon taking office and fill the currently vacant seat. With Republican William Emmanuel's term expiring on August 27, 2021, his eventual replacement will shift the Board to Democratic control. The NLRB renders decisions on union elections, the National Labor Relations Act's (NLRA) joint employer standard, and other labor issues.

The future of the Affordable Care Act remains to be seen

The Supreme Court is scheduled to hear an appeal of the Affordable Care Act's constitutionality on Nov. 10, with a decision expected next spring. If the law withstands its third Supreme Court challenge in 10 years, the Biden administration is expected to push Congress to expand the Affordable Care Act. If the ACA falls, Biden has pledged to come up with a replacement. Regardless, the future of healthcare may rest in the Senate. A

Republican-controlled Senate could thwart any action by the Biden administration. A 50-50 split Senate would allow the vice-president to break any ties, paving the way for Democrats to pass more legislation.

Executive orders on immigration are likely to be reversed

President-elect Joe Biden is expected to immediately reverse many executive orders issued during President Donald Trump's time in office. Anticipated reversals include reinstating the Dreamers executive order, which would allow the renewal of work permits for individuals brought to the country without legal authorization as children. In addition, employers with workers who hold Deferred Action on Childhood Arrivals (DACA) work permits should continue to urge holders to renew their applications.

Employment law issues

Employers should expect a push for greater worker protections and more support for labor unions. In addition, Biden administration priorities include higher minimum wages and new anti-discrimination laws covering more protected classes. Other priorities include national mandates for paid family and medical leave and reducing income inequality. Early education and daycare support are also on the agenda – which could help employers fill open positions.

- **Minimum wage:** Biden's campaign platform included support for a nationwide \$15 per hour minimum wage. In addition, employers may see the elimination of the tipped minimum wage for the service industry. Expect an end to the lower minimum wage for employing certain disabled workers, which the Fair Labor Standards Act permits.
- **Worker protection:** In addition to countermeasures to prevent coronavirus exposure, expect more initiatives to protect workers from a broad range of workplace hazards. A particular focus may be preventing sexual harassment and violence against service workers.
- **More classes protected against discrimination and harassment:** Expect new regulations enforcing and broadening Title VII discrimination prohibitions on the basis of sexual orientation, gender identity, and transgender status. Plus, new and expanded rules may ban employer discrimination based on appearance, hairstyles, family structure, and other related statuses. The Biden administration is also expected to push for passage of the Paycheck Fairness Act, a legislative effort aimed at closing the gender pay gap.
- **Organized labor:** Biden supports the Protecting the Right to Organize Act (PRO Act). The PRO Act would allow unions to organize workplaces more easily by streamlining union elections and limiting employer participation in them. Employers would not be able to challenge election-related issues, nor could they hold captive-audience meetings to dissuade employees from choosing to unionize. The PRO Act also would gut state right-to-work laws.
- **Paid leave:** The Biden administration will push for extending the sunset date for the Families First Coronavirus Response Act paid leave provisions. Those are currently set to expire on Dec. 31, 2020. In addition, Congress, at Biden's urging, is expected to pass some form of broad national paid leave.
- **Pregnancy protection:** The Pregnant Workers' Fairness Act, which would extend reasonable accommodations to pregnant employees, already cleared the House of Representatives with a bipartisan vote of 329-73. It may be one of the first major pieces of legislation to pass under a Biden administration as there is also strong Senate bipartisan support.