

# Biden's unapologetic worker agenda could mean big changes for employers



It didn't take long for President Biden to telegraph whose rights will take priority in his administration. Through executive orders, regulations, and legislation, it's clear workers are about to get powerful backing.

Movement can already be seen on unions, immigration, OSHA regulations, paid leave, and gender/pay. Employers will have to adapt to a new environment where the balance has shifted from pro-employer to pro-union and pro-worker.

Employers who don't start acting now to evaluate, and when necessary update, their policies and procedures may very well find themselves playing catch-up later.

## Unions

President Biden sent a pro-union message on his first day in office. In an unprecedented move, he fired National Labor Relations Board General Counsel, Peter Robb. Robb, a Trump appointee, had rendered very pro-employer rulings in his tenure. Assistant General Counsel, Alice Stock, assumed the position only to be fired the next day. Biden then appointed Peter Sung Ohr as Acting General Counsel.

In August 2021, the Board will swing to Democratic control. Observers predict the NLRB priorities will be:

- Reinstating rules allowing employee use of employer email systems for union organizing.
- Revising election procedures that allow a return to “quickie elections” that tend to favor unions.
- Easing restrictions on non-employee/union organizer access to employer property for organizing purposes.
- Returning to a less-stringent, joint-employer standard, exposing more employers to union organizing.

Congressional Democrats are also pushing a pro-union agenda. The House of Representatives passed The PRO Act. The bill would vastly expand the options unions would have when organizing.

## **Immigration**

The White House has signaled strong support for Congressional action to allow a path to citizenship for undocumented workers. On inauguration day, President Biden sent proposed legislation to Congress. Dubbed the U.S. Citizenship Act, the bill would allow all undocumented individuals to immediately apply for temporary legal status. Some undocumented persons, including those brought to the country as children, could immediately receive green cards. Known as “Dreamers,” they hold temporary protected status under President Biden’s reissued Obama-era executive order. That order, known as Deferred Action on Childhood Arrivals (DACA), grants temporary residence and work permission for qualified childhood arrivals. Immigrant farmworkers would also be immediately eligible.

Congress is already acting on the White House’s immigration priority. On March 18, the “Dreamers” portion of the bill easily cleared the House of Representatives, with some Republican support. The House also passed an agricultural worker pathway to citizenship measure — again in a bipartisan vote. The measures now move to the Senate.

For employers, immigration reform likely has a net positive impact. Those who currently employ immigrants will face a lower chance of them being deported. Additionally, this could open up new participants in the workforce.

## **OSHA**

President Biden’s \$1.9 Trillion “American Rescue Plan” (ARP) is now law. The bill includes funding for additional inspectors at the Occupational Safety and Health Administration (OSHA). The agency has been underfunded for years.

Candidate Biden pressed for an Emergency Temporary Standard (ETS) that would require employers to enact specific COVID protocols. OSHA has reportedly drafted the ETS and sent it to the Whitehouse for review.

OSHA may actually taking a slower approach. A Department of Labor spokesperson referred to OSHA efforts as a National Emphasis Program rather than a full-blown ETS. This seems to indicate OSHA is gathering data in order to decide whether an ETS is needed.

## **FFCRA tax credit**

In March 2020, Congress passed the Families First Coronavirus Response Act (FFCRA) that created paid sick leave. Federal tax credits reimbursed employers for the cost. Those credits were set to expire on December 31 before Congress extended them to March 31, 2021. ARP extends the tax credits for employers that offer paid leave to September 30, 2021.

The ARP adds new eligibility reasons for taking paid leave — vaccine appointments, vaccine-related complications, and testing for COVID. ARP also resets the clock for employees taking the initial two weeks of paid leave so that those who have used it earlier may use it again. ARP raised the maximum tax credit for family leave from \$10,000 to \$12,000 to account for the additional leave reasons.

To qualify for the credit, employers must offer it in a nondiscriminatory fashion meaning across their workforce. Offering paid leave is still optional. Employers who opt to provide paid leave should update their forms, policies, and records to reflect the new permitted reasons for leave along with the extended deadlines. Additionally, software used to monitor leave usage should be updated as well.

## **Unemployment compensation**

The ARP continues the additional \$300 a week payment to the unemployed approved back in December of last year. ARP extends federal unemployment benefits through early September 2021. As a practical consequence, employers may see some reluctance to return to work. Especially for those for whom the extra money essentially means they are making what they were working while unemployed.

The extra money coupled with the recent DOL announcement that workers concerned about COVID-19 safety protocols can turn down job offers may mean finding workers is going to be challenging. Smaller employers may have to follow the lead from major employers like Amazon, Target, and Walmart and raise wages to attract workers.

## **Gender Equality Issues**

Gender equality will be a major focus of the Biden/Harris administration. Administration allies have introduced three pieces of legislation.

### **The Equality Act**

This bill would prohibit discrimination in employment based on sex, sexual orientation, and gender identity as well as other areas. The bill would codify last June's Supreme Court Civil Rights Act decisions. In three decisions, it ruled that the Act's Title VII bar on sex discrimination includes sexual orientation and gender identity. The Equality Act would also bar discrimination in public accommodations, education, federal funding, housing, credit, and the jury system. The bill expands the definition of public accommodations to include places or establishments that provide:

- Exhibitions, recreation, exercise, amusement, gatherings, or displays.
- Goods, services, or programs.
- Transportation services.

The bill would allow individuals to use restrooms, locker rooms, and dressing rooms in accordance with the individual's gender identity.

### **The Paycheck Fairness Act**

This bill:

- Limits the defenses an employer can raise in wage discrimination claims.
- Enhances nonretaliation prohibitions.
- Bars employers from prohibiting an employee from disclosing information about the employee's wages.
- Increases civil penalties for violations of equal pay provisions.

If passed, the bill would also require the Equal Employment Opportunity Commission (EEOC) to collect additional pay data to combat sex discrimination.

### **Pregnant Workers Fairness Act (PWFA)**

The bill would require employers with 15 or more employees to offer accommodations to pregnant employees.

Accommodations would include:

- Extra bathroom breaks.
- A stool.
- Limiting contact with certain chemicals.
- Modified lifting requirements.

The PFWA is very likely to pass. It has drawn support from work-life balance advocates and the U.S. Chamber of Commerce. The bill passed the House of Representatives in 2019 after five previous versions had failed. In the contentious run-up to the election, the bill never got on the Senate's calendar. Given the 329 votes it garnered last year and democratic control of the Senate, the bill's prospects are better than ever.

For employers, the bill would provide more certainty. Many terms in the Pregnancy Discrimination Act of 1978 are vague and have led to prolonged litigation. The PFWA uses a similar model as the Americans With Disabilities Act (ADA) to address accommodation requests.

## **Employer Preparedness**

Clearly, the months ahead will bring changes for employers. Now is probably a good time to sit down with counsel for a legal checkup. Changes on any of these fronts will present challenges. Failure to react to them could trigger liability.

**Additional Resource:** Read more on chances of new [worker-focused legislation passing](#) this year.