



PRESIDENTIAL  
ELECTION

## Littler WPI's Election Report: How Voters Have Shaped Workplace Policy

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### Introduction

Although the 2020 presidential election is technically behind us, razor-thin and contested elections for the presidency and Congress remain, potentially drawing out the uncertainty through the new year. As of the date of publication, Joe Biden appears to have narrowly won the presidency, but President Trump has challenged the results in several swing states, and is prepared to take the matter to the Supreme Court. The composition of the Senate—and which party controls the upper chamber—may not be known for some time. At least two contests remain in play, as both races in Georgia might be headed for run-off elections in early January. The only outcome that is clear is that Democrats have maintained control of the House of Representatives after losing some seats.

There are two key points to consider as we assess how the election results will affect the workplace. First, although all current indices point to a Joe Biden win, should President Trump ultimately prevail, we will issue a separate report explaining what to expect during his second term. It will come as no surprise that the candidates' labor and employment priorities differ appreciably.

Second, assuming Joe Biden garners sufficient electoral votes to claim the presidency, whether Democrats gain control of the Senate will be the determinative factor in predicting what next year will bring for labor and employment.

If Democrats achieve a political trifecta—*i.e.*, control both chambers and the White House—President-elect Biden would have more tools at his disposal to pursue his ambitious workplace agenda. If Democrats *do not* gain at least 50 Senate seats, a Republican-majority Senate would serve as a check on his ability to enact laws and make judicial and Cabinet appointments. This may mean President-elect Biden would have to choose more moderate candidates to fill leadership roles in his administration. In addition, without full congressional backing, the Biden administration might have to resort to non-legislative means to pursue its agenda. In that

event, employers could expect the new administration to turn to executive actions and federal agency regulations to achieve its goals.

Regardless of the Senate outcome, the challenge for the new administration will be how to accomplish a potentially broad workplace regulatory agenda while seeking to stimulate business efforts to recover from the pandemic-induced recession. While it is impossible to predict with any degree of certainty what any administration might do—particularly during these unsettled times—this Report aims to provide policy makers, employers, employees, trade associations, academics, and other interested stakeholders with some insight on what a new president and Congress will mean for the world of work.

### State of the Economy and Coronavirus Response

The new administration will inherit an economy battered by the coronavirus, although the real gross domestic product (GDP) increased at a record-setting annual rate of 33.1 percent in the third quarter of 2020.<sup>1</sup> While the latest Bureau of Labor Statistics Employment Situation Report also showed continued signs of modest jobs recovery in October,<sup>2</sup> private employers added fewer jobs last month than initially projected. It is clear that rebounding fully from the 20.8-million job contraction in April will take time.<sup>3</sup>

Notably, the pandemic-related job loss and the subsequent economic recovery have differed dramatically in their impacts on different economic sectors. Industries providing essential services, particularly through on-line shopping and delivery, have maintained and even increased jobs and economic performance, while many retailers, restaurants, hotels, and travel companies have been particularly hard hit during 2020.

Despite signs of modest economic recovery in some sectors, unemployment remains a significant problem. In October, over 15 million individuals reported they are currently out of work because their employer went out of business, temporarily closed, or experienced a reduction in business

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1 U.S. Bureau of Economic Analysis, [www.bea.gov](http://www.bea.gov), noting further that the third quarter GDP's advance exceeded the 31 percent decrease in GDP during the second quarter.

2 Total nonfarm payroll employment rose by 638,000 in October (down from 661,000 in September), and the unemployment rate declined to 6.9 percent. Economic News Release, U.S. Bureau of Labor Statistics, [Employment Situation Report – October 2020](https://www.bls.gov/news.release/archives/empst020201106.pdf) (Nov. 6, 2020).

3 Total payroll jobs decreased by 1.4 million in March 2020, and then by 20.8 million in April 2020. U.S. BLS, Labor Force Statistics from the Current Population Survey, [https://www.bls.gov/web/empsit/ces\\_cps\\_trends.htm](https://www.bls.gov/web/empsit/ces_cps_trends.htm).



due to the pandemic.<sup>4</sup> While new unemployment insurance (UI) claims have been steadily declining,<sup>5</sup> states reported that for the week ending October 31, 2020, over 9.3 million individuals were claiming Pandemic Unemployment Assistance (PUA) benefits under the Coronavirus Aid, Relief, and Economic Security (CARES) Act,<sup>6</sup> which covers workers not typically covered under state UI programs, such as independent contractors and those in the gig economy.<sup>7</sup> In addition, states reported nearly 4 million individuals (up from 3.7 million the week before) were claiming CARES Act Pandemic Emergency Unemployment Compensation (PEUC) benefits, which provide for up to an additional 13 weeks of UI benefits for those who have otherwise exhausted their eligibility.<sup>8</sup> The number of long-term unemployed—those out of work for 27 weeks or more—has increased by 1.2 million, to 3.6 million.<sup>9</sup> Without a legislative

expansion of emergency unemployment benefits conferred under the CARES Act, an estimated 13.5 million will stop receiving benefits by year's end.<sup>10</sup>

Developing and implementing a new response to COVID-19 will likely be the Biden administration's first priority. At the employment level, the coronavirus response may include, among other initiatives, reforming state work-sharing programs, implementing an emergency COVID-related safety standard featuring increased federal mandates, continuing the leave provisions of the Families First Coronavirus Response Act (FFCRA), and extending CARES Act emergency UI benefits.

Many of these initiatives were included in versions of the House-passed Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act.<sup>11</sup> The \$3 trillion and

4 BLS Employment Situation Report, *supra* note 2.

5 During the week ending October 31, 2020, states processed 751,000 new unemployment claims. News Release, U.S. DOL, [Unemployment Insurance Weekly Claims](#) (Nov. 5, 2020).

6 Pub. L. No. 116-136 (2020).

7 DOL Unemployment Insurance Weekly Claims report, p. 3, *supra* note 5.

8 *Id.*

9 BLS Employment Situation Report, *supra* note 2.

10 DOL Unemployment Insurance Weekly Claims report, *supra* note 5.

11 H.R. 6800, 116th Cong. 2d Sess. (2020); see also Jim Paretti and Michael J. Lotito, [House Passes New \\$3 Trillion COVID-19 Relief Package with Significant Labor and Employment Provisions, but Future Unclear](#), Littler ASAP (May 18, 2020). The HEROES Act cleared the House of Representatives on May 15, 2020, but failed to advance in the Senate. A pared-down version of the HEROES Act was introduced in September 2020 and passed the House on October 1, 2020, but that bill similarly failed to advance. See Press Release, House Committee on Appropriations, [House Passes Updated Heroes Act](#) (Oct. 1, 2020).

\$2.2 trillion relief packages passed the House on May 15 and October 1, 2020, respectively, but were not considered in the Senate. Senate Majority Leader Mitch McConnell (R-KY), however, has called for a coronavirus relief measure to be enacted before the end of the year. Because Democratic races fell short of expectations on Election Day, and because the fate of the Senate is unknown, House Speaker Nancy Pelosi (D-CA) might not have the leverage to push either version of the HEROES Act, although scaled-down versions of its provisions could be incorporated in a compromise stimulus bill. As with many other things this election season, whether Congress can agree to such a measure before 2021 remains uncertain.

### Executive Orders

Two actions President-elect Biden can take immediately upon taking office are (a) issuing executive orders; and (b) rescinding the prior administration's orders. For example, President Trump has issued 196 executive orders to date—34 of which were issued during his first 100 days in office. Similarly, during his two terms in office, President Obama issued 295 executive orders, 19 of which were issued during his first 100 days.

President-elect Biden is expected to take a similar path. As will be discussed in greater detail in this Report, President Trump issued several controversial executive orders that will likely be rescinded in short order. For example, President Trump has signed scores of executive orders, proclamations,<sup>12</sup> and memoranda designed to curtail immigration, three of which he issued during his first week in office.<sup>13</sup> The vast majority of these immigration directives focused on restricting the issuance of employment-based visas for foreign workers; implementing COVID-19-related, region-specific entry restrictions; heightening U.S.-Mexico border security; and enhancing immigration enforcement, including instituting information-sharing initiatives among agencies. The Biden

administration will likely take a hard look at these policies and ease some of these limitations during his first 100 days in office, including by reinstating the Deferred Action for Childhood Arrivals (DACA) program and rescinding the so-called "travel ban" order targeting majority-Muslim countries.

More recently, President Trump issued Executive Order 13950, *Combating Race and Sex Stereotyping*,<sup>14</sup> which, among other things, instructs government contracting agencies to add provisions to government contracts prohibiting the use of any workplace training "that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating." It is likely President-elect Biden will rescind this order soon after Inauguration Day.

At the same time, President-elect Biden can issue new executive orders and reinstate old ones, such as of Executive Order 13495, *Nondisplacement of Qualified Workers Under Service Contracts*, which President Obama signed shortly after taking office, and which President Trump only rescinded last year.<sup>15</sup>

### Agency Rulemaking

If history is a guide, the new administration might pump the brakes on federal agency rules that were in progress but not yet finalized during President Trump's term. Many presidents over the past few decades have imposed a moratorium on rules under development shortly after taking office.<sup>16</sup> These directives typically ordered heads of federal agencies to postpone effective dates of rules finalized at the end of the previous administration's term, and to hold off on moving forward with rules that have not taken effect. Although the 2020 Fall Regulatory Agenda has not yet been released, the Trump administration's Spring 2020 Unified Agenda of Regulatory and Deregulatory Actions, which reports on administrative rules at various stages of development, included over 75 items on the Department of Labor's regular and long-

<sup>12</sup> Typically, executive orders direct and govern actions by government officials and agencies, whereas proclamations affect the activities of private individuals. President Trump issued 538 proclamations and 196 executive orders between 2017 and 2020.

<sup>13</sup> See, e.g., Jorge R. Lopez, Michelle A. White and Sean M. McCrory, [What Does the President's Executive Order Blocking Foreign Nationals From Seven Countries Mean for Employment-Based Visas?](#), Littler ASAP (Jan. 29, 2017).

<sup>14</sup> Executive Order 13950 of September 22, 2020, [Combating Race and Sex Stereotyping](#), 85 Fed. Reg. 60683-60689 (Sept. 28, 2020); see also David Goldstein, Jim Paretti, and Michael J. Lotito, [New Executive Order Seeks to Regulate Diversity Training by Federal Contractors and Grant Recipients](#), Littler Insight (Sept. 23, 2020); Jim Paretti, David Goldstein, and Chris Gokturk, [OFCCP Releases FAQs on Diversity and Inclusion Executive Order](#), Littler ASAP (Oct. 7, 2020).

<sup>15</sup> Executive Order 13495 of Jan. 30, 2009, [Nondisplacement of Qualified Workers Under Service Contracts](#), 74 Fed. Reg. 6103-6106 (Feb. 4, 2009); rescinded by Executive Order 13897 of Oct. 31, 2019, [Improving Federal Contractor Operations by Revoking Executive Order 13495](#), 84 Fed. Reg. 59709-59710 (Nov. 5, 2019).

<sup>16</sup> See Maeve P. Carey, [Can a New Administration Undo a Previous Administration's Regulations?](#), CRS Insight (Nov. 21, 2016); see also Ilyse Schuman and Michael J. Lotito, [New Administration Orders Freeze of Pending Regulations, Takes Aim at the Affordable Care Act](#), Littler ASAP (Jan. 23, 2017).



term agency rule lists.<sup>17</sup> Most of those measures had not been finalized by Election Day. Similarly, the Equal Employment Opportunity Commission and National Labor Relations Board still have items pending on their regulatory agendas. The Trump administration is expected, however, to move quickly to finalize as many rules as possible before Inauguration Day. Hitting the pause button on some of those efforts that have not sufficiently advanced (which may vary by department and agency) would enable the new administration to review and reevaluate which rules merit further development.

Some rules that will likely be finalized by January 20, 2021, will face almost certain judicial challenge. In that instance, the plaintiff may ask the court to stay enforcement of the rule pending the outcome of litigation. If the rule is ultimately struck down or enjoined, the Biden administration may choose not to file an appeal, although private parties might do so. This is one way to dispense with or at least delay enforcement of a contested rulemaking by a prior administration. As will be discussed, controversial rules that have or will likely face judicial challenge include the Department of Labor's rule that clarifies and "sharpens" the economic reality test used to determine independent contractor status under the Fair Labor Standards Act (FLSA), and a final rule that creates a balancing test for assessing joint-employer status under the FLSA.

At the same time, history also tells us that a divided Congress can lead to legislative stalemates. To that end, presidents have often resorted to federal rulemaking to achieve their goals. During President Obama's administration, the DOL issued 303 final rules, the EEOC issued 26 final rules, and the National Labor Relations Board issued 17 final rules.<sup>18</sup> While a number of these rules were administrative in nature, many were significant, and the sheer the volume of new regulations is telling. High on new administration's regulatory agenda will be workplace health and safety regulations, particularly as they relate to COVID-19.

Another way of challenging rules that have already taken effect are through resolutions of disapproval. Such resolutions are authorized under the Congressional Review Act (CRA),<sup>19</sup> a law enacted in 1996 that provides Congress with a means to overturn a rule issued by a federal agency, including rules issued in a previous session of Congress and by a previous presidential administration. When a disapproval resolution passes both chambers of Congress, it is presented to the president for signature. Any rule undone through the CRA is "treated as though [it] had never taken effect." Notably, section 801(b)(2) of the CRA prohibits a rule undone through the CRA from being "reissued in substantially the same form." Owing to its limited use, and the fact that its use has not been challenged, there is no case law interpreting what "substantially the same form" means in practice—although in the Trump administration, the Department of Labor reissued one rule that had been repealed by the CRA, and took the position that the rule satisfied the CRA's not "substantially the same form" requirement because it had a "substantially different scope and fundamentally different approach" than the rule that had been repealed.<sup>20</sup>

Relatively few employment-related rules have had been nullified in this fashion. The first time was in 2001, when former President George W. Bush signed a resolution blocking OSHA's controversial ergonomics rule issued during the Clinton administration.<sup>21</sup> The second time was on March 27, 2017, when President Trump signed a joint resolution of disapproval to block the rule implementing Executive Order 13673, *Fair Pay and Safe Workplaces*, otherwise known as the "blacklisting" rule, which would have, among other things, required federal contractors to disclose adverse findings and decisions related to their compliance with federal and state labor and employment laws.<sup>22</sup> The Trump administration also used the CRA to dispense with a DOL rule related to drug-testing applicants for unemployment compensation,<sup>23</sup> a rule

17 U.S. Office of Information and Regulatory Affairs, Office of Management and Budget, Spring 2020 Unified Agenda of Regulatory and Deregulatory Actions, <https://www.reginfo.gov/public/do/eAgendaMain>.

18 *Federal Register* search of final rules issued by the DOL from January 20, 2009 through January 20, 2017.

19 Pub. L. No. 104-121 (1996).

20 DOL, *Federal-State Unemployment Compensation Program: Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants Under the Middle Class Tax Relief and Job Creation Act of 2012*, 84 Fed. Reg. 53037-53052 (Oct. 4, 2019). For an analysis of the CRA's "substantially the same form" requirements, and its reviewability by courts, see Congressional Research Service, *The Congressional Review Act (CRA): Frequently Asked Questions*, No. R43992 (Jan. 14, 2020).

21 Pub. L. No. 107-5 (2001).

22 Pub. L. No. 115-11 (2017).

23 Pub. L. No. 115-17 (2017).

governing an employer's ongoing obligation to make and maintain records of work-related injuries and illnesses,<sup>24</sup> and two rules related to savings arrangements established by states for non-governmental employees.<sup>25</sup>

Whether the 117<sup>th</sup> Congress will take this step will depend on the makeup of the Senate after the final election returns are tallied. Depending on the ultimate composition of the Senate (which would dictate the fate of any CRA effort to revoke prior administration regulations), it is likely that some high-profile rules, such as the DOL rule governing independent contractor status under the FLSA, would face a CRA challenge early in the new administration.

### Congressional Action

During the campaign, both President-elect Biden and Vice President-elect Kamala Harris mentioned the filibuster, although neither said definitively whether they were in favor of jettisoning this procedural tool outright. The filibuster is used to block a Senate vote—and therefore prevent a bill from advancing—by allowing continuous debate over the measure. Decades ago the Senate adopted the cloture rule, which limits debate (and therefore precludes the possibility of a filibuster) on a bill if three-fifths of the Senate (60 members) vote in favor of invoking cloture. Therefore, most bills must meet this 60-vote approval threshold in order to make it to a final vote, where a simple majority (51 votes) is needed. The threat of a filibuster is now routinely used by the minority to block action by the majority on controversial measures or those that do not enjoy broad support.

In recent years, the Senate has dispensed with the filibuster over presidential nominations, including Supreme Court justices, meaning a simple majority vote is required for approval. This came into sharp focus following the death of Justice Ruth Bader Ginsburg, where on October 26, 2020, Justice Amy Coney Barrett was confirmed to the High Court by a largely party-line vote of 52-48.

Although dispensing with the filibuster had not been a priority of the Biden campaign, the push to seat Justice Barrett on the Supreme Court could galvanize the Democratic

Party—should it take control of the Senate—in favor of using what leverage it has to move its agenda forward, particularly if close margins mean that Senate Republicans can prevent the approval of most legislation. Therefore, if Democrats are able to win a majority in both chambers of Congress, it is quite possible eliminating the filibuster will be a viable option in 2021.

What would this mean for President-elect Biden's agenda? Simply put, without a filibuster, it would be a lot easier to enact laws. Many legislative items that had languished on the Democratic Party's wish list might be able to advance. This could include increases to the minimum wage, enhanced pay discrimination laws, national paid leave, beefed-up union protections, new health and safety standards, limits on classifying workers as independent contractors, and greater accountability for employers that commit employment law violations. As noted, if Congress winds up being politically divided, President-elect Biden will likely rely more on regulatory and executive actions to achieve these ends.

### Federal Judiciary and Supreme Court Challenges

President Trump seated over 200 federal judges to the bench during his term in office. Over 50 were appointed to the U.S. circuit courts of appeal, more than 160 to U.S. district courts, and three to the Supreme Court. As of November 4, 2020, there were 35 federal judge nominees awaiting a hearing with the Senate Judiciary Committee and 19 awaiting Senate floor confirmation.<sup>26</sup>

President-elect Biden is expected to blunt some of these conservative picks. Supreme Court Justice Stephen Breyer is in his 80s and could retire this term, although his replacement would not change the current ideology of the Court. If Democrats gain control of the Senate, President-elect Biden will have more leeway in picking judicial candidates. When pressed about whether he would consider adding more justices to the Court, President-elect Biden stated he would create a commission to "consider" such changes.<sup>27</sup> Without

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24 Pub. L. No. 115-21 (2017).

25 Pub. L. No. 115-24 (2017); Pub. L. No. 115-35 (2017).

26 See Current federal judicial vacancies, Ballotpedia, [https://ballotpedia.org/Current\\_federal\\_judicial\\_vacancies](https://ballotpedia.org/Current_federal_judicial_vacancies) (last visited Nov. 4, 2020).

27 See, e.g., Annie Linskey, *Biden, squeezed on the Supreme Court, promises a commission to consider changes*, The Washington Post, Oct. 22, 2020.



a Democratic majority in the Senate, however, changing the number of Justices would not be an option.

In the near future, however, the Supreme Court, which now includes six justices with more conservative leanings, will soon consider a handful of cases with employment law implications. For example, the Court is set to address cases that could expand protections for religious-based actions, which while narrow in their precise scope, will likely give some indication of how the Court will address religious liberty in the workplace for some years to come.

On June 15, 2020, the Court in *Bostock v. Clayton County* held that Title VII prohibits discrimination based on sexual orientation and gender identity.<sup>28</sup> The High Court reasoned, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." The Court explained, "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex." Accordingly, the Court concluded, "[s]ex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."

This decision left open the question of what the interplay is between Title VII and the Religious Freedom Restoration Act of 1993 (RFRA)<sup>29</sup> and other protections for religious beliefs. A couple of cases before the Court this term, although not involving questions of employment law specifically, could help define the scope of religious protections.

In *Tanzin v. Tanvir*,<sup>30</sup> the Court will decide whether the RFRA permits suits seeking money damages against individual federal employees. In a second religion-based case, *Fulton v. Philadelphia*,<sup>31</sup> the Court will consider whether a religious nonprofit that receives government funding must adhere to the city's anti-discrimination laws if it asserts a religious objection. This case involved a Catholic foster care agency denied public funding because it would not place children

with same-sex couples on religious grounds. One of the issues before the Court is whether it should reconsider its 1990 decision in *Employment Division v. Smith*,<sup>32</sup> in which the Court held that denying unemployment benefits to individuals fired for using an illegal drug (peyote) as a religious sacrament did not violate the Constitution's Free Exercise Clause.

A more conservative Court may expand the ability of entities and individuals to use religious freedom as grounds to take actions that would otherwise be considered discriminatory or unlawful. This tenet could wend its way into the workplace, where RFRA and Title VII collide.

The more pressing issue before the Court involves the Affordable Care Act (ACA). While the Trump administration made dismantling the ACA—President Obama's signature legislative achievement—a goal during his term, the landmark health care law still stands, at least for now. The U.S. Supreme Court is scheduled, however, to weigh in on the ACA's constitutionality 10 years after the law was enacted.

Court challenges to the ACA began almost immediately after the law took effect. One case made its way to the Supreme Court in 2012. The High Court in *National Federation of Independent Business v. Sebelius*<sup>33</sup> upheld the constitutionality of the ACA's individual mandate on the grounds that the penalty for refusing to purchase health insurance constitutes a tax that Congress can legitimately impose under its taxing power. The Tax Cuts and Jobs Act of 2017,<sup>34</sup> however, eliminated the penalty for the individual mandate. The new challenge to the ACA—filed in February 2018 by 20 Republican state attorneys general and Republican governors—is premised on the idea that the individual mandate is rendered a nullity absent the penalty, and thus the entire basis for upholding the ACA is gone.

A Texas federal court sided with the plaintiffs and invalidated the ACA in December 2018, but stayed enforcement of the decision pending appeal.<sup>35</sup> A year later,

28 590 U.S. \_\_\_, 140 S. Ct. 1731 (2020). See also Jim Paretti, Michael Hui, and Julie Stockton, [Supreme Court Rules that Gay, Lesbian, and Transgender Individuals Are Protected Under Title VII of the Civil Rights Act](#), Littler Insight (June 15, 2020).

29 42 U.S.C. § 2000bb.

30 No. 19-71, cert. granted Nov. 22, 2019.

31 No. 19-193, cert. granted Feb. 24, 2020.

32 494 U.S. 872 (1990).

33 567 U.S. 519, 574 (2012).

34 Pub. L. No. 115-97, 131 Stat. 2054 (2017).

35 *Texas v. United States*, No. 4:18-cv-167-O (D. Tex. Dec. 30, 2018) (granting partial final judgment on Count I of plaintiffs' amended complaint).

the Fifth Circuit agreed with the lower court that the individual mandate was unconstitutional, but remanded so the lower court could determine which portions of the ACA are still valid and whether the decision should apply nationwide.<sup>36</sup> On March 2, 2020, the Supreme Court agreed to take up the matter in a consolidated case, *California v. Texas*.<sup>37</sup> Oral argument is set for November 10, 2020, and a decision is expected in the spring of 2021.

The ACA is more vulnerable now that Justice Coney Barrett has been confirmed to the High Court. Based on her numerous writings, Barrett's judicial philosophy seems in line with that of the late Justice Antonin Scalia. In a 2017 law review article, Barrett emphasized Justice Scalia's criticism of the majority opinion in *Sebelius*.<sup>38</sup> This position may offer some insight as to how she may approach the validity of the health care law.

If the Court does in fact find the ACA unconstitutional, an estimated 20 million individuals might lose their health insurance, and insurers will be able to reinstate preexisting condition exclusions, annual and lifetime limits on coverage, among other benefits. Congress, however, would likely jump in with proposed legislative fixes should this transpire. If Congress remains politically divided, any changes would have to be implemented on a bipartisan basis.

President-elect Biden indicated that he intends to build upon the ACA by, among other things, providing individuals with a public health insurance option like Medicare.<sup>39</sup> The Democratic Party Platform similarly supported a pathway to universal health care through a public option.<sup>40</sup> President-elect Biden's health care plan also included a vow to protect the ACA from further attacks, and to institute additional reforms, such as providing larger tax credits to individuals who purchase insurance through the health insurance marketplace, if in fact the ACA survives Supreme Court scrutiny. Specifically, President-elect Biden's plan called for eliminating the 400%

income cap on tax credit eligibility and lowering the limit on the cost of coverage from 9.86% of income to 8.5%.<sup>41</sup> Of course, as we learned in 2010, overhauling our health care system is not an easy or speedy undertaking. If Congress ends up politically divided, any future changes to our country's health care policy would require some Republican support.

New leadership at federal agencies is expected to help bolster the ACA's provisions, should it survive. In June 2020, the U.S. Department of Health and Human Services (HHS) issued a new rule interpreting Section 1557 of the ACA, which contains the ACA's anti-discrimination provisions.<sup>42</sup> The rule substantially changed Obama-era HHS regulations interpreting Section 1557 to prohibit discrimination in certain health programs based on gender identity, gender expression, and transgender status.

Lawsuits seeking to block the rule quickly followed. A day before the rule was to take effect, the U.S. District Court for the Eastern District of New York ordered a stay of its enforcement and a preliminary injunction preventing it from taking effect pending the outcome of litigation.<sup>43</sup> A DC court similarly blocked portions of the rule.<sup>44</sup> If the rule survives judicial scrutiny, the HHS under new leadership would likely issue new rulemaking on this issue in response.

### Labor Management Relations

*"If I have the honor of becoming your president, I'm going to be the strongest labor president you have ever had."*

— Joe Biden, speaking at September 7, 2020, AFL-CIO Labor Day Event

Though only time will tell the strength of President-elect Biden's labor reform agenda, in its present form, it contains many items that have been on organized labor's wish list for years. The core of the Biden labor reform agenda is

<sup>36</sup> *Texas v. United States*, No. 19-10011 (5th Cir. Dec. 18, 2019) (affirming in part and vacating in part the district court's grant of partial final judgment).

<sup>37</sup> *California v. Texas*, \_\_\_ F.3d \_\_\_\_ (5th Cir. 2019), cert. granted, No. 19-840 (Mar. 2, 2020).

<sup>38</sup> See, e.g., Amy Coney Barrett, *Justice Scalia and the Federal Court: Originalism and Stare Decisis*, 92 Notre Dame L. Rev. 1921 (2017).

<sup>39</sup> Joe Biden Platform, Health Care, <https://joebiden.com/healthcare/>.

<sup>40</sup> [2020 Democratic Party Platform](#), pp. 27-29.

<sup>41</sup> *Id.*

<sup>42</sup> HHS, [Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority](#), 85 Fed. Reg. 37160 (June 19, 2020).

<sup>43</sup> *Walker v. Azar*, No. 1:20-cv-02834 (E.D.N.Y. Aug. 17, 2020).

<sup>44</sup> *Whitman-Walker Clinic, Inc. v. HHS*, No. 20-1630 (D.D.C. Sept. 2, 2020).

the Protecting the Right to Organize (PRO) Act,<sup>45</sup> the most expansive federal labor relations legislation since the National Labor Relations Act (NLRA) itself. The PRO Act expands on the Employee Free Choice Act,<sup>46</sup> legislation that failed to pass the Democratic-controlled Congress during then-Vice President Biden's first year in office in 2009. The PRO Act is viewed by some as an attempt to restore organized labor's role in Democratic Party policymaking.

The PRO Act's chances of passage—in whole or in part—will depend entirely on the Senate outcome. If Republicans maintain control, the PRO Act will almost certainly fail to advance. In that case, the Biden administration would have to shape labor policy by other means, including by flipping the National Labor Relations Board majority and appointing a Democratic general counsel during President-elect Biden's first year in office.

### The National Labor Relations Board and General Counsel

The current composition of the NLRB is weighted toward President Trump's Republican appointees—Chairman John F. Ring, and members Marvin Kaplan and Bill Emanuel—and is rounded out by President Obama appointee Lauren McFerran, whom President Trump re-nominated to a five-year term when her prior term expired in December 2019. President-elect Biden is expected to designate her as chair, but she will be politically outnumbered, at least in the short term. It is probable that President-elect Biden will nominate a fifth member in his first days or weeks in office. He has already promised that he would “appoint members to the NLRB who will protect, rather than sabotage, worker organizing, collective bargaining, and workers' rights to engage in concerted activity whether or not they belong to a union.”<sup>47</sup> Because he needs Senate approval, if Democrats do not control the Senate, this seat could remain vacant until later in the year when General Counsel Peter Robb's four-year term expires, and a deal could be made involving his replacement.

Member Emanuel's term expires on August 27, 2021, which will create another vacancy on the five-member Board. If Republicans control the Senate at this time, it is possible that unless and until a deal to seat new members can be made, the Board will operate with two Republican members and one Democratic member for much of the year.

Thereafter, Chairman Ring's term will expire on December 16, 2022, Member McFerran's term expires just after the next election, on December 16, 2024, and Member Kaplan's term expires on August 27, 2025.

As noted, GC Robb's term expires in November 2021. The GC is independent from the Board itself, serves as the independent supervisor of NLRB field offices, and sets the Board's prosecutorial priorities by determining in which cases the Board will issue a complaint, and which policies and decisions it will seek to overturn. It is likely the eventual Biden appointee will take steps to roll back many Trump-era decisions. This would follow the pattern set in the Obama administration, which reversed 4,559 years of NLRB precedent.<sup>48</sup> Such actions will not take place, however, until a Democratic GC is confirmed.

### Dissecting the PRO Act

As noted, the cornerstone of the Biden-Harris labor platform is the PRO Act, which was first introduced in the House in May 2019, and passed in a 224-194 vote on February 6, 2020.<sup>49</sup> The lengthy bill is a kitchen sink of labor law policy, containing more than 50 significant changes in this area. Though some believe the Act is unlikely to be enacted in its entirety, much depends on the new Senate majority, given that the House has already enacted the bill as a single package. Its many provisions do, however, provide some insight into the next administration's labor priorities.

The stated purpose of PRO Act is to expand unionization, enhance remedies for unfair labor practices, safeguard the right to strike, and permit “fair share” union dues. More specifically, the bill would:

45 H.R. 2474, S. 1306, 116th Cong. 1st Sess. (2019); see also Fact Sheet, U.S. Committee on Education & Labor, [Protecting the Right to Organize Act](#).

46 S. 1041, [Employee Free Choice Act of 2007](#), 110th Cong. (2007-2008); see also [The Employee Free Choice Act is Introduced, Albeit With Less Support](#), Littler ASAP (Mar. 10, 2009).

47 Joe Biden Platform, The Biden Plan For Strengthening Worker Organizing, Collective Bargaining, And Unions, <https://joebiden.com/empowerworkers/>.

48 For a complete analysis of the Obama-era NLRB's reversal of precedent, see Michael J. Lotito, Maury Baskin, Melissa Parry, [Was the Obama NLRB the Most Partisan Board in History?](#) (Dec. 6, 2016).

49 H.R. 2474 – [Protecting the Right to Organize Act of 2019](#), 116th Cong., 2d. Sess. (2019-2020).

- Add a definition of "Joint Employer" to the NLRA that would codify the Obama-era Board decision, *Browning-Ferris Industries of California, Inc.*,<sup>50</sup> "indirect control" standard into the Act, and nullify the current Board's recently issued joint employer rule that states an employer is only a "joint employer" if it exercises "substantial direct and immediate control" over another company's employees;<sup>51</sup>
- Revise the definition of "employee" in the NLRA to add the "ABC test" that has been subject of much debate since California adopted it last fall.<sup>52</sup> Under the ABC test, any person providing labor or services for remuneration is considered an employee instead of an independent contractor unless the "hiring entity" demonstrates that all of the following conditions are satisfied: (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; (B) The person performs work that is outside the usual course of the hiring entity's business; and (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. Expanding the historic definition of "employee" by adding the ABC test would expand the Act's protections to millions of independent contractors who are currently unable to form unions and collectively bargain with the companies to which they provide services;
- Revise the definition of "supervisor" in the NLRA to reduce the types of authority that indicate supervisory status, and insert a temporal requirement for supervisory responsibilities that has never been part of the supervisory analysis. This step would broaden the NLRA's coverage to include some managers who, since the Act's inception, have been precluded from assisting unionization efforts due to their presumed loyalty to the employer, and key role in the employer's operations and management structure;
- Declare that employers would no longer have standing to contest union election petitions;
- Expand the scope of unfair labor practices by employers by making it an unfair labor practice to (1) "promise, threaten, or take any action" to permanently replace striking employees, a right that has existed as to "economic strikers" for decades, (2) communicate with employees during their shift about "campaign activities unrelated to the employee's job duties," which would limit employers' free speech rights during union campaigns by restricting the Act's protection of expression of views, arguments, or opinions, made without threat of reprisal or promise of benefit, (3) require employees to sign class action waivers, thus overruling the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 584 U.S. \_\_\_\_ (2018), which permitted individual arbitration agreements, and (4) provide additional available remedies, including back pay without reduction for interim earnings, front pay, and liquidated damages equal to twice the amount of other damages awarded;
- Authorize unions to engage in "secondary boycotts" including picketing against neutral businesses with which an employer does business. Such tactics have historically been barred by the NLRA due to their negative impacts on commerce;
- Compel employers and newly certified unions to participate in mediation with the Federal Mediation and Conciliation Service, and if the mediation fails, to submit all first contracts to binding interest arbitration;
- Re-institute the Obama-era notice-posting rule that was invalidated by the U.S. Court of Appeals for the D.C. Circuit in 2013;<sup>53</sup>

50 *BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015); see also Michael Lotito, Maury Baskin and Missy Parry, [NLRB Imposes New "Indirect Control" Joint Employer Standard in Browning-Ferris](#), Littler Insight (Aug. 28, 2015).

51 NLRB, [Joint Employer Status Under the National Labor Relations Act](#), 85 Fed. Reg. 11184-11236 (Feb. 26, 2020); see also A. John Harper III, Michael J. Lotito, Maury Baskin, Art Carter, and Jim Paretti, [NLRB Joint-Employer Rule Restores "Substantial Direct and Immediate Control" Test](#), Littler ASAP (Feb. 25, 2020).

52 Michael J. Lotito, Bruce J. Sarchet, and Jim Paretti, [AB 5: The Aftermath of California's Experiment to Eliminate Independent Contractors Offers a Cautionary Tale for Other States](#), Littler Insight (Mar. 10, 2020).

53 See Gregory A. Brown, [D.C. Circuit Invalidates NLRB's Posting Rule](#), Littler ASAP (May. 8, 2013).

- Include the key personal information provisions of the Board's 2014 "quickie election" rules<sup>54</sup> in the NLRA itself, requiring employers to disclose available personal contact information including personal home and cell phone numbers and personal email addresses for all employees eligible to vote in an election. The PRO Act would also compel employers to provide unions their employees' work email addresses, effectively codifying the recently overturned Obama-era *Purple Communications* decision;<sup>55</sup>
  - Empower unions to circumvent secret ballot election losses through a card check process. The PRO Act would embed a process in the NLRA by which unions could overturn election results where the union lost, but the Board later sets aside the election due to employer misconduct, so long as the union can demonstrate that a majority of bargaining unit employees signed authorization cards within the year before the election;
  - Institute civil penalties for non-compliance with Board orders, enforceable by civil action in federal district court, starting at \$50,000 for each failure to comply with a Board order. Such civil penalties would also be subject to doubling if the employer committed a similar unfair labor practice in the previous five years;
  - Lower the standard for the Board to obtain 10(j) injunctions;
  - Impose director and officer liability where the Board determines that a director or officer of an employer is personally liable for unfair labor practice violations;
  - Provide a private right of action for anyone injured by employer unfair labor practices, including the enhanced civil penalties listed above, attorney's fees, and punitive damages;
  - Override state "right-to-work" laws by authorizing "fair share" union dues arrangements, regardless of where a contract is entered into. Currently, at least 27 states have passed right-to-work laws;
  - Codify the Obama-era "persuader rule" that was blocked by a federal district court in Texas in 2016,<sup>56</sup> and was opposed by legal industry groups including the American Bar Association, because it would compel employers to reveal the labor relations advice and services obtained from attorneys; and
  - Create new whistleblower claims for violations of the NLRA, under the supervision of the Department of Labor (not the NLRB), imposing an entire new set of regulations and potential penalties on employers.
- The undeniable impact of the PRO Act is that it would be easier for unions to organize employees, including employees who have never before been able to join unions, while simultaneously creating new leverage for unions at the bargaining table, and imposing unprecedented changes in the workplace structures of many employers.

### PRO Act "Plus"—Other Labor Law Reform Promises

Several key Biden campaign platform promises<sup>57</sup> reached beyond the vast changes encompassed in the PRO Act. Perhaps most significant was his commitment to allow employees to unionize based on authorization cards alone, a process called "card check." Under that system the NLRB would *not* direct a secret ballot election—the preferred means for determining whether employees wish to become unionized—if a majority of employees in the proposed bargaining unit signed authorization cards, and no other union is certified or recognized as their exclusive representative. President-elect Biden has advocated for a process whereby a union could obtain certification based on authorization cards alone only *after* an unsuccessful secret ballot election, and where the Board *also* ultimately determines the employer engaged in unfair labor practices that undermined the election process.

Independent contractors who do not automatically garner the NLRA's protections in light of the revised definition of "employee," would also benefit beyond the PRO Act, as during the campaign, President-elect Biden proposed expanding

54 See Alan I. Model and Jason J. Silver, [The NLRB Issues Its Long-Anticipated "Quickie Election" Rule, Making Union Organizing Faster and Easier](#), Littler Insight (Dec. 15, 2014).

55 See Meredith C. Shoop, [Board Overturns Purple Communications, Restores Employer Right to Restrict Email Use](#), Littler ASAP (Dec. 18, 2019).

56 See Michael J. Lotito, [Court Permanently Blocks DOL's Persuader Rule](#), Littler ASAP (Nov. 16, 2016).

57 Joe Biden Platform, The Biden Plan For Strengthening Worker Organizing, Collective Bargaining, And Unions, <https://joebiden.com/empowerworkers/#>.



organizing rights even to those who are unquestionably independent contractors under the “ABC test.” This change would likely extend the right to organize to millions of additional workers, and could lead to proliferation of fractured bargaining units given the uniqueness and individuality of independent contractors who, among other things, work in their own different locations without regular, direct supervision as is the case with traditional employees. President-elect Biden’s platform also expressly supported modifying antitrust law to guarantee “that independent contractors can organize and bargain collectively for their mutual protection and benefit.”<sup>58</sup>

Another proposed expansion of labor law is to enhance penalties for employers and individual executives where they are found to have interfered with organizing activity, including criminal penalties where interference is deemed intentional.

President-elect Biden also promised to develop a “cabinet-level working group” in his first 100 days in office that includes union representatives, and “will deliver a plan to dramatically increase union density and address economic inequality.”<sup>59</sup> The working group would consider ways federal law can bow to local law in order to increase union organizing. Initial proposed methods include requiring government contractors to sign neutrality agreements or by instituting card check as an option for unionization. The working group would also investigate avenues to sectoral bargaining, where a single or multiple unions bargain collectively with all competitor employers in an industry. Sectoral bargaining is not possible under current federal law, but is espoused primarily by progressive labor groups, as it would result in massive bargaining power for labor unions.

Another Obama-era proposal President-elect Biden promises to resurrect is debarment, which would disqualify employers that refuse to sign neutrality agreements, or have been accused of wage and hour violations, for example, from contracting with the federal government. Such “blacklisting” was advocated through the Fair Pay and Safe Workplaces Executive Order that was revoked through the Congressional Review Act process during the Trump administration.

Many of these items would take legislative action to implement, an option that would not be an option if the 117<sup>th</sup> Congress winds up being politically divided. If the Biden administration can implement any of these initiatives through rulemaking, executive orders, or prioritized Board decisions, however, it may attempt to do so.

### Wage and Hour

The new administration may address several wage and hour policies over the next couple of years. These changes could come in the form of both new rulemaking and laws.

**Minimum Wage.** First, the Biden administration indicated it would support efforts to raise the federal minimum wage to \$15 per hour. During his campaign, President-elect Biden not only voiced his support for such a measure, but also included as part of his platform a pledge to award federal contracts to only those employers that pay a \$15-per-hour minimum wage and family-sustaining benefits. The feasibility of enacting a \$15 national minimum wage will necessarily depend on the Senate outcome. Regardless, President-elect Biden could issue an executive order to achieve the latter priority with respect to federal contract awards, although it is by no means certain. He also identified support for eliminating the tip credit, although it is less likely that such a bill would garner the wholesale support in Congress necessary to become law.

**Independent Contractors.** A focus on broadening the definition of “employee” is expected in the upcoming administration. We could well see a federal shift towards adopting a federal “ABC test” to distinguish employees from independent contractors. This would result in fewer individuals meeting the independent contractor definition and would require upending of the recent rulemaking engaged in by the Trump Department of Labor, which sought to clarify and “sharpen” the economic reality test applied by the FLSA.<sup>60</sup> This rule, which is expected to be issued in final form by the Trump administration before January’s inauguration, is likely to be the subject of legal challenge (as was DOL’s joint employment rule, discussed below, by a coalition Democratic state attorneys general). The administration could take advantage of a court

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> WHD, [Independent Contractor Status Under the Fair Labor Standards Act](#), 85 Fed. Reg. 60600–60639 (Sept. 25, 2020); see also Tammy McCutchen and Dane Steffenson, [DOL Releases Proposed Regulation on Independent Contracting](#), Littler Insight (Sept. 22, 2020).



challenge to delay implementation. Finally, in conjunction with narrowing the definition, the administration is expected to increase enforcement of misclassification of independent contractors.

**Joint Employment.** In January 2020, the DOL released its long-awaited final rule creating a four-factor balancing test for determining joint-employer status under the FLSA, which largely focused on the employer's right to control the employee.<sup>61</sup> A portion of the DOL's rule, however, was struck down by a New York federal court in September.<sup>62</sup> Should the Biden DOL reissue joint-employer guidance, it would likely expand upon the test, factoring not only the right of control, but also the worker's economic dependence and the integration of the operations of the entities. In addition, as discussed in the next section of this Report, the administration could pursue legislative action to better delineate joint employment. Finally, it is highly likely that a Biden DOL would not pursue an appeal of the New York court's decision, and instead focus on development of a new rule (although a number of trade associations that intervened as parties in the legal challenge may pursue an appeal on their own).

### Expanded Worker Protections & Predictable Scheduling.

The administration has signaled its support for expanded worker protections. This includes enforcing prevailing wage standards and ensuring that Davis-Bacon requirements are strictly complied with on all investment projects.<sup>63</sup> Additionally, if the Biden administration moves forward with plans for a massive investment in infrastructure, as his campaign material predicted he would,<sup>64</sup> it is possible that any such package would include a number of labor-friendly positions, such as requiring contractors to enter into project labor agreements, agreeing to union neutrality provisions, or requiring contractors to disclose information about their employees' compensation.

President-elect Biden also signaled that he is in favor of national legislation that would impose predictive scheduling requirements on employers. Vice President-elect Harris was the Senate sponsor of the Domestic Workers Bill of Rights Act, which would, among other things, establish fair scheduling practices for domestic employees.<sup>65</sup> Vice President-elect Harris also co-sponsored the Schedules that Work Act, which would permit employees to request changes to their work schedules without fear of retaliation and require employers to provide more predictable and stable schedules for employees in certain occupations.<sup>66</sup> It is unclear how receptive a Republican Senate would be to such a bill, should that be the outcome. Similar legislation has been popping up across the country, particularly aimed at providing workers in the retail and service industries advance notice of work schedules and shift changes, and guaranteeing a minimum amount of time between scheduled shifts. These laws may be subject to legal challenge—for example, Littler currently is representing a coalition of trade associations that have brought a legal challenge to New York City's predictive scheduling Fair Workweek Law.<sup>67</sup>

Finally, as previously discussed, the Biden DOL may take a hard look at whether other Trump-era rules should be revised. Although the Trump DOL did reissue updates to the minimum salary level required to meet the white-collar exemption tests under the FLSA, they fell far short of those enacted by President Obama. An effort to further increase the minimum salary required to meet the exemption tests, or further revisions to the duties tests, may be contemplated. Notably, Vice President-elect Harris was a cosponsor of the Restoring Overtime Pay Act, which would codify the Obama-era overtime rule.<sup>68</sup>

Similarly, the new administration may review the guidance the Trump administration issued on topics such as compensation that should be included in the regular rate of

61 WHD, [Joint Employer Status Under the Fair Labor Standards Act](#), 85 Fed. Reg. 2820-2862 (Jan. 16, 2020); see also Jim Paretti, Tammy McCutchen, Maury Baskin, and Michael Lotito, [DOL Issues Final Rule on Joint-Employer Status under Fair Labor Standards Act](#), Littler ASAP (Jan. 13, 2020).

62 *State of New York v. Scalia*, No. 1:20-cv-1689-GHW, 2020 U.S. Dist. Lexis 163498, (S.D.N.Y. Sept. 8, 2020). The court held that the rule violates the Administrative Procedure Act because it conflicts with the FLSA and is arbitrary and capricious.

63 Sen. Harris was a co-sponsor of the [Build Local, Hire Local Act](#), S. 2404, 116th Cong., 1st Sess. (2019). This bill would, among other things, protect Davis-Bacon prevailing wage requirements.

64 Joe Biden Platform, The Biden Plan to Build a Modern, Sustainable Infrastructure and an Equitable Clean Energy Future, <https://joebiden.com/clean-energy/#>.

65 [Domestic Workers Bill of Rights Act](#), S. 2112, 116th Cong., 1st Sess. (2019).

66 [Schedules That Work Act](#), S. 3256, 116th Cong., 2d Sess. (2020).

67 A copy of the complaint challenging this law, which is currently pending in the New York state appeals court, may be found [here](#).

68 [Restoring Overtime Pay Act of 2019](#), S. 1786, 116th Cong., 1st Sess. (2019).

pay,<sup>69</sup> the fluctuating workweek,<sup>70</sup> and the application of the Section 7(i) overtime exemption for commissioned retail or service sales employees.<sup>71</sup> It is also likely that a Biden DOL would limit the use of opinion letters under the FLSA—the Obama administration had greatly restricted their use, and the Trump administration restored their use with respect to a number of significant wage and hour issues.<sup>72</sup> It is likely under President Biden that this pendulum will swing back towards limiting their issuance.

### “Fissured” Workplace

During the Obama administration, much policy surrounding worker misclassification stemmed from the idea that the workplace has become increasingly “fissured,” making it easier for employers to violate wage and hour law. Legislation introduced in both chambers on September 24, 2020, reignites this argument. The Worker Flexibility and Small Business Protection Act (H.R. 8375, S. 4738)<sup>73</sup> is a sprawling, 392-page bill that seeks “to address the ‘fissured workplace’ and resulting erosion of workers’ rights, wages, and bargaining power.”<sup>74</sup> According to a Senate summary of the bill:

massive corporations have worked to evade their responsibilities under traditional labor and employment laws in order to give themselves maximum leeway to deny workers their rights and protections without fear of legal liability. Corporations have done this primarily by “fissuring” the workplace, a phrase that refers to a range of actions taken by employers to restructure their businesses and business relationships to create multiple layers of companies between the top business and the worker, including the use of subcontractors, temp agencies, franchising, and classifying workers as independent contractors.<sup>75</sup>

To that end, the bill includes four sections that would make significant changes to labor and employment law.

President-elect Biden and Vice President-elect Harris have expressed support for many of the concepts in this bill.

Section I proposes to convert a significant portion of workers previously considered independent contractors to employees, and give them the right to request flexible schedules without reprisal from the employer for the duration of their employment. The bill would expand the definition of covered employees under the FLSA to include any worker previously classified by the employer as an independent contractor, who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed by an enterprise engaged in commerce or in the production of goods for commerce. The worker would only retain their independent contractor status if they are (1) free from control and direction, irrespective of what an existing contract may say about their status; (2) labor is performed outside of usual course of business for the hiring entity; and (3) customarily engaged in an independently established trade, occupation, or of the same nature as that involved in the labor performed. An existing non-compete agreement would be considered evidence of control (and employee status) under the first factor.

This portion of the bill would also broadly expand the definition of *employer* to include any person that benefits from the covered employee’s labor in the fields of transportation and network dispatching (including any person that uses a digital network to connect individuals or entities seeking services or labor with individuals or entities seeking to provide services or labor). The section would also confer traditional bargaining rights to most workers, including independent contractors, and enhance misclassification enforcement and penalties.

The second section of the bill would define *employer* in instances when two or more entities benefit from the labor of the worker and establish rights for the subsidiary entity in the joint employer relationship. Generally, the bill would make it easier to deem businesses joint employers, hold franchisors/

69 WHD, [Regular Rate Under the Fair Labor Standards Act](#), 84 Fed. Reg. 68736-68776 (Dec. 16, 2019).

70 WHD, [Fluctuating Workweek Method of Computing Overtime](#), 85 Fed. Reg. 34970-34993 (June 8, 2020).

71 WHD, [Partial Lists of Establishments that Lack or May Have a “Retail Concept” Under the Fair Labor Standards Act](#), 85 Fed. Reg. 29867-29870 (May 19, 2020).

72 See Tammy McCutchen and Lee Schreter, [DOL: Opinion Letters Are Back!](#), Littler ASAP (June 27, 2017).

73 H.R. 8375; S. 4738, 116th Cong. 2d Sess. (2020).

74 Worker Flexibility and Small Business Protection Act, [section-by-section summary](#), available at Senate.gov.

75 *Id.*

licensors responsible for corporate-driven violations, make corporate officers responsible for workers' rights violations, and create a host of new protections for temporary workers, including giving them the right to transition to full employees after one year.

Section III of the bill would, among other things, create a publicly available database where companies would have to report compliance violations. The final portion of the bill would extend the statute of limitations for most employment law violations, and prevent agencies from reducing rights afforded under this law unless Congress directs them to.

The changes this bill would make are significant and extensive. Like the PRO Act, it reads more like a legislative wish list at this point, and the chances of its advancement will depend in large part on the composition of the Senate. It does, however, provide a window into the types of employment changes Democratic lawmakers may pursue in 2021 if given the opportunity.

### Federal Contracting

The Trump administration paid relatively little attention to the employment practices of government contractors. For example, President Obama's executive orders relating to employee rights under the National Labor Relations Act and Service Contract Act that would typically have been quickly rescinded by a Republican president either remain in place or were not rescinded until late last year.<sup>76</sup> The Trump administration's primary impact on the Office of Federal Contract Compliance Programs (OFCCP) was in terms of resources and leadership.

In terms of resources, between fiscal years 2016 and 2020, OFCCP's budget fell from \$105,476,000 in 2016 to \$103,476,000 in 2019 before increasing in 2020 to \$105,976,000.<sup>77</sup> Reflecting these cuts in funding, OFCCP's

staffing fell from 615 full-time equivalents in 2016 to 496 in 2020. Under President-elect Biden, we expect some increase in OFCCP's budget and workforce but also expect the increases to be limited in light of expected constraints on the overall federal budget as the pandemic continues and into the period of recovery.

During the prior administration, OFCCP issued or amended 19 directives intended to make OFCCP's operations more transparent, consistent, and efficient.<sup>78</sup> In spite of budget cuts and reduced staff, the agency increased the number of audits conducted and damages collected.<sup>79</sup> The Agency also saw increased focus on affirmative action for individuals with disabilities. This meant, however, that given its limited resources, less attention was paid to opportunities for women and minorities.

In perhaps its most consequential move, OFCCP seemed to take a political turn in the weeks leading up the election.

After George Floyd's death at the hands of Minneapolis police officers in May, other similar incidents, and the resulting outpouring of grief and anger, many employers committed to making greater efforts to employ and advance Black workers.

OFCCP was directly involved in the administration's response to these developments, sending letters to prominent companies in September 2020 stating that "it has come to our attention" that executives in those companies had publically indicated an intention to increase the number of Black employees in leadership positions and asking how this goal could be accomplished without discriminating on the basis of race. The letters included extensive demands for the production of documentation regarding the contractors' efforts and intentions. This type of OFCCP inquiry into a contractor's statements of future intention was unprecedented and seen by many contractors as designed to chill diversity efforts.

76 Executive Order 13494, [Economy in Government Contracting](#), 74 Fed. Reg. 6099-6102 (Feb. 4, 2009); Executive Order 13495 of January 30, 2009, [Nondisplacement of Qualified Workers Under Service Contracts](#), 74 Fed. Reg. 6103-6106 (Feb. 4, 2009); Executive Order 13496 of January 30, 2009, [Notification of Employee Rights Under Federal Labor Laws](#), 74 Fed. Reg. 6107-6111 (Feb. 4, 2009); See also Gavin S. Appleby and C. Scott Williams, [President Obama Issues Three Executive Orders That Dramatically Affect Labor Relations for Federal Contractors](#), Littler Insight (Feb. 2, 2009). Executive Order 13495 was revoked on October 31, 2019. Executive Order 13897 of October 31, 2019, [Improving Federal Contractor Operations by Revoking Executive Order 13495](#), 84 Fed. Reg. 59709-59710 (Nov. 5, 2019).

77 OFCCP, [FY 2021 Congressional Budget Justification](#), p. 14.

78 OFCCP, Directives, <https://www.dol.gov/agencies/ofccp/directives>.

79 Annual data on audits conducted, monetary relief obtained, and other metrics are available at <https://www.dol.gov/agencies/ofccp/about/data/accomplishments>.

Around the same time, the White House issued Executive Order 13950, *Combating Race and Sex Stereotyping*,<sup>80</sup> and delegated primary enforcement authority under this order to OFCCP. Among other things, the order instructs government contracting agencies to add provisions to government contracts prohibiting the use of any workplace training “that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating.” The executive order lists a number of prohibited concepts—most of which are not commonly emphasized in workplace diversity training programs but some of which are at least related to concepts of implicit bias or the history of systemic racism—that may be included in such programs. Again, many contractors viewed this order as an attempt by the Trump administration to chill diversity efforts.

Under President-elect Biden, we can expect an immediate shift in priorities. We expect the president to quickly rescind Executive Order 13950 and for the administration to be supportive of active employer efforts to create and maintain a diverse workplace, including acting on commitments to increase the representation of Black employees in management and senior positions. One of President-elect Biden’s campaign promises was to “work with civil rights leaders to develop and institute implicit bias training programs for federal workers and contractors to address discrimination based on race, sex, sexual orientation, gender identity or expression, or disability.”<sup>81</sup>

Whoever is appointed to take over the leadership of OFCCP will be inheriting processes and procedures initiated in the prior administration that substantially increase the Agency’s ability to efficiently and effectively audit contractors. An administration that is both strongly committed to OFCCP’s original mission of increasing opportunities for women and minorities and willing to take advantage of prior reforms could substantially increase its oversight of federal contractors, rewarding successful efforts to hire and advance women and

minorities, and requiring more from those contractors whose efforts have been less successful.<sup>82</sup>

We therefore expect to see the Biden administration continue to pursue the current administration’s interest in designing some kind of routine periodic submission of affirmative action plans. The Trump administration only began to approach implementation of such a strategy by seeking comments on a proposal for creating an electronic interface for contractors to use to periodically certify compliance and to upload affirmative action plans when audited. The creation of such a system would be a necessary first step to developing the capacity to routinely collect annual affirmative action plans from all federal contractors. We expect OFCCP to continue to support this initiative during the Biden administration as it could make it possible for OFCCP, for the very first time, to meaningfully review all federal contractors’ compliance efforts. On the other hand, it is not clear that OFCCP will have sufficient resources to design a program of such complexity while continuing to conduct routine compliance reviews. To succeed on both fronts, OFCCP will need to work with the contractor community and not view federal contractors with the same level of suspicion and distrust that characterized interactions during the Obama administration.

In 2019, OFCCP proposed a very controversial rule that would greatly expand the definition of religious organizations that would be entitled to claim an exemption from the non-discrimination provisions of Executive Order 11246.<sup>83</sup> We do not expect the Biden administration to move forward with this proposal. In fact, one of President-elect Biden’s campaign promises was to: “restore full implementation of President Obama’s executive order prohibiting discrimination by federal contractors, which Trump has undermined.”<sup>84</sup>

OFCCP’s approach toward attempting to identify and remedy pay discrimination claims has now been rejected twice by Department of Labor administrative law judges in two

80 Executive Order 13950 of September 22, 2020, *Combating Race and Sex Stereotyping*, 85 Fed. Reg. 60683-60689 (Sept. 28, 2020); see also David Goldstein, Jim Paretti, and Michael J. Lotito, *New Executive Order Seeks to Regulate Diversity Training by Federal Contractors and Grant Recipients*, Littler Insight (Sept. 23, 2020); Jim Paretti, David Goldstein, and Chris Gokturk, *OFCCP Releases FAQs on Diversity and Inclusion Executive Order*, Littler ASAP (Oct. 7, 2020).

81 Joe Biden Platform, The Biden Plan To Advance LGBTQ+ Equality In America And Around The World, <https://joebiden.com/lgbtq-policy/>.

82 At the same time, an increasingly conservative federal judiciary may limit just how aggressive employers may be. While federal law requires federal contractors to make efforts to increase the representation of protected classes in the workforce, it is generally understood that employers must seek to achieve their goals without engaging in any explicit preferences. Under President Biden, OFCCP will have to take care to structure its expectations so as to ensure that its requirements can survive judicial scrutiny and employers will likewise want to be careful to avoid claims of reverse discrimination.

83 OFCCP, *Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption*, 84 Fed. Reg. 41677-41691 (Aug. 15, 2019).

84 Joe Biden Platform, The Biden Plan To Advance LGBTQ+ Equality In America And Around The World, <https://joebiden.com/lgbtq-policy/>.

opinions that were each highly critical of the Agency.<sup>85</sup> Over the past 20 years, OFCCP has been the federal agency most engaged in attempting to address the gender pay gap and yet it has found success in this area to be elusive. Nevertheless, we assume that OFCCP over the next four years will continue to develop considerable resources trying to figure out how to have a meaningful impact on an issue that is equally important and complicated.

Finally, during his campaign for office, President-elect Biden promised to meet "the Federal Government's goal of ensuring that at least 23% of federal contracts get awarded to small businesses."<sup>86</sup> Unfortunately, the burdens imposed by OFCCP's requirements discourage many small businesses from pursuing federal work. A federal contract or subcontract with a value as low as \$50,000 subjects a small business to the very same requirements that apply to huge companies with tens or hundreds of millions of dollars in federal work. Assuming that the Biden administration is sincere in creating greater opportunities for small businesses, one would hope to see the jurisdictional threshold for OFCCP jurisdiction under Executive Order 11246 (which has been unchanged since the Agency was established during the Carter administration) increased to at least \$150,000, if not higher.

### Health and Safety

The Occupational Safety and Health Administration is expected to re-start the enforcement and regulatory approach of the Obama administration. OSHA during that administration was led by Dr. David Michaels, an academic from George Washington University. During Dr. Michaels' tenure at the Agency, OSHA was particularly aggressive in both the enforcement and regulatory arenas, including finalizing major health rules for respirable crystalline silica and beryllium. OSHA also finalized the highly controversial electronic recordkeeping rule, which required employers to submit their OSHA 300 Logs electronically to the Agency, and the Agency to make that information publicly available.

Here is what to expect with OSHA under President-elect Biden:

### Permanent Assistant Secretary

Under the Biden administration, expect the quick appointment of a permanent, Senate-confirmed head of the Agency. Throughout the *entire* administration of President Trump, there was no Senate-confirmed political appointee. This will most assuredly change during the Biden administration. In addition, given the ongoing pandemic, confirming a permanent political head will likely occur sooner than in a typical first-term administration.

### Emergency Rule for COVID-19

There is virtually no doubt that the first order of business for OSHA will be to promulgate an emergency temporary standard related to COVID-19. Organized labor has pushed heavily for this, even filing a petition in the D.C. Circuit Court of Appeals to force the Agency to issue such a standard. There has also been Democratic efforts on Capitol Hill to force the Agency to issue an emergency temporary standard to protect employees from the virus. It remains to be seen what such a standard would look like, and the course of the pandemic over the next three months may also dictate how far-reaching the standard would be. But, there is no doubt that this will be OSHA's focus immediately after the inauguration.

If by some chance an emergency temporary standard is not pursued, OSHA will likely move forward with its stalled Airborne Infectious Disease standard, which has already been through the Small Business Regulatory Enforcement Fairness Act (SBREFA) review process. While this rule would not be specific to COVID-19, it would address airborne infectious disease generally and would likely place requirements on certain employers to manage current and future airborne infectious disease hazards, including COVID-19. As employers continue to struggle with the pandemic across the country, in a Biden administration, OSHA will move in some form or fashion to implement new requirements on employers to protect employees.

### Other New Regulatory Initiatives

While the initial "all hands on deck" focus by OSHA will be the promulgation of new rules related to COVID-19 or

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<sup>85</sup> *OFCCP v. Analogic Corporation Inc.*, 2017 –OFC-00001 (ALJ Mar. 22, 2019) and *OFCCP v. Oracle America, Inc.*, 2017-OFC-00006 (Sept. 22, 2020).

<sup>86</sup> Joe Biden Platform, The Biden Plan To Ensure The Future Is "Made In All Of America" By All Of America's Workers, <https://joebiden.com/made-in-america/#>.



airborne infectious diseases, several rulemakings that were under development by OSHA under the Obama administration, but put on the shelf during the Trump administration, will also likely be restarted. This includes rulemakings on a Tree Care Industry standard and Communication Tower Safety.

In addition, it is expected that OSHA will move aggressively to finalize a rule on workplace violence in health care and social assistance. Workplace violence has been an area of focus both on Capitol Hill and in OSHA enforcement actions over the last several years. This will be a major regulatory priority for the Biden administration.

And finally, during the Trump administration, OSHA issued a memorandum clarifying to its enforcement personnel that OSHA's recordkeeping rule does not prohibit post-incident drug testing or safety incentive programs.<sup>87</sup> After issuing the memorandum, OSHA entered into rulemaking to make this clear in the regulatory text of the regulation itself.<sup>88</sup> That rulemaking has progressed little, however, and it is certainly possible that under a Biden administration the rulemaking would be ended. Furthermore, the OSHA memorandum will likely be withdrawn, reverting the Agency back to its previous positions on the questionable legality of drug-testing and safety-incentive programs.

### Enforcement Initiatives

OSHA may increase its overall enforcement of COVID-19 issues early in President-elect Biden's term. Many Democrats—and organized labor—have been critical of OSHA enforcement over the last several months of the pandemic, asserting that OSHA has not issued enough citations to employers.<sup>89</sup> Whether true or not, employers should expect OSHA to focus significant resources on COVID-19 enforcement.

Given the expected focus on COVID-19 enforcement shortly after Inauguration Day, it is unlikely that OSHA will immediately launch other new enforcement initiatives. In addition, under the Trump administration, most of the Obama-era enforcement initiatives were continued, and OSHA

finalized a new enforcement program for respirable crystalline silica and re-started the Site-specific Targeting Program (SST).

From a long-term perspective, however, it is expected that OSHA in a Biden administration will launch new enforcement initiatives related to workplace violence and heat illness. These areas began to garner attention from an OSHA enforcement perspective toward the end of the Obama administration. It is likely that enforcement in these areas will pick up under President-elect Biden.

## Discrimination, Harassment, and Accommodation

### Equal Employment Opportunity Commission

Absent any resignations after the election, the U.S. Equal Employment Opportunity Commission will remain at its full complement of five commissioners, with two Democratic members, and three Republican members. The make-up of the Commission on Inauguration Day is anticipated to be:

- Jocelyn Samuels (D), whose term expires on July 1, 2021
- Chair Janet Dhillon (R), whose term expires on July 1, 2022
- Charlotte Burrows (D), whose term expires on July 1, 2023
- Vice Chair Keith Sonderling (R), whose term expires on July 1, 2024
- Andrea Lucas (R), whose term expires on July 1, 2025

The chair and vice chair of the Commission are designated by the president. Dhillon chaired the Agency during the latter half of the Trump administration, with Sonderling joining as vice chair in late September 2020, and Lucas sworn in as a commissioner in October 2020. It is anticipated that shortly after assuming office, President-elect Biden would designate Burrows as chair or acting chair, given her seniority at the Commission and the length of her term. Absent (or until) a Republican resignation or other vacancy, Burrows and Samuels would be in the minority, limiting the ability of the Commission to move forward on significant policy matters, issue new guidance or regulations, or revisit policies and

<sup>87</sup> OSHA, Standard Interpretation Memorandum, [Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 C.F.R. § 1904.35\(b\)\(1\)\(iv\)](#) (Oct. 11, 2018); See also Tom Metzger, Nancy Delogu, Dale Deitchler, Kevin Griffith and Ben Mounts, [About Face: OSHA Clarifies that Safety-Incentive Programs and Post-Incident Drug/Alcohol Testing ARE Permissible](#), Littler Insight (Oct. 19, 2018).

<sup>88</sup> OSHA, [Drug Testing Program and Safety Incentives Rule](#), RIN 1218-AD24.

<sup>89</sup> Victoria Knight, [Biden Says OSHA Isn't Doing Enough To Protect Workers' From COVID-19](#), KHN (Apr. 23, 2020).



priorities of the prior administration. It is conceivable that a Republican majority will continue at the agency for some time if Republicans maintain control of the Senate, and it is unclear what the taste will be in a Republican Senate for confirming Democratic nominees when vacancies arise.

Upon attaining a Democratic majority, it is likely the EEOC would seek to revisit several Trump-era proposals, including regulations regarding conciliation procedures<sup>90</sup> (which were proposed in October and are likely to be issued in final form before Inauguration Day), regulations concerning permissible incentives for workplace wellness programs under the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act,<sup>91</sup> and possible restoration of pay data reporting requirements instituted during the Obama administration and suspended last spring.<sup>92</sup> The Agency likewise may return its attention to guidance on harassment in the workplace, which was proposed for public comment but stalled during the Trump administration.

### Legislative Action

On the legislative front, there is no shortage of potential bills to strengthen or expand non-discrimination protections. If the Democrats win control of the Senate, the question will quickly become whether the legislative filibuster (which, as noted, generally requires a supermajority of 60 votes to pass most legislation) will be eliminated. If it is, such that the Senate could pass bills with a simple majority (similar to the Democratic-controlled House of Representatives), a number of bills might see action in the next Congress. If Republicans control the Senate, however, the fate of these efforts is unclear at best.

**Pay Equity.** As noted above, if the EEOC attains a Democratic majority, it is likely that the Commission will propose requirements for employers to report information on worker pay, broken out by race, ethnicity, and gender in

the workplace by way of regulation. The EEOC collected two years of this data under a proposal adopted in the Obama administration, and at least one state has already adopted similar reporting requirements at the state level.<sup>93</sup> This has also been a prominent provision of legislation to combat pay inequity. For example, the proposed Paycheck Fairness Act—which has been introduced for decades in Congress, and has passed the Democratic-controlled House on several occasions—would require the federal collection of pay data as a matter of law.<sup>94</sup> The Biden campaign platform endorsed this legislation, and expressed support for “improving pay transparency.” That bill would also restrict employer defenses to sex-based wage discrimination claims, and limit the use of prior salary history in making hiring and compensation decisions; enhance non-retaliation prohibitions; make it unlawful to require an employee to sign a contract or waiver prohibiting the employee from disclosing information about the employee’s wages; and increase civil penalties for violations of equal pay provisions. In the past, while this bill has been approved by a Democratic-controlled House, it has not gained any traction in a Republican Senate.

**Harassment.** Similarly, both President-elect Biden and Vice President-elect Harris supported legislation to reduce workplace harassment in the workplace. As a senator, Vice President-elect Harris sponsored bipartisan legislation to reduce workplace harassment, the Ending the Monopoly Over Workplace harassment through Education and Reporting or “EMPOWER” Act.<sup>95</sup> Key provisions of that bill would:

- Prohibit non-disparagement and nondisclosure clauses that cover workplace harassment as a condition of employment, promotion, compensation, benefits, or change in employment status or contractual relationship;

90 EEOC, [Update of Commission's Conciliation Procedures](#), 85 Fed. Reg. 64079-64084 (Oct. 9, 2020); See also Barry Hartstein and Jim Paretti, [EEOC Proposes Conciliation Procedures Rule](#), Littler Insight (Oct. 9, 2020).

91 See Jim Paretti and Michael J. Lotito, [EEOC, NLRB, DOL Plan to Issue Rules Governing Joint Employment](#), Littler ASAP (Nov. 20, 2019).

92 See Jim Paretti and David Goldstein, [EEOC Will Not Collect EEO-1 Data This Year](#), Littler ASAP (May 7, 2020).

93 See Jim Paretti, Denise M. Visconti, and Allan G. King, [California Poised to Enact Law Requiring Compensation Data Collection](#), Littler ASAP (Aug. 31, 2020).

94 See, e.g., H.R. 7, S. 270, 116th Cong., 1st Sess. (2019).

95 Ending the Monopoly of Power Over Workplace harassment through Education and Reporting Act-Part I or the EMPOWER Act-Part I, S. 575, 116th Cong., 1st Sess. (2019); Ending the Monopoly of Power Over Workplace harassment through Education and Reporting Act-Part 2 or the EMPOWER Act-Part 2, S. 574, 116th Cong., 1st Sess. (2019); See also Press Release, [Harris, Murkowski Introduce Legislation to Curb Workplace Harassment and Increase Transparency and Accountability](#) (June 5, 2018).

- Establish a confidential tip-line to receive reports about harassment to allow the EEOC to target employers that continue to allow for systemic harassment at the workplace;
- Require that public companies disclose the number of settlements, judgments, and aggregate settlement amounts in connection with workplace harassment (as a material disclosure) in their annual SEC filings, and disclose the existence of repeat settlements with respect to a particular individual;
- Prohibit companies from tax deductions for expenses and attorneys' fees in connection with litigation related to workplace harassment, and prohibit tax deductions for amounts paid pursuant to judgments related to workplace harassment; and
- Require employers to develop and disseminate workplace training programs to educate at all levels about what constitutes prohibited workplace harassment and how to prevent this behavior; educate employees about their rights with respect to workplace harassment, including how to report it; train bystanders on how to intervene and report; and develop a public service advertisement campaign to provide further education on this issue.

President-elect Biden also indicated he would support legislation to address workplace harassment and discrimination, including the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace ("BE HEARD") Act.<sup>96</sup> That bill would, among other things, extend anti-discrimination protections under federal civil rights law to employers of all sizes (rather than the current 15-employee threshold); lower the legal standard for actionable claims of harassment; limit the use of arbitration and non-disclosure agreements in the workplace; and authorize research, data, and training on harassment in the workplace.

It is assumed these bills would face resistance in a Republican-majority Senate. In that case, it is unlikely they would move forward without substantial change. A Democratic-controlled EEOC under President-elect Biden,

however, would likely look for alternative regulatory and sub-regulatory approaches to achieve these ends.

**Pregnant, Disabled Workers.** During the campaign, President-elect Biden also expressed support for the Pregnant Workers Fairness Act,<sup>97</sup> which Vice President-elect Harris co-sponsored. This bill would ensure that employers offer reasonable workplace accommodation (akin to their responsibilities under the Americans with Disabilities Act) to pregnant workers when their abilities are limited by pregnancy, childbirth, or a related medical condition. President-elect Biden has also advocated for stronger ADA enforcement, and supports expansion of tax credits to enable small businesses to improve accessibility and to comply with their responsibilities under the ADA. These issues have gained limited bipartisan support in the past, so it is possible that compromise measures that could pass a potential Republican Senate might move forward.

**LGBTQ Workers.** As previously discussed, in its June 2020 *Bostock v. Clayton County* decision, the U.S. Supreme Court held that Title VII's prohibition of discrimination on the basis of sex also prohibited discrimination on the basis of sexual orientation and gender identity. The Court recognized in *Bostock* that its decision left many workplace questions unanswered, including how to square religious liberty and prohibition of religious discrimination in the workplace, which may sometimes be in conflict with the rights of LGBTQ workers in the workplace. As a candidate, President-elect Biden criticized as "inappropriate" the broad use of exemptions to allow businesses and others to discriminate against LGBTQ individuals as a matter of "religious freedom." More broadly, President-elect Biden has endorsed the Equality Act, which would codify the protection of LGBTQ workers under a range of federal laws, and strictly limit the ability of employers to invoke federal law protecting religious liberty (notably, the Religious Freedom Restoration Act) as a defense to employment discrimination claims from LGBTQ workers. While the Equality Act is unlikely to move forward in a possible Republican Senate, President Biden could explore other options, such as executive orders, to address some of these issues, and again, a Democratic EEOC could move forward

96 H.R. 2148, S. 1082, 116th Cong., 1st Sess. (2019); Joe Biden Platform, The Biden Agenda for Women, <https://joebiden.com/womens-agenda/>; See also, Newsroom, [Senator Murray Introduces Sweeping Legislation to Address Harassment in the Workplace](#) (Apr. 9, 2019).

97 S. 1101, 115th Cong. (2017); H.R. 2694, 116th Cong. (2019).

on regulatory or sub-regulatory measures to address key questions left open after *Bostock*.

### Paid Leave

The pandemic has brought the issue of paid sick leave to the fore. As previously discussed, the House of Representatives twice passed emergency COVID-19 relief bills (the HEROES Act), both of which included sections applying the emergency paid sick leave and expanded family and medical leave provisions of the FFCRA to *all* employers (not just those with fewer than 500 employees), and extending such benefits through 2021. Neither bill gained any traction in the U.S. Senate.<sup>98</sup> This could change, however, if Democrats gain control of that chamber, and such provisions are included as part of a COVID-19 relief package.

Emergency paid leave aside, if Democrats do gain control of both houses of Congress, the country could see a more permanent paid sick leave policy under a Biden administration. A national paid sick leave law has long been a Democratic priority. Included in this year's party platform was a call for paid sick and family leave:

Democrats will implement paid sick days and a high-quality, comprehensive, and inclusive paid family and medical leave system that protects workers from the unfair choice between attending to urgent health or caretaking needs and earning a paycheck. We will fight to ensure workers are guaranteed at least 12 weeks of paid family and medical leave for all workers and family units, to enable new parents to recover from childbirth and bond with their newborns, foster or adopted children, and allow all workers to take extended time off to care for themselves or ailing loved ones.<sup>99</sup>

President-elect Biden's platform similarly called for universal paid sick days and 12 weeks of paid family and medical leave.<sup>100</sup> Again, whether such a law will be possible depends on the ultimate composition of the Senate.

### Work-Sharing Programs

The massive number of furloughs and layoffs in 2020 brought renewed attention to state workshare programs. Work sharing, otherwise known as short-time compensation, is an unemployment insurance (UI) benefit program that gives employers the option of reducing employee hours during an economic downturn in lieu of layoffs. The employee receives a prorated UI benefit to replace the loss in wages. At least 27 states have such programs in place. One of President-elect Biden's platform issues was to shore up and expand such programs, both in the short and long term.<sup>101</sup>

In response to COVID-19, President-elect Biden's campaign platform recommended that small businesses that avail themselves of work sharing:

get help to cover their worker's benefits as well as their other costs, like rent and non-payroll overhead, as they are partially shut down through the crisis. Companies that fulfill the goal of payroll protection by using work sharing should not be punished by being excluded from any small business program for loans or forgiveness that is tied to essential overhead in proportion to their fall in revenues.<sup>102</sup>

In addition, President-elect Biden's platform recommended that the federal government temporarily waive the need for states to "experience rate" companies, and secure participation for all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands. President-elect Biden is also expected to push to create a refundable tax credit to reimburse employers for the extra costs of providing full health benefits of all their workers during a period of work-hour reductions, and raise the caps on employer work reductions to 80%. Currently, if an employer reduces hours by 40-60% in most states, it cannot participate in the workshare program.

As a more permanent step, President-elect Biden's platform advocated for the federal government to completely fund work-sharing programs.

98 Press Release, House Committee on Appropriations, [House Passes Updated Heroes Act](#) (Oct. 1, 2020).

99 [2020 Democratic Party Platform](#), p. 16.

100 See Joe Biden Platform, Build Back Better: Joe Biden's Jobs And Economic Recovery Plan For Working Families, <https://joebiden.com/build-back-better/>; The Biden Agenda For Women, <https://joebiden.com/womens-agenda/>.

101 See Joe Biden Platform, The Biden Plan To Scale Up Employment Insurance By Reforming Short-Time Compensation Programs, <https://joebiden.com/the-biden-plan-to-scale-up-employment-insurance-by-reforming-short-time-compensation-programs/>.

102 *Id.*

Regarding a separate tax-related measure, Vice President-elect Harris in 2019 reintroduced the Livable Incomes for Families Today (LIFT) the Middle Class Act,<sup>103</sup> which would, among other things, repeal most of the provisions of the Tax Cuts and Jobs Act of 2017 (TCJA),<sup>104</sup> and provide a refundable tax credit to individuals and families earning below a set threshold. Along the same lines, one of President-elect Biden's tax proposals was to roll back the TCJA's income tax reductions for taxpayers with incomes above \$400,000,<sup>105</sup> impose 12.4% social security payroll tax on wages above \$400,000, and create a tax credit for small businesses adopting workplace retirement savings plans.<sup>106</sup> Such changes would likely only have a realistic chance of passage in a Democratic Congress.

### Retirement Plans

Bipartisan legislation to promote retirement savings introduced in the House of Representatives on October 27, 2020, could advance in 2021. The Securing a Strong Retirement Act of 2020,<sup>107</sup> introduced by House Ways and Means Committee Chairman Richard E. Neal (D-MA) and Ranking Member Kevin Brady (R-TX), would build upon the Setting Every Community Up for Retirement Act of 2019 (the "SECURE Act") enacted in December 2019.<sup>108</sup> Among other changes, the bill would require employers to automatically enroll employees in the company's 401(k) plan when a new plan is created, and create financial incentives for small businesses to offer retirement plans. Other provisions would "increase and modernize" the existing federal tax credit for contributions to a retirement plan or IRA (the Saver's Credit), and allow groups of non-profits to join together to offer retirement plans to their employees.<sup>109</sup>

Because the legislation appears to have bipartisan support, if it is not enacted this year, it will likely be reintroduced in the 117<sup>th</sup> Congress.

### Immigration

Significantly curtailing immigration—both unlawful *and* lawful—was a cornerstone of the Trump administration's policies. While the administration pushed a narrative that immigration negatively impacts the labor market for U.S. workers, during the campaign, President-elect Biden touted the benefits of immigration for economic growth. Employers are particularly affected by these decisions, as they directly shape hiring decisions and the feasibility of onboarding prospective candidates.

The current White House has issued a number of immigration-related executive orders, presidential memoranda, and regulatory directives. These policies have severely limited an employer's ability to obtain skilled labor. The Biden administration is expected to ease some of these restrictions, while at the same time afford immigrant workers certain protections available to citizens.

At the outset, the President-elect Biden will be able to rescind President Trump's executive orders, proclamations, and directives, and issue new ones in their place if necessary. The administration can also undertake new notice-and-comment rulemaking to revise rules that have already been issued in final form, but that process can take months or years. A discussion of how the Biden administration plans to reform employment-based immigration must necessarily start with an overview of what has transpired over the past four years.

### Trump Administration Immigration Policies

Through over 400 executive actions on immigration,<sup>110</sup> the Trump administration has decreased legal immigration significantly by creating hurdles for employers to overcome when attempting to sponsor individuals for employment-based visas. At the core of the administration's proposed policies (as well as implemented policies during the last four years) is the idea that immigrants bring labor force

<sup>103</sup> S. 4, 116th Cong., 1st Sess. (2019).

<sup>104</sup> Pub. L. 115-97 (2017).

<sup>105</sup> Gordon B. Mermin et al., [An Analysis Of Former Vice President Biden's Tax Proposals](#), Tax Policy Center (Mar. 5, 2020).

<sup>106</sup> Garrett Watson et al., [Details and Analysis of Democratic Presidential Nominee Joe Biden's Tax Plan](#), Tax Foundation (Oct. 22, 2020).

<sup>107</sup> H.R. 8696, 116th Cong. 2d Sess. (Oct. 17, 2020); see also Press Release, Ways & Means Committee, [Neal And Brady Introduce New Bipartisan Legislation To Strengthen Americans' Retirement Security](#) (Oct. 27, 2020).

<sup>108</sup> See Eric Graffeo, [SECURE Act Provides Sweeping and Immediate Changes to Retirement Plans](#), Littler Insight (Jan. 8, 2020).

<sup>109</sup> Ways & Means Committee Press Release, *supra* note 107.

<sup>110</sup> Sarah Pierce and Jessica Bolter, [Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes under the Trump Presidency](#), Migration Policy Institute (July 2020).

competition, which, in turn, means fewer jobs and depressed wages for U.S. workers.

Notably, the “Buy American, Hire American” Executive Order Trump signed in April 2017<sup>111</sup> directed the Secretaries of State, Labor, and Homeland Security to suggest reforms to ensure that H-1B visas were awarded to the “most skilled” and highest-paid beneficiaries. This created a flurry of policy changes, both published and unpublished, that have reduced United States Citizenship and Immigration Services (USCIS) approvals of visa petitions.

Indeed, one of the most frequently utilized employment-based visa classifications, the H-1B, has been particularly hard hit by the Trump administration’s policies. According to an analysis of USCIS data run by the National Foundation for American Policy:

[m]ore restrictive Trump administration policies have increased denials for H-1B petitions significantly, with denial rates rising from 6% in FY 2015 to 21% in FY 2019 for new H-1B petitions for initial employment ... [i]n FY 2019, USCIS adjudicators denied 21% of H-1B petitions for “initial” employment and 12% of H-1B petitions for “continuing” employment. The 12% denial rate for continuing employment was the same in both FY 2018 and FY 2019, indicating there has been little change in USCIS policies over the past year. The 12% denial rate for continuing employment remains historically high – 4 times higher than the denial rate of only 3% for H-1B petitions for continuing employment as recently as FY 2015.<sup>112</sup>

In addition, the percentage of “Requests for Evidence” (RFE) issued on H-1B cases increased from 22.3% in FY 2015 to 40.2% in FY 2019.<sup>113</sup>

Likewise, L-1 denial rates for high-skill foreign national executives, managers, and specialized knowledge individuals have also surged. According to data compiled from USCIS, the FY 2015 approval rate for L-1s was 83.7%, while FY 2019 approvals fell to 74.3%. L-1s were issued RFEs at a rate of 53.6% in FY 2019, versus 34.3% in FY 2015.<sup>114</sup> In essence, the administration has reduced the rate of lawful, employment-based immigration, which makes it difficult for employers to hire individuals needing an employment-based visa.

In recent months leading up to the election, the Trump administration drastically altered employment-based immigration through presidential proclamations, new initiatives, and interim final rules that are impacting employers’ ability to hire foreign workers. On July 31, 2020, the Departments of Labor and Homeland Security (acting through USCIS) jointly announced a partnership to share data and records on both nonimmigrant and immigrant petitions and workers contained within the DOL Office of Foreign Labor Certification’s labor certification and labor condition application databases.<sup>115</sup> The agreement was instituted in the wake of Presidential Proclamation 10052,<sup>116</sup> which was widely publicized for implementing an entry ban on certain categories of immigrant and nonimmigrant workers, but also included an “Additional Measures” section, which called for enhanced enforcement protocols to regulate the H-1B, EB-2, and EB-3 nonimmigrant and immigrant programs. Pursuant to this joint DOL-DHS initiative, unless the Biden administration reverses course, employers should anticipate administrative and targeted site visits, and ensure compliance and consistency with and between the H-1B, EB-2, and EB-3 programs utilized for their employees.

Likewise, the Trump administration recently issued two interim final rules through the DOL<sup>117</sup> and DHS<sup>118</sup> that

111 Executive Order 13788 of April 18, 2017, [Buy American and Hire American](#), 82 Fed. Reg. 18837-18839 (Apr. 21, 2017).

112 [H-1B Approved Petitions and Denial Rates For FY 2019](#), National Foundation for American Policy (Feb. 2020).

113 USCIS, I-129 - Petition for a Nonimmigrant Worker Specialty Occupations (H-1B) by Fiscal Year, Month, and Case Status: October 1, 2014 - December 31, 2019, [https://www.uscis.gov/sites/default/files/document/data/I129\\_Quarterly\\_Request\\_for\\_Evidence\\_FY2015\\_FY2020\\_Q1.pdf](https://www.uscis.gov/sites/default/files/document/data/I129_Quarterly_Request_for_Evidence_FY2015_FY2020_Q1.pdf).

114 USCIS I-129, - Petition for a Nonimmigrant Worker Specialty Occupations (H-1B) by Fiscal Year, Month, and Case Status: October 1, 2014 - March 31, 2020, [https://www.uscis.gov/sites/default/files/document/data/I129\\_Quarterly\\_Request\\_for\\_Evidence\\_FY2015\\_FY2020\\_Q2.pdf](https://www.uscis.gov/sites/default/files/document/data/I129_Quarterly_Request_for_Evidence_FY2015_FY2020_Q2.pdf).

115 News Release, DOL, [U.S. Department Of Labor and U.S. Department of Homeland Security Enter into a Memorandum of Agreement](#) (July 31, 2020).

116 Presidential Proclamation 10052 of June 22, 2020, [Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak](#), 85 Fed. Reg. 38263-38267 (June 25, 2020).

117 DOL, [Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States](#), 85 Fed. Reg. 63872-63915 (Oct. 8, 2020); See also Jorge Lopez and Elizabeth Whiting, [U.S. Agencies Issue Interim Final Rules with Major H-1B Reforms for Legal Definition of Specialty Occupation Workers and Wage Rates](#), Littler ASAP (Oct. 7, 2020).

118 DHS, [Strengthening the H-1B Nonimmigrant Visa Classification Program](#), 85 Fed. Reg. 63918-63965 (Oct. 8, 2020).



immediately impact employers hiring skilled foreign workers in the H-1B program and employment-based immigrants. The two rules implement dramatic reforms to prevailing wage rates and to the classification of specialty occupations.

The DOL rule significantly increases prevailing wage rates for all four wage levels an employer must pay their H-1B workers, implementing a difficult standard for employers to meet in order to sponsor foreign workers. The DOL last updated the prevailing wage system in 2004, when Congress mandated the creation of the four-tiered wage level structure.<sup>119</sup> These wage levels are set using wage survey data from the BLS' Occupational Employment Statistics (OES) survey, which assesses wages paid by occupation and geographic location. An employer hiring H-1B workers must pay them according to these DOL-established wage level ranges, which correspond to the H-1B worker's occupation and region in which they will be employed.

The interim rule, which was effective immediately upon publication on October 8, 2020, increased wage levels as follows:<sup>120</sup>

- Level I Wage: 45<sup>th</sup> percentile of local wages (increased from the 17<sup>th</sup> percentile)
- Level II Wage: 62<sup>nd</sup> percentile of local wages (increased from 34<sup>th</sup> percentile)
- Level III Wage: 78<sup>th</sup> percentile of local wages (increased from 50<sup>th</sup> percentile)
- Level IV Wage: 95<sup>th</sup> percentile of local wages (increased from 67<sup>th</sup> percentile)

These wages are higher than the industry standard, which could effectively destroy the H-1B program as we know it, and create significant disruptions for employers' H-1B, H-1B1, and E-3 visa holders, as well as for employment-based immigrant petitions. For reference, under the new schema, an individual previously eligible for Wage Level 3 at the 50<sup>th</sup> percentile of local wages for the position is now limited to filing a new Labor Condition Application under Wage Level 1 (a category that USCIS heavily scrutinizes as not requiring sufficiently advanced

duties to qualify as an H-1B specialty occupation with complex work duties).

Separately, set to take effect on November 9, 2020,<sup>121</sup> the new DHS rule creates onerous burdens on employers in the sponsorship of H-1B specialty occupation workers by:<sup>122</sup>

- Dramatically narrowing the regulatory definition of "specialty occupation," no longer providing the option to show how the position "normally" requires a bachelor's degree, but now requiring that the position "always" requires a bachelor's degree.
- Implementing a narrower standard regarding acceptable degrees for an H-1B position, and now requiring a bachelor's degree in a "directly related specific specialty" instead of just a "specific specialty."
- Restricting the ability of employers to sponsor H-1B workers placed at third-party worksites by (among others):
  - Revising the definitions of an "employer-employee" relationship, "worksites," and "third-party worksites" to be much more restrictive and instituting guidance on whether the "employer-employee" relationship exists between the petitioner and beneficiary;
  - Placing a one-year limitation on H-1B validity for workers placed at third-party worksites; and
  - Requiring employers heavily document that there is available work for the H-1B holder and revision of itinerary requirements to specify that they will apply to petitions filed by agents who perform the function of an employer.
- Enhancing the authority of USCIS to conduct site visits to enforce H-1B compliance and consequences for inspection violations.

These interim rules are expected to be litigated over the next several months. At least two lawsuits have already been filed to enjoin the rules from taking effect. The Biden administration will likely withdraw these rules.

<sup>119</sup> Consolidated Appropriations Act, 2005, [Pub. L. 108-447](#) (2004).

<sup>120</sup> DOL, [Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States](#), 85 Fed. Reg. 63872-63915 (Oct. 8, 2020).

<sup>121</sup> DHS, [Strengthening the H-1B Nonimmigrant Visa Classification Program](#), 85 Fed. Reg. 63918-63965 (Oct. 8, 2020).

<sup>122</sup> *Id.*



Likewise, the Trump administration recently announced a proposed rule that provides for restructuring the H-1B Cap lottery system as it currently stands. This new proposal is known as the registration prioritization rule. Under the proposal, the USCIS would only review H-1B petitions submitted during the H-1B registration period that offer the highest wages. The rule states, "USCIS will rank and select from among all registrations properly submitted on the final registration date on the basis of the highest OES wage level that the proffered wage equals or exceeds for the relevant [standard occupational classification] code and area of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I."<sup>123</sup> The administration further has proposed to implement a fixed period of admission for individuals entering the United States with an F student visa or a J exchange visitor visa, instead of the historically used, "Duration of Status," that allowed F and J visa holders to remain in the United States for the duration of their approved programs.<sup>124</sup> The Biden administration is not expected to move forward with this rule.

In addition to the reduction in visa sponsorship, the U.S. Immigration and Customs Enforcement (ICE) has increased site visits, audits, and raids. This increased enforcement action is historically and politically known as the doorway to more comprehensive immigration reform initiatives, and includes the more common Form I-9 audits and so-called "raids" in which ICE seeks to arrest employees, or retrieve evidence regarding employees without proper work authorization. To that end, in 2017, ICE's former Acting Director Thomas Homan indicated that ICE would *quadruple* worksite enforcement actions.<sup>125</sup> During the entire fiscal year of 2017, ICE conducted only 1,716 actions. On July 24, 2018, ICE announced it had performed more than 5,200 I-9 audits since January 1, 2018, while performing only 1,360 audits during the entire 2017 fiscal year.

While these numbers already represent a drastic increase, in FY 2018, there were 6,848 worksite-related cases that resulted in 779 criminal arrests, 1,525 administrative arrests and 49 criminal convictions of employers in management positions.<sup>126</sup> In FY 2019, ICE initiated 6,812 new worksite investigations,<sup>127</sup> 6,456 Form I-9 inspections, 2,675 arrests resulting from I-9 inspections (including 627 criminal arrests), and issued \$14.3 million in judicial fines, forfeitures, and restitutions against those found to be in violation of Form I-9 requirements. Enforcement actions in 2020 have slowed due to a temporary halt on audits due to COVID-19.

The increase in audits is of obvious concern to employers. Civil fines for I-9 paperwork violations increased in July 2020, and range from \$234 to \$2,332 per form with at least one violation. Penalties for knowingly hiring or continuing to employ an unauthorized worker(s) range from \$583 to \$4,667 for a first-time offense.<sup>128</sup> Fines for I-9s are one issue, but employers must also contend with potential work force shortages and morale issues should an enforcement action occur, along with the increasing concern of criminal liability.

### Changes Ahead for the Biden Administration

President-elect Biden's campaign endorsed fewer restrictions on immigration compared to the Trump administration, citing research suggesting that key sectors of the U.S. economy rely on immigration.<sup>129</sup> President-elect Biden has promised to reverse many of the Trump administration's policies, to return to Obama-era policies, and to promote a model of offering protections to immigrants both here lawfully and unlawfully. Among his campaign promises was prioritizing family reunifications, reinstating and protecting the Deferred Action for Childhood Arrivals (DACA) program, and rescinding the Trump administration's ban on travel first instituted in 2017 in its first 100 days.<sup>130</sup>

<sup>123</sup> DHS, [Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions](#), RIN 1615-AC61 (Oct. 28, 2020).

<sup>124</sup> DHS, [Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media](#), 85 Fed. Reg. 60526-60598 (Sept. 25, 2020).

<sup>125</sup> Tal Kopan, [ICE chief pledges quadrupling or more of workplace crackdowns](#), CNN (Oct. 17, 2017).

<sup>126</sup> FY 2018 ICE Enforcement and Removal Operations Report, <https://www.ice.gov/features/ERO-2018>.

<sup>127</sup> Michelle Hackman, [Workplace Immigration Inquiries Quadruple Under Trump](#), The Wall Street Journal, Dec. 5, 2019; see also FY 2018 ICE Enforcement and Removal Operations Report, <https://www.ice.gov/features/ERO-2019>.

<sup>128</sup> DHS, [Civil Monetary Penalty Adjustments for Inflation](#), 85 Fed. Reg. 36469-36483 (June 17, 2020).

<sup>129</sup> See Joe Biden Platform, The Biden Plan For Securing Our Values As A Nation Of Immigrants, <https://joebiden.com/immigration/#>.

<sup>130</sup> *Id.*

Other employment-based reforms the Biden campaign promised include:<sup>131</sup>

- Reforming the temporary visa system to establish a wage-based allocation process and to establish enforcement mechanisms to ensure they are aligned with the labor market and not used to undermine wages.
- Increasing the number of visas offered for permanent, work-based immigration based on macroeconomic conditions. President-elect Biden promised to work with Congress to increase the number of visas awarded for permanent, employment-based immigration from the 140,000 per-year cap during times of economic growth, and promote mechanisms to temporarily reduce the number of visas during times of high U.S. unemployment.
- In connection with the increase in visa numbers, the Biden campaign promoted a policy that would exempt recent graduates of PhD programs in STEM fields in the United States from any visa cap in an effort to avoid, "losing these highly trained workers to foreign economies [which] is a disservice to our own economic competitiveness."<sup>132</sup>
- Reversing the Trump administration's public charge rule, which requires individuals applying for immigration benefits (including employment-based immigration benefits) to disclose any use of government services such as SNAP or Medicaid, which can then be used by USCIS to deny the immigration benefit.
- Reforming the visa program for temporary workers in select industries to allow workers in seasonal positions to switch jobs, while certifying the labor market's need for foreign workers. President-elect Biden's campaign platform indicated that "employers should be able to supply data showing a lack of labor availability and the harm that would result if temporary workers were unavailable. This flexibility, coupled with strong safeguards that require employers to pay a fair calculation of the prevailing wage and ensure the right of all workers to join

a union and exercise their labor rights, will help meet the needs of domestic employers, sustain higher wages for American workers and foreign workers alike, incentivize workers and employers to operate within legal channels, prevent exploitation of temporary workers, and boost local economies."<sup>133</sup>

Notably, President-elect Biden has indicated that he will "end workplace raids to ensure that threats based on workers' status do not interfere with their ability to organize and improve their wages and working conditions."<sup>134</sup> Practically, this should mean a sharp decrease in worksite raids, audits, site visits, and investigations, or a redirection to the Obama years of focusing on employers' actions and not those of the workers. It remains to be seen how this policy could play out. Under the Obama administration, the practice of large-scale raids was halted, but the prosecution of employers that were thought to have knowingly hired unauthorized workers was prioritized through increased Form I-9 audits.<sup>135</sup> If the Obama-era approach is at all indicative of how a Biden administration may conduct enforcement actions, employers may see an overall decrease in worksite raids, but certainly not an abolishment of the practice of examining companies' I-9s. We do feel this trend of increased I-9 audits is likely to continue.

### Noncompetition Agreements

If Democrats take control of Congress, the administration may target restrictions on what it views as unfair competition. During the Trump administration, Senators Chris Murphy (D-CT) and Elizabeth Warren (D-MA) criticized the Federal Trade Commission (FTC) for failing to engage in rulemaking to rein in the use of noncompetition agreements. The Agency held a public workshop in January to examine whether the FTC should promulgate such a rule.<sup>136</sup> In July, the senators once again urged the FTC to restrict such agreements during the pandemic.<sup>137</sup>

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> USCIS, Memorandum, [Worksite Enforcement Strategy](#) (Apr. 30, 2009).

<sup>136</sup> Federal Trade Commission, [Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues](#), Jan. 9, 2020.

<sup>137</sup> Elizabeth Warren, Press Release, [Warren and Murphy Urge FTC to Protect Workers By Restricting Non-Compete Agreements During the COVID-19 Pandemic](#), July 28, 2020.

According to his campaign pledge, as president, President-elect Biden will “work with Congress to eliminate all non-compete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets, and outright ban all no-poaching agreements.”<sup>138</sup>

Such a push could be in the form of previously introduced legislation. In October 2019 and January 2020, lawmakers in the Senate and House, respectively, reintroduced bipartisan legislation, the Workforce Mobility Act,<sup>139</sup> which seeks to prohibit employers from entering into, enforcing, or threatening to enforce non-compete agreements in most circumstances. Democratic lawmakers also reintroduced the End Employer Collusion Act,<sup>140</sup> which would prohibit no-poach agreements among employers. The bill defines a “no poach” or “restrictive employment agreement” as any agreement between two or more employers that prohibits or restricts one employer from soliciting or hiring another employer’s employees or former employees.

As with other legislative items high on Democratic lawmakers’ agenda discussed in this Report, it is unclear whether or how soon such a bill would move through Congress.

### State of the States

While a divided Congress failed to enact many labor and employment laws during the Trump administration, states—particularly those in which one political party controlled the legislature and the governorship—picked up the slack. Over the past four years, states and major cities enacted over 1,000 new labor and employment laws. The flood of state and local mandates on various topics often creates a compliance challenge for employers operating in multiple jurisdictions. This is particularly true when dealing with laws that vary in application and execution, such as paid leave, background check, and wage and hour statutes.

While the focus this November has been on the federal election, many state houses saw some reshuffling. How these

changes will affect the workplace remains to be seen. But if the past is prologue, employers would be wise to monitor activities at the local level, as state legislative sessions move quickly each term. For example, between just August 1 and October 1 of this year, California enacted over 20 new employment-related laws.<sup>141</sup> The Golden State is often a legal trendsetter, so employers across the country should keep apprised of new developments out West.

In 2020, the California legal landscape has been dominated by questions regarding the classification of independent contractors under state wage and hour law, first by the California Supreme Court’s landmark *Dynamex* decision, which adopted the so-called “ABC test” for determining contractor status, and then by the state legislature’s codification of *Dynamex* by way of state law AB 5.<sup>142</sup> This in turn led to a ballot initiative, Proposition 22, which will statutorily classify certain transportation network company drivers and deliver network company drivers as contractors, provided certain conditions are met. California voters approved this initiative on November 3.<sup>143</sup> Approval of Proposition 22 will likely cause ripple effects as other states seek to either emulate California’s model or, recognizing the economic havoc it may potentially cause, find alternate approaches to worker classification.

The patchwork of state and local laws has been particularly challenging given the way COVID-19 has fundamentally changed the workplace. More employees than ever are working remotely. According to a recent Census Bureau survey, approximately 87.2 million workers in the United States were teleworking during the two-week period ending October 26, 2020.<sup>144</sup> This brings a host of employment complications, such as determining which laws apply to which employees. Does an employee working from home, perhaps indefinitely, in a state other than the company’s brick-and-mortar location, receive benefits available in the employer’s “home” state or in the employee’s? Which state notice requirements and new-hire documents apply? Is an arbitration

<sup>138</sup> See Joe Biden Platform, The Biden Plan For Strengthening Worker Organizing, Collective Bargaining, And Unions, <https://joebiden.com/empowerworkers/#>

<sup>139</sup> S 2614, 116th Cong., 1st Sess. (2019); H.R. 5710, 116th Cong., 2d Sess. (2020).

<sup>140</sup> H.R. 3920; S. 2215, 116th Cong., 1st Sess. (2019).

<sup>141</sup> See Bruce Sarchet, [California Imposes New Compliance Obligations on Employers](#), Littler Insight (Oct. 1, 2020).

<sup>142</sup> See [AB 5: The Aftermath of California’s Experiment to Eliminate Independent Contractors Offers a Cautionary Tale for Other States](#), *supra* note 52.

<sup>143</sup> See Bruce Sarchet, Michael Lotito and Jim Paretti, [California’s Proposition 22: Impacts in the Golden State and Beyond](#), Littler Insight (Nov. 4, 2020).

<sup>144</sup> U.S. Census, Household Pulse Survey, Week 17 (Oct. 14 – Oct. 26, 2020), <https://www.census.gov/data/tables/2020/demo/hhp/hhp17.html>.

agreement that is lawful in the employer's brick-and-mortar location still valid in the employee's state? These questions are arising with increasing frequency, and will only escalate as the pandemic wears on and new state laws proliferate.

### Future of Work

Beyond any single legislative proposal, one of the biggest issues to face the new administration and Congress will be the dramatic transformation of the workplace, which had already begun prior to the COVID-19 pandemic, but which now is likely to accelerate at an even faster pace. A recent report released by the World Economic Foundation (WEF) details how more than two-fifths of the large companies surveyed by WEF plan to reduce their workforces due to the integration of technology, with up to 85 million jobs at risk of being displaced by automation in the next five years.<sup>145</sup>

Littler has been at the forefront of detailing the coming technology-induced displacement of employment (or TIDE™),<sup>146</sup> which is now exacerbated by what we are calling the virus-induced displacement of employment (or VIDE). The question of whether automation and artificial intelligence will fundamentally reshape our workforce is no longer before policymakers—those trains have left the station. The questions are now when, how, and to what extent these changes will come, and, perhaps most important, what can be done to prepare our workforce for them.

In January of 2019—a full year before the pandemic we find ourselves in—the Brookings Metropolitan Policy Program reported that jobs that involve routine and predictable physical and cognitive tasks are the most vulnerable to displacement by automation; perhaps not surprisingly, these are most often positions that already pay the lowest wages. In contrast, the jobs Brookings found to be least threatened by automation are those requiring a bachelors' degree and a series of non-routine and "softer" skills:

Among the most vulnerable jobs are those in office administration, production, transportation, and food preparation. Such jobs are deemed "high risk," with

over 70 percent of their tasks potentially automatable, even though they represent only one quarter of all jobs. The remaining, more secure jobs include a broader array of occupations ranging from complex, "creative" professional and technical roles with high educational requirements, to low-paying personal care and domestic service work characterized by non-routine activities or the need for interpersonal social and emotional intelligence.<sup>147</sup>

It is important to note that in many instances, the displacement of some jobs by automation will result in the creation of new and different jobs. Those numbers are harder to quantify. But the pandemic has dramatically upended that equation: as noted by the WEF, "For the first time in recent years, job creation is starting to lag behind job destruction—and this factor is poised to affect disadvantaged workers with particular ferocity." The challenge will be how to ensure that workers who are displaced by technology and automation are given the tools they need to upskill or reskill themselves for new jobs, existing or to be created, that require a broader range of aptitude and skillsets.

President-elect Biden's campaign platform proposed investing \$50 billion in workforce training, including community college-business partnerships and apprenticeships. According to his platform:

These funds will create and support partnerships between community colleges, businesses, unions, state, local, and tribal governments, universities, and high schools to identify in-demand knowledge and skills in a community and develop or modernize training programs – which could be as short as a few months or as long as two years – that lead to a relevant, high-demand industry-recognized credential.<sup>148</sup>

Whether such job-training programs get off the ground—and would be available to those already in the workforce—is uncertain. For such programs to succeed, it will be essential

<sup>145</sup> Amanda Russo, *Recession and Automation Changes Our Future of Work, But There are Jobs Coming, Report Says*, World Economic Forum (Oct. 20, 2020).

<sup>146</sup> Michael J. Lotito et. al, *Automation & Artificial Intelligence: TIDE at the Tipping Point*, WPI Report (May 9, 2019).

<sup>147</sup> Mark Muro, Robert Maxim, and Jacob Whiton, *Automation and Artificial Intelligence: How machines are affecting people and places*, Brookings Institute (Jan. 24, 2019).

<sup>148</sup> Joe Biden Platform, The Biden Plan For Education Beyond High School, <https://joebiden.com/beyondhs/>.

to involve the business community to ensure the training addresses the skills needed for the changing workforce.

The long-term impact of TIDE and VIDE, and how we retool our workforces to account for these phenomena, should be front and center as a matter of workforce policy, even during the pandemic. There are a range of options policymakers may explore. Some have called for a close examination and restructuring of the federal Workforce Innovation and Opportunity Act (WIOA),<sup>149</sup> which sets federal policy with respect to workforce training programs administered through the states. Others have urged the creation of lifelong learning accounts, wherein an employer and/or employee can bank monies for continued training and upskilling. Littler, through its partnership with the non-profit Emma Coalition,<sup>150</sup> will continue to explore and advocate

policies to address these sea changes, which will be with us long after the current public health crisis has passed.

### Conclusion

Employers and employees are eager to put the events of 2020 behind them. Nursing the economy back to health, however, will take time and careful consideration at the federal and local levels. It is without question that 2021 will bring changes to the workplace, both logistically and legally. It is crucial that these changes take a holistic view of the workplace and those operating within it. The WPI will continue to monitor how the new administration approaches the numerous challenges before it, and ensure the employment community has a voice in the process

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<sup>149</sup> Pub. L. No. 113-128 (2014).

<sup>150</sup> The Emma Coalition, <https://www.littler.com/service-solutions/wpi/emma-coalition>.

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