

January 21, 2021

New Administration, New Priorities: What Does a Biden Harris Administration Look Like for Employers?

Human Resources & Employment

With the inauguration of Joseph R. Biden as the President of the United States yesterday, we expect to see a different focus, new guidance and new laws. Some of the major changes that may be delivered in the Biden administration include:

Renewed Focus on Misclassifications

Recently, few areas of employment law have been debated so frequently as how to analyze whether a worker is an employee or an independent contractor. Historically, courts have looked to a multifactor “economic realities” test to make this determination. During the Obama administration, the U.S. Department of Labor (DOL) issued guidance warning employers that, despite these factors, the economic dependence of the worker was the primary question. The Trump administration rescinded that guidance and offered its own version in 2020. On January 7, 2021, the DOL’s Wage and Hour Division issued a new final rule (effective March 8, 2021) that lays out two “core factors” in determining whether a worker is an independent contractor:

- The extent of control exercised over key aspects of the work
- The opportunity for profit or loss

In stark contrast, President Biden has stated before taking office that he supports California’s pro-employee Assembly Bill 5, which enacted the so-called “ABC test.” The ABC test assumes a worker is an employee, unless all three of the following factors are met:

- The worker 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
- The worker performs work that is outside the usual course of the hiring entity’s business
- The worker is customarily engaged in an independently established trade, occupation or business of the same nature as that involved in the work performed

Assembly Bill 5 has been the subject of intense debate nationwide and aggressive lobbying in California. Eight months after its enactment, it was amended by Assembly Bill 2257, which left its three-factor framework intact but added exemptions for a variety of roles and business arrangements, including one-time engagements and professional services. The law now contains over 100 exemptions. With voters reporting that the law has cost them their livelihoods, this list is expected to grow. This past November, California citizens voted overwhelmingly in favor of Prop 22, which classifies workers at mobile app-based transportation and delivery companies such as Uber, Lyft and InstaCart, as independent contractors untouched by Assembly Bill 5.

During his campaign, President Biden denounced Prop 22 as an unacceptable “gutting” of Assembly Bill 5. President Biden is also on record supporting the Protect the Right to Organize (PRO) Act, which would codify California’s ABC test into federal law. Accordingly, employers – especially those relying on gig economy workers – can anticipate that either the economic dependence of the worker, the lack of an independently established trade, or both, will render many gigs as employments.

Expanded Definition of Joint Employer

In 2015, the National Labor Relations Board (NLRB) expanded the definition of a joint employer in the *Browning-Ferris* decision, which held that indirect control, rather than direct control, as well as certain rights afforded by contract (even if never exercised) could be sufficient to find a joint employment relationship.

Since then, both the NLRB and the D.C. Circuit Court of Appeals had adopted that new standard. But in February 2020, the NLRB reversed course, publishing a final rule specifying that a business is a joint employer only if the two employers share or codetermine the employee's essential terms and conditions of employment. The new rule also specifies what "essential" means in this context, listing wages, benefits, hours of work, hiring, discharge, discipline, supervision and direction. The final rule states that employers must possess and exercise such substantial direct and immediate control over one or more essential terms and conditions of employment of another employer's employees to be a joint employer, and that indirect and contractually reserved but never exercised control over essential terms is only probative where it supplements and reinforces evidence of direct and immediate control.

In March 2020, the DOL's revised final rule regarding who is a joint employer under the Fair Labor Standards Act (FLSA) went into effect. Under the FLSA, which regulates wage and hours issues such as minimum wage, overtime and recordkeeping, joint employment is found when either:

- An employee has an employer who suffers, permits or otherwise employs the employee to work, but another individual or entity simultaneously benefits from that work, or
- An employer employs an employee for one set of hours in a workweek, and another employer employs the same employee for a separate set of hours in the same workweek

The revised regulations sought to "reduce uncertainty over joint employer status, promote greater uniformity among court decisions, reduce litigation, and encourage innovation in the economy" by providing a four-factor test to determine when an employee performs work for an employer and when that simultaneously benefits another individual or entity. These factors are whether the employer:

- Hires or fires the employee
- Supervises and controls the employee's work schedules or conditions of employment to a substantial degree
- Determines the employee's rate and method of payment
- Maintains the employee's employment records

No factor is dispositive, and the final rule specifies that the potential joint employer's maintenance of the employee's employment records alone will not lead to a finding of joint employer status. Furthermore, the final rule states that an employee's economic dependence on the potential joint employer is not relevant for determining whether that individual or entity is an FLSA joint employer.

The final rule was partially vacated in September 2020 by a federal judge in the Southern District of New York, who concluded that the rule was arbitrary and capricious, in conflict with the FLSA and contrary to precedent. While the DOL appealed, the Biden Administration will likely seek to rewrite the final rule and have the appeal dismissed as moot.

As for the NLRB, President Biden will likely try to reinstate the *Browning-Ferris* decision. In fact, the Protect the Right to Organize Act would codify its standard into federal law. In a sign of the new administration's focus on reversing many NLRB policies, President Biden has already terminated the NLRB's general counsel after he refused to resign. A new general counsel will mean a new focus on which cases to pursue. By August, when the NLRB turns from a Republican to Democratic majority, we expect changes to the joint employer standard and more.

Increased Minimum Wage

President Biden supports a \$15 minimum wage. Currently, the federal minimum wage is \$7.25. While many cities and states, including Chicago and Illinois, have passed laws to increase the minimum wage, most gradually increase wages over a period of years. It is likely that a federal minimum wage hike would also take effect over time, though perhaps more quickly than many state and local increases.

Universal Paid Leave

If universal paid leave was on the agenda before COVID-19, it is now the main event. As the worldwide pandemic closed schools and day care centers, as well as sickened millions of employees and their loved ones, many Americans were eligible for and used paid leave under the Families First Coronavirus Response Act (FFCRA). This entitlement program, which expired December 31, 2020, brought short-term relief; however, it may have long-lasting effects.

Handling illness and emergencies are not surprisingly on many employees' minds, and more states are passing emergency sick leave laws. President Biden's administration has indicated it supports both sick days and the first nationwide paid family leave entitlement program, which could be as much as 12 weeks of *paid* family and medical leave. As former President Trump signed into law paid leave for federal workers, universal paid leave seems more likely now than ever.

Harassment Training Renewed Everywhere

As we wrote about, in the wake of the #MeToo movement, Illinois was one of many jurisdictions to tackle sexual harassment in the workplace, mandating harassment prevention training in 2020 for all employers. In September 2020, former President Trump signed an executive order focused on ending racial sensitivity training by federal contractors. However, the order used broad language and may call into question sexual harassment prevention training as well.

We expect that President Biden will rescind that executive order. Indeed, with a renewed focus on civil rights, we may see additional emphasis from the new administration on both harassment prevention and racial sensitivity training.

For additional information or questions related to changes in employment law, please contact a member of Gould & Ratner's [Human Resources and Employment Law Practice](#).