



Labor & Employment Issues In Focus

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For Clients and Friends
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“All that serves labor serves the Nation. All that harms labor is treason to America. No line can be drawn between these two. If any man tells you he loves America, yet hates labor, he is a liar. If any man tells you he trusts America, yet fears labor, he is a fool. There is no America without labor, and to fleece the one is to rob the other.”

Abraham Lincoln

DECISIVE BIDEN ADMINISTRATION ACTIONS IMMEDIATELY IMPACT LABOR AND EMPLOYMENT

President Joseph R. Biden, Jr. started his first official days in the Office by taking measures to roll back many Trump Administration Executive Orders and staffing decisions, thereby advancing many of laborers’ interests on issues ranging from diversity to wages, as well as on staffing, particularly at the National Labor Relations Board (“NLRB”). A summary review follows.

Diversity, Diversity, Diversity

President Biden signed Executive Order No. 13992 rescinding the previous administration’s restrictions on diversity training among federal agencies and contractors. In September 2020, President Trump signed an Executive Order that proscribed federal agencies and contractors from educating workers on topics in a way that the previous administration felt could be perceived as scapegoating individuals based on race or gender, like “white privilege,” because the former administration believed such topics were “divisive.” However, as part of the Biden Administration’s efforts to advance racial equity, the January 20, 2021 Executive Order reinstated the mandate on federal agencies and contractors to conduct diversity training. President Biden, through Executive Order No. 13985, also launched “a whole-of-government” initiative requiring the heads of agencies to compile plans to address any discriminatory disparities or barriers in policies or programs. Further, President Biden signed Executive Order No. 13988 directing all federal agencies to ensure that other federal laws, which prohibit gender-based discrimination, also protect gender identity and sexual orientation statuses, building upon the groundbreaking precedent in support of marriage equality in *Obergefell v. Hodges*, 576 U.S. 644 (2015).

Wealth Equity/Minimum Wage

President Biden issued Executive Order 14003 mandating a minimum wage of \$15 an hour for federal workers. This wage increase makes good, in part, on the President’s campaign pledge that no full time workers should toil in poverty. Although implementation of any minimum wage increase for private sector workers requires congressional approval, this Executive Order ramps up the pressure for Congress to act, a goal strongly advocated by the Country’s labor unions, especially the Service Employees International Union (“SEIU”) and UNITE HERE. The Biden

Administration has also frozen the Trump Administration's last minute, employer friendly joint employer and tip pooling rules as the first step to rescission.

Hire, Fire, Organize

Wiping out several of the Trump Administration's Executive Orders curtailing employment rights of federal workers, and sending a signal to the private sector as well, President Biden explained: "It is the policy of the U.S. to protect, empower and rebuild the career federal workforce. It is also the policy of the U.S. to encourage union organizing and collective bargaining." In furtherance thereof, a January 22, 2021 Executive Order revoked the Trump Administration's limitations on collective bargaining, progressive discipline and just cause, and union release time for representation for federal employees. President Biden also erased "Schedule F," which created a class of at-will federal workers.

Fire Robb, Save Scabby

President Biden fired Peter Robb, who had been General Counsel for the NLRB. Although the President initially requested Robb to submit his resignation, since Robb had approximately 10 months left on his senatorially confirmed position, Robb refused, compelling the President to remove an individual who had been aggressively pro-management during his tenure with the NLRB. As General Counsel, Robb advanced the curtailment of workers' rights through internal decisions to take up certain cases and to challenge prior NLRB decisions. Robb was also one of the architects behind the NLRB's reinstatement of a pro-employer definition of joint employer, as well as the NLRB's challenging of unions conducting elections other than through in-person means during the pandemic and an ongoing attempt to ban "Scabby the Rat," a First Amendment fixture at union picketing. However, this action taken by President Biden may be challenged because both Presidents Bush and Obama retained the NLRB's General Counsels whom they respectively inherited from previous administrations. Nevertheless, proponents of Robb's dismissal cite the recent decision in *Seila Law v. Consumer Financial Protection Bureau*, 140 S.Ct. 2183 (2020), which permitted then-President Trump to terminate the head of that agency. Robb will be replaced, for the time being, by Peter Sung Ohr, who has served in the NLRB as a Field Attorney, a Deputy Assistant General Counsel, and a Regional Director.

The Saints Come Marching In

In other staffing decisions implemented by President Biden during the first stages of his presidency, he named Lauren McFerran as the chair of the NLRB, replacing John Ring, who presided over major business-friendly decisions. Further, President Biden tapped Charlotte Burrows and Jocelyn Samuels to serve as the chair and vice chair, respectively, of the U.S. Equal Employment Opportunity Commission ("EEOC"). At the U.S. Department of Labor ("DOL"), President Biden earlier replaced anti-union Eugene Scalia with Marty Walsh, the former Mayor of Boston, to serve as the Secretary of Labor; has nominated Julie A. Su, who currently heads California's Labor and Workforce Development Agency, to serve as the Deputy Secretary of Labor; and installed Jessica Looman to serve as the acting Wage and Hour Division administrator. Additionally, President Biden tapped Jenny Yang to serve as the director of the Office of Federal Contract Compliance Programs, and Jeffrey Freund to serve as the director of the Office of Labor-

Management Standards. By placing these individuals into their respective positions of leadership, the Biden Administration aims to guide implementation of its promised worker-friendly agenda.

**NEW YORK STATE BUILDING AND TRADES COUNCIL
ENDORSES STATE LEGISLATION DESIGNED TO
PROTECT WORKERS DURING COVID-19 PANDEMIC**

With Bill No. A2681/S1034, the New York State Legislature begins the process to amend § 218-b of the New York State Labor Law (“NY Hero Act”) in order to protect employees of private sector employers from occupational exposure to airborne infectious diseases. This Act would empower the Commissioner of the New York State Department of Labor (“NYSDOL”) to devise a “model airborne infectious disease exposure prevention standard” and to bolster the NYSDOL’s enforcement capabilities related to this purpose.

The NY Hero Act seeks to effectuate this goal by requiring private sector employers to devise methods by which employees have access to employee health screenings, face coverings, personal protective equipment, and workplace hand hygiene stations, as well as requiring said employers to perform “regular cleaning and disinfecting of shared equipment and frequently touched surfaces.” Additionally, this legislation would prohibit private sector employers from taking any adverse employment action against any employee who exercises his/her rights under this statutory provision, who reports any violation thereof, or who refuses to work in conditions that run contrary to the purpose of the proposed law. Moreover, employees would be empowered with a private right of action against his/her private sector employer and may recover monetary damages, injunctive relief, and attorney’s fees.

The New York State Building and Trades Council (“NYS BTC”) submitted a Memorandum in Support of the NY Hero Act on January 19, 2021 urging that this legislation codify the guidance originally promulgated by the Governor’s Executive Orders that were instrumental in protecting workers. The NYS BTC argued that the NY Hero Act is necessary in order to combat unscrupulous construction contractors who are willing to utilize numerous cost-saving measures to the detriment of the workers’ safety and welfare. The COVID-19 pandemic has exposed such practices, as exploited workers often find themselves on unsafe jobsites without appropriate safety measures. The NYS BTC agrees that this legislation represents a step in the right direction towards protecting all essential workers, not just those within the construction industry, and will assist in the slowing of the spread of COVID-19.

OTHER NEW GOVERNMENTAL MEASURES UNDERTAKEN TO IMPLEMENT COVID-19 WORKPLACE SAFETY STANDARDS

Recently, there has been growing momentum to begin implementing more comprehensive COVID-19 worker-related protections both at the federal and state levels. Virginia and OSHA lead the way.

On January 13, 2021, Virginia passed the first statewide permanent rule requiring employers to take measures designed to protect workers from exposure to and spread of COVID-19. This new rule, which makes permanent the preexisting, temporary state order that was set to expire at the end of this month, continues: i) the process of separating jobs into high, medium, and low risk groups, ii) the mandate requiring employers to develop a workplace infection protection program, and iii) the training of its employees related to this program. Additionally as part of this new rule, employers are required to contact the State’s health department whenever there is one confirmed case of COVID-19 in the workplace. It also provides that businesses that employ individuals in the high risk group, which includes nurses, doctors, and prison guards, must have specific ventilation systems in place, in order to prevent the potential spread of COVID-19. Finally, this permanent rule, which does not have a sunset clause, builds on the steps of California, Michigan, Oregon, Nevada, and Washington, all of which issued similar, but temporary, orders.

Federally, President Biden announced on January 21, 2021 that he is asking for the U.S. Occupational Safety and Health Administration (“OSHA”), as well as other related sub-agencies, to issue updated guidance on COVID-19 worker-related protections and to ascertain whether such promulgations can be instituted on an emergency basis, in order to circumvent the typical rulemaking process. In order to meet the emergency standard, OSHA must determine that “employees are exposed to grave danger” related to COVID-19. The exigent and emergent need of taking such actions is based, in large part, on there being no explicit, national requirement designed to protect employees from workplace COVID-19 infections, given that the Trump Administration relied on the “general duty” clause of the Occupational Safety and Health Act. Moreover, the Biden Administration seeks to implement the guidance received from OSHA as part of a broader COVID-19 relief legislation. The Biden Administration has preexisting templates from which to work being that the Obama Administration had drafted similar protections in connection with the H1N1 virus and the U.S. House of Representatives, as part of the HEROES Act that was passed in May 2020, contained workplace protections related to COVID-19 for employees.

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