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The Labor Law Insider: The Biden Administration - Expected Changes in Workplace Protections

Service

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Husch Blackwell's Labor & Employment team is launching a series of labor and employment alerts that discuss the expected changes in labor and employment laws under the Biden administration and provide answers to specific questions that employers may have regarding these anticipated legal developments. As details emerge with regard to legislative and regulatory changes, we will update these alerts.

As expected, the new administration has taken immediate actions that signal its priorities. On January 20, 2021, the White House issued a freeze on all regulatory actions in process under the Trump administration, and has re-directed rulemaking activity by federal agencies and replaced individuals in leadership positions at those agencies, including at the Equal Employment Opportunity Commission (EEOC). In this alert, we explore the potential impact of these actions on employers and steps that can be taken to prepare for anticipated changes.

Changes in EEOC leadership signal Biden priority

Overview

Immediately after his Inauguration, President Biden designated Democratic Commissioners, Charlotte Burrows and Jocelyn Samuels, as Chair and Vice Chair of the EEOC. While the current membership of the EEOC is composed of three Republican and two Democratic Commissioners, Chairwoman Burrows will be controlling the agency's agenda. On March 5, 2021, President Biden terminated Sharon Gustafson, the EEOC General Counsel appointed by President Trump, and named Gwendolyn Young Reams, a veteran EEOC lawyer, as the agency's acting general counsel. Acting General Counsel Reams

will be responsible for leading the litigation program and enforcement actions under federal anti-discrimination laws.

1. What conclusions can be drawn from the leadership changes at the EEOC?

ANSWER: President Biden's immediate changes signal the administration's intent to prioritize enforcement of federal anti-discrimination laws and to quickly and aggressively pursue litigation and strategic initiatives consistent with the Biden administration priorities.

Employers can expect expanding protections for women, minorities and the LGBTQ community

Overview

On January 20, 2021, President Biden issued Executive Order 13988, Preventing and Combating Discrimination on the Basis of Gender Identity and Sexual Orientation, signaling his administration's focus on strengthening protections against discrimination on behalf of the LGBTQ community. Executive Order 13988 applies to executive and independent federal agencies and extends the 2020 U.S. Supreme Court decision in *Bostock v. Clayton County, (Bostock)* to other federal laws prohibiting discrimination on the basis of sex. *Bostock* expanded the application of Title VII to prohibit discrimination based on sexual orientation and gender identity.

The Biden administration also supports H.R. 5, the Equality Act, which passed the House of Representatives (House) on February 25, 2021. The Equality Act goes one step further than Executive Order 13988 by codifying the *Bostock* decision's holding that Title VII's prohibition on employment discrimination "because of sex" inherently includes discrimination "because of sexual orientation or transgender status." The Equality Act amends Title VII, as well as other civil rights laws, to prohibit discrimination based on sexual orientation and gender identity, expands protections for pregnant individuals, and prohibits discrimination based on sex stereotypes and sex characteristics.

The Act expands the definition of the term "sex" to include: 1) a sex stereotype; 2) pregnancy, childbirth or a related medical condition; 3) sexual orientation or gender identity; and 4) sex characteristics, including intersex traits. It defines the term "gender identity" as referring to "gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual, regardless of the individual's designated sex at birth." Sexual orientation is defined as "heterosexuality, homosexuality or bisexuality." According to the Act's section entitled "Findings and Purpose," gender non-binary individuals are protected by the Act's provisions. Finally, the Act specifically excludes the use of the Religious Freedom Restoration Act as a defense or a basis for challenging a claim of discrimination prohibited under the Civil Rights Act of 1964. Protections against sex discrimination under the Equality Act would extend beyond Title VII to those sections of

the Civil Rights Act of 1964 that protect against sex discrimination including, housing, healthcare, education, credit, programs and activities receiving federal funding, and jury service.

Passage of the Equality Act is not assured. It requires 60 votes to overcome an expected Republican filibuster in the Senate. Regardless of its passage, employers should review and revise policies and practices to comply with the *Bostock* decision, as we have previously discussed here.

The Biden administration also supports passage of the Pregnant Workers Fairness Act (PWFA), re-introduced in the House on February 16, 2021, by a bi-partisan group of representatives. The PWFA requires private employers with 15 or more employees and public sector employers to provide reasonable accommodations for pregnant employees and job applicants with known limitations related to pregnancy, childbirth or related medical conditions.

2. What does Executive Order 13988 indicate with respect to agency enforcement actions related to unlawful employment discrimination?

ANSWER: The Order directs federal agencies to interpret existing laws and regulations, related to employment, housing, education and immigration consistent with *Bostock's* holding, absent evidence of contrary intent. The Order indicates the Biden administration intends to pursue enforcement actions against other forms of "overlapping" prohibited discrimination, such as race and disability.

3. What obligations would the Equality Act impose on employers?

ANSWER: The Equality Act requires employers to treat "pregnancy, childbirth or a related medical condition no less favorably than other physical conditions." Employers would also be required to provide "access to a shared facility, including a restroom, a locker room, [or] dressing room that is in accordance with the individual's gender identity." If sex is a bona-fide occupational qualification, then "individuals are recognized as qualified in accordance with their gender identity." Employers will also need to ensure policies and practices treat individuals equally and without respect to gender stereotypes, mannerisms or appearance.

4. How can employers manage the expanded anti-discrimination laws?

ANSWER: California law already prohibits discrimination and harassment based on gender, gender identity, gender expression and sexual orientation. More and more states are following suit. Even on a national level, we have advised employers to maintain gender-neutral dress codes and to update anti-harassment policies to prohibit such conduct. Employee forms should be revised consistent with the prohibitions on gender stereotyping. It is now more important than ever for employers across the country to ensure their handbooks and policies are up to date. More importantly, employers should ensure human resources and management personnel maintain current awareness of these new requirements and adjust practices accordingly.

5. What new obligations would be imposed under PWFA?

ANSWER: Currently, employers are required under federal law only to provide accommodations with respect to employees' and job applicants' disabilities and religious practices. The PWFA would require employers to engage in an interactive process with and provide reasonable accommodations for pregnant employees and job applicants with known limitations related to pregnancy, childbirth or related medical conditions, absent an undue hardship.

The PWFA also prohibits retaliation against workers exercising rights afforded by the PWFA.

6. How should employers adjust policies and practices related to pregnancy and related conditions?

ANSWER: Recent court decisions, combined with the new administration's policy goals, suggest that "gender" discrimination will be broadly interpreted to include pregnancy and related conditions. Therefore, regardless of whether the PWFA passes, all employers should update accommodations policies and ensure human resources and supervisory personnel are familiar with the types of accommodations potentially required for pregnant workers, such as more frequent breaks, seating and permitting food/drink at a workstation. Additionally, lactation is generally considered a pregnancy-related condition that should be treated as such when considering updates to policies and practices. Of course, these expanding obligations will not change the requirements for California employers or employers in others states that already have similar laws in any meaningful way.

Employers can expect expanded wage equality measures

Overview

The Biden administration supports passage of the Paycheck Fairness Act (PFA) H.R. 7, re-introduced in the House and the Senate in January 2021 with bi-partisan support.

The PFA narrows the justification for pay disparities. Presently, employers may defend a pay disparity as lawful under federal law by asserting one of four defenses, including the defense that the disparity is based on "any other basis other than sex." The PFA eliminates that broad defense and instead, requires employers to establish that pay differentials are based on a *bona fide* factor other than sex, such as education, training and experience. Further, the entire pay differential must be attributable to the alleged *bona fide* factor.

In addition, the PFA prohibits employers from 1) restricting discussions and retaliating against employees who share pay information, and 2) seeking salary history information from prospective employees as a means of establishing a starting salary or as a condition of employment. Passage of a federal ban on salary history inquiries would introduce uniformity and aid in compliance issues faced

by multi-state employers already subject to similar requirements in numerous state and local jurisdictions.

Biden also signed Executive Order 13985, on Advancing Racial Equity and Support for Underserved Communities through Federal Government. Executive Order 13985 expresses the need for federal government efforts to address historical systemic racism and requires the establishment of an equitable data working group to gather datasets disaggregated by race, ethnicity, gender, disability, income, veteran status and other key demographic variables. As a result, employers may see efforts to collect data beyond pay data information.

7. What obligations would PFA impose on employers?

ANSWER: Compliance with the PFA will require employers to ensure uniformity in pay practices and implement measures to tie wage rates to factors such as education, training and experience. The PFA also requires the collection of compensation data and other employment-related data disaggregated by sex, race, ethnicity and job categories of employees on an annual basis. As of January 1, 2021, employers with employees in Colorado are subject to that state's Equal Pay for Equal Work Act, which has already eliminated the catch-all for "any other basis other than sex," making it perhaps the most strict equal pay law in the country to date.

8. How can employers defend against pay disparity claims?

ANSWER: With increasing attention focused on pay disparities, employers should develop quantitative metrics to track levels of applicant and employee education, training and experience, and ensure pay disparities are based on such metrics. Employers should remember that equal pay laws typically look at total compensation, making things like bonuses and other financial incentives also subject to scrutiny. Employers should also ensure that these data are being tracked and retained for at least four years post-termination.

9. Will efforts to collect EEO-1 Component 2 pay data from employers be renewed?

ANSWER: Probably. Collection of EEO-1 Component 2 pay data, which requires that employers report employees W-2 income information disaggregated by gender, race/ethnicity and job category is expected to be renewed under newly appointed Chair, Charlotte Burrows. EEO-1 Component 2 pay data collection was halted under the Trump administration in 2019.

Employers can expect restrictions on forum selection clauses, class and collective action waivers, and non-compete agreements

Overview

The Biden administration has promised to enact legislation banning mandatory arbitration agreements and agreements requiring employees to relinquish their right to participle in class or collective actions.

In February 2021, the Forced Arbitration Injustice Repeal (FAIR) Act was re-introduced in the House and amends the Federal Arbitration Act to:

Prohibit the use of pre-dispute mandatory arbitration agreements; and

Prohibit the use of pre-dispute joint action waivers which waive the right of one party to participate in a joint, class or collective action in any forum in the context of employment, consumer, antitrust and civil rights disputes.

If passed, employers would be required to permit employees and prospective employees to opt out of any arbitration agreements. The FAIR Act would invalidate current arbitration agreements with regard to disputes or claims that arise or accrue after the date of enactment.

The Biden administration also has articulated its opposition to broad non-compete clauses and no-poaching agreements characterizing them as anti-competitive agreements that lead to wage suppression. Even under the Trump administration, the Department of Justice (DOJ) targeted no-poaching agreements. In December 2020 and January 2021, the Antitrust Division of the DOJ announced indictments in two cases against private companies for entering into no-poaching agreements and conspiring to suppress competition for senior-level employees. The DOJ's announcement of its intent to prosecute companies who "enter into naked wage fixing and no-poach agreements" came in the context of investigating employers that allegedly took advantage of essential workers who served on the front lines during the COVID-19 pandemic.

Employers can expect this trend to continue, as the Biden administration has promised to work with Congress to enact legislation restricting the use of non-compete agreements except those that "are absolutely necessary to protect a narrowly defined category of trade secrets" and to "outright ban all no-poaching agreements."

10. What steps can employers take to ensure enforceability of employment agreements?

ANSWER: Employers should carefully monitor developments in the area of non-competes and arbitration agreements and prepare for the possibility that employment agreements will need to be updated to comply with new restrictions.

11. What can employers do to prepare for the possibility that limitations on competition by former employees will be significantly curtailed?

ANSWER: Many states already place significant limitations on the scope of non-compete and non-solicitation agreements. Employers who rely heavily on these types of agreements to protect confidential, competitive information should take steps to ensure that this information does not leave with a former employee in the first place. Employers should focus on what they do to be the supplier of choice to their customers, regardless of who is competing with them.

Contact us

If you have questions regarding anticipated changes and compliance recommendations, contact Barbara Grandjean, Amberly Morgan or your Husch Blackwell attorney.