

# **Biden's America: Labor and Employment Policy Update**

October 7, 2021

# Biden Administration's Labor & Employment Priorities

- **Worker Empowerment**

- Increase union density through executive and legislative action
  - White House Labor Task Force
  - PRO Act

- **Worker Classification**

- New rules on independent contractors and joint employer liability
- Greater social safety net for gig workers

- **Enforcement**

- Increased funds and enforcement personnel
- Democratic-majority NLRB

- **Workplace Safety**

- COVID-19 vaccine mandates

- **Paid Leave**

- Federal paid family and medical leave program

# Worker Empowerment – the PRO Act

- PRO Act – main legislative vehicle for labor law reform
- Key provisions:
  - Card check elections
  - First contract arbitration
  - Legalization of secondary boycotts
  - Removal of procedural rights for employers in election proceedings
  - Ban on right to work laws
  - Personal liability for executives and board members
  - Ban on class action restrictions in arbitration agreements
  - Ban on captive audience meetings
- **OUTLOOK:** The PRO Act passed the House in March 2021, and has yet to be voted on in the Senate, where it has slim chances of garnering the 10 Republican votes needed for passage. Democrats and the Biden Administration are instead attempting to include some of the above provisions in the budget reconciliation bill – remains to be seen whether the provisions will get past the parliamentarian.

## Worker Empowerment – White House Labor Task Force

- White House Task Force on Union Organizing and Worker Empowerment
  - Established by President Biden through Executive Order
  - Membership comprised of entire cabinet and major agency heads
  - Task force is directed to propose new ways of using federal policies and programs “to empower workers to organize and successfully bargain with employers”
  - Expected recommendations in mid-October:
    - Identify “**statutory, regulatory, or other changes** that may be necessary to make policies, practices, and programs more effective means of supporting worker organizing and collective bargaining”
    - “Our principal focus is on **finding as long a list as possible of recommendations to the President for executive action using existing authority** within existing programs, policies, and practices that would facilitate worker organizing” – Seth Harris, White House Labor Advisor
- **OUTLOOK:** Likely to see executive orders imposing union-friendly requirements on federal contractors, including required neutrality during union organizing, card check recognition, HCM disclosures, restrictions on arbitration agreements, among more.

# Worker Classification

- Crackdown on independent contractor classifications
  - More restrictive legal tests for whether a worker is an employee or IC
  - DOL will take the view that most ICs are employees
  - Beyond the gig economy
- Increased safety net for gig workers
  - Middle ground approach – some access to benefits?
- Expansion of joint employer liability
  - Crackdown on subsidiary/third party relationships
    - Franchisees, temp workers, contractor employees
- **OUTLOOK:** DOL will likely introduce new rules/regulations for independent contractor classification and joint employer liability. The NLRB will also create new more restrictive standards on each of these issues.

# Enforcement

- President Biden's proposed budget includes massive increase in funding for the DOL, NLRB, and EEOC
  - OSHA: increased workplace safety investigations
  - Wage and Hour: targeting worker misclassification, overtime violations
  - OFFCP: increased audits, pay equity a priority
  - EEOC: increased harassment/racial equity investigations
- **OUTLOOK:** Even in the absence of major legislative or regulatory action, employers can expect increased oversight through an uptick in investigation and enforcement actions

# Enforcement – National Labor Relations Board

- NLRB has a Democratic majority for the first time since 2017
- Issues in play:
  - Card check authorization
  - Bargaining unit size
  - Increased scrutiny of workplace rules and policies (employee handbooks)
  - Expansion of employee activity that is protected under the NLRA – political protests etc. as lawful concerted activity
  - Union access to employer property – physical and technological
  - Joint employer liability
  - Independent contractor status
  - Restrictions on employer speech in union campaign settings
  - Election procedural rules
- **OUTLOOK:** Employers can expect vigorous prosecution of unfair labor practice charges and significantly pro-union decision-making – labor relations balance will be tipped as much as possible towards unions/workers.

# Paid Leave

- President Biden has called for a federal paid family and medical leave program offering up to 12 weeks of paid leave
- Current budget reconciliation bill includes a new federal paid family and medical leave program:
  - Up to 12 weeks
  - Wage replacement of roughly 60-70% of an individual's average earnings
  - Benefits available regardless of tenure, job type, or worker classification – part time and gig workers included
  - Expansive qualifying reasons for leave beyond what is currently in unpaid FMLA
  - Employers can be reimbursed for their own programs if they meet the requirements of the federal program
  - Paid through general revenue – no dedicated payroll tax
- **OUTLOOK:** A likely reduction in the price tag of the overall budget bill means the paid leave proposal is likely to get scaled back significantly – fewer weeks, lesser wage replacement, less qualifying reasons, all possible reductions. Remains to be seen whether any paid leave proposal will get past parliamentarian. A paid leave bill through normal legislative avenues possible, but would need significant bipartisan support that would likely limit any impact.



## Workplace Safety – Vaccine Mandates

- Federal contractors are now required to ensure that most of their employees are vaccinated for COVID-19 (by Dec. 8, 2021).
  - Mandate has broad coverage:
    - Contracts
    - Employees
    - Workplaces
- A vaccine mandate for private sector employers with 100+ employees is coming soon
- **OUTLOOK:** Private sector mandate will likely be similar to federal contractor mandate, with testing as an alternative. Both mandates may be subject to legal challenges, remains to be seen whether such challenges will succeed. Significant compliance questions for employers, with little guidance from federal government.