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EMPLOYMENT LAWSCENE ALERT: BIDEN ADMINISTRATION SUPPORTS NEW LAWS PROTECTING EMPLOYEES FROM DISCRIMINATION

In this, the latest installment in our series discussing the Biden Administration's workplace initiatives, we will now consider the potential impact on employment discrimination laws. At the moment, there are two main legislative actions underway in Congress, and President Biden has lent his support to both these initiatives, as well as other proposals that would affect employment discrimination laws.

Equality Act

In February 2020, the House of Representatives passed the Equality Act, which was originally passed in 2019 but never received a vote in the Senate. The Equality Act would write protections for LGBTQ individuals into Title VII and other federal civil rights statutes and would explicitly prohibit discrimination based on sexual orientation and gender identity. The U.S. Supreme Court's 2020 *Bostock v. Clayton County* decision held that Title VII protects employees against discrimination due to sexual orientation and gender identity, but the Equality Act would codify that decision for employment purposes and also expand the protections to housing, public accommodations, and other contexts. During debate on the bill, Republican lawmakers in the House voiced concerns about how the Equality Act will affect religious freedom for religious organizations. The bill that passed the House specifically states that the Religious Freedom Restoration Act, which provides that the government cannot infringe on a person's religious rights unless it has a good reason to do so and does so in the least restrictive way, cannot be used as a defense against a claim of LGBTQ discrimination under the Equality Act.

The Equality Act now heads to the Senate, where it will need 60 votes to overcome the filibuster. To do so, it may require the addition of religious freedom protections. If the Senate passes the Equality Act, President Biden, who has stated that it is necessary to "lock[] in critical safeguards," is likely to sign the bill into law. Whether or not the Equality Act becomes law, given the recency of the *Bostock* decision, the EEOC is likely to prioritize the protection of LGBTQ employees under Title VII.

Pregnant Workers Fairness Act

In February 2020, the House reintroduced the Pregnant Workers Fairness Act ("PWFA"). The PWFA would require private employers with 15 or more employees and public sector employers to make reasonable accommodations for pregnant employees unless such accommodations would impose an undue hardship on the employer. This will codify and expand upon the U.S. Supreme Court's decision in *Young v. UPS*, which held that employers are required to treat pregnant employees no less favorably than they treat non-pregnant workers with similar inabilities to work. Given the *Young* decision, many employers are likely already providing a least some accommodations to pregnant workers. The PWFA, however, would eliminate the comparison to "non-pregnant workers with similar inabilities to work" and simply require reasonable accommodations, absent an undue hardship.

Under the PWFA, employers would also be prohibited from retaliating against pregnant employees for requesting a reasonable accommodation, and a pregnant employee could not be forced to take paid or unpaid leave if another reasonable accommodation is available. The PWFA has bipartisan support and will likely pass the House when it comes up for a vote. Like other legislation, the PWFA would need 60 votes in the Senate to over come the filibuster. Given the PWFA's broad bipartisan support, it is likely that it will get a vote in the Senate, pass, and be signed into law by President Biden.

Other Potential Changes

Currently, in order to prevail on a claim of age discrimination under the Age Discrimination in Employment Act ("ADEA"), an employee must show that age was the "but-for" reason for the adverse employment action. This is a more stringent standard than the "motivating factor" or "mixed motive" standards, which are required to prove other types of employment discrimination, including under Title VII. President Biden has indicated his support for legislation that would eliminate the "but-for" standard and bring the ADEA in line with other anti-discrimination laws that protect employees.

Finally, during his presidential campaign, President Biden expressed support for the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act ("BE HEARD Act"). This proposed legislation would expand Title VII to cover all employers, not just those with 15 or more employees; would expand the definition of employee to include independent contractors, volunteers, interns, and trainees; and would require anti-harassment policies and training. The BE HEARD Act was introduced in the House in 2019, but never received a vote. Given the other pending employment discrimination legislation, it may not be reintroduced, but its underpinnings of expanded rights are an important barometer for where employment discrimination legislation and policy through the EEOC is likely headed over the next four years.

As always, O’Neil Cannon is here for you. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have, including those regarding employment discrimination.