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.

EMPLOYMENT LAWSCENE ALERT: BIDEN ADMINISTRATION WILL PROMOTE A SIGNIFICANT SHIFT IN RECENT FEDERAL LABOR LAW

In our series discussing the new workplace initiatives under the Biden Administration, we will next address the Biden Administration's desire to make significant changes in National Labor Relation Board ("NLRB"' or "Board") policy and to roll back the labor law precedent of the Trump Administration's NLRB. The Biden Administration's labor policy through the NLRB will focus on two primary goals: (1) the promotion of collective bargaining and (2) the protection of employees' rights to join and form unions. In pursuing this focused labor policy, the Biden Administration is keeping the promise it made during the Presidential campaign that it will pursue policies and the development of labor law that serves the interests of unions. All employers will need to pay attention for the next four years to the NLRB's development and application of the Biden Administration's labor policies.

Through the former NLRB's General Counsel, Peter Robb, the Trump Administration made significant pro-management policy changes and shepherded pro-management developments in labor law under the National Labor Relations Act (the "NLRA" or the "Act"). Under the Obama Administration, the Democratically–led Board took an expansive view on how the Act should be interpreted and enforced, including a very broad reading of Section 7 of the Act, which provides that employees have the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Trump-era Board then narrowed this expanded reach of Section 7.

During the Trump Administration, many of the Obama-era Board policies and decisions were overturned by the Board or by the federal courts, including: (i) overturning of the Board's *Specialty Healthcare* decision that allowed unions to define their own bargaining units, including the recognition of micro-units; (ii) allowing employers, in the Board's decision of *Johnson Controls*, to withdraw union recognition at the expiration of a collective bargaining agreement if the employer can prove that the union does not continue to have majority support amongst bargaining unit employees; (iii) the U.S. Supreme Court's decision in *Epic Systems* overturning the Board's *Murphy Oil* decision where the Supreme Court held that an employer's requirement that employees agree to class- and collective-action waivers in mandatory arbitration agreements does not violate the NLRA; (iv) the Board's *MV Transportation* decision that applied a "contract coverage" analysis instead of a "clear and unmistakable waiver" standard in determining whether an employer with a collective bargaining agreement has the duty to bargain over, or has the right to implement, work or safety rules without bargaining that are within the scope and compass of the parties' existing collective bargaining agreement; (v) overturning, in *Caesars Entertainment*, the Board's 2014 controversial *Purple Communications* decision, which had held that employees have the right to use their employers' email systems for non-business purposes, including communicating about union organizing; and (vi) overturning, in *Apogee Retail*, the Board's decision in *Banner Estrella Medical Center* where the Board ruled that employees have a Section 7 right to discuss discipline and ongoing investigations involving themselves and other co-workers despite an employer's confidentiality policy that prohibits such communications during a workplace investigation.

To follow through on his pledge made during his campaign to be "the most pro-union president," President Biden, as part of his first executive actions, took the unprecedented step to fire Mr. Robb as the NLRB's General Counsel. President Biden broke 85 years of tradition by being the first U.S. President to remove an incumbent NLRB general counsel before the end of his term. Mr. Robb's term was set to end in mid-November. President Biden's termination of Mr. Robb signals a shift in NLRB policy objectives under the Biden Administration and sets the stage for a roll back of the Trump-era NLRB policies and precedent.

President Biden quickly replaced Mr. Robb with Peter Ohr as NLRB's acting General Counsel. Mr. Ohr comes from the NLRB's Chicago Regional Office where he was its Regional Director. Mr. Ohr did not waste any time as the NLRB's acting General Counsel when, in a two-day span, he rescinded 10 Trump-era NLRB General Counsel Memoranda and two NLRB Operations-Management Memoranda issued by his predecessor. Mr. Ohr cited that the rescinded memoranda guidances were either not necessary or in conflict with the NLRB's policy objective of encouraging collective bargaining. Those guidances rescinded by Mr. Ohr, among others, included: (i) holding that employers may violate the Act when they enter "neutrality agreements" with unions to assist unions in their organizing efforts; (ii) on handbook rules developed following the Board's decision in *Boeing*; (iii) on a union's duty to properly notify employees subject to a union security clause of their *Beck* rights not to pay dues unrelated to collective bargaining and to provide further notice of the reduced amount of dues and fees for dues objectors in the initial *Beck* notice; (iv) on deferral of NLRB Charges under *Dubo Manufacturing Company* that instructed NLRB Regions to defer under *Dubo* or consider deferral of all Section 8(a)(1), (3), (5) and 8(b)(1)(A), and (3) cases in which a grievance was filed; and (v) on instructing NLRB Regions and Board agents on how to proceed during investigations in connections with securing the testimony of former supervisors and former agents and how audio recordings should be dealt with during investigations.

In the meantime, President Biden has nominated Jennifer Abruzzo to become the next NLRB General Counsel. Ms. Abruzzo was the second-ranking NLRB official under the Obama

Administration as the agency's Deputy General Counsel. Most recently, Ms. Abruzzo was special counsel for the Communications Workers of America. The White House referred to Ms. Abruzzo as "[a] tested and experienced leader, [who] will work to enforce U.S. labor laws that safeguard the rights of workers to join together to improve their wages and working conditions and protect against unfair labor practices." Richard Trumpka, president of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) supported Ms. Abruzzo's nomination by stating that "the days of the NLRB actively blocking workers from organizing a union are over." Ms. Abruzzo's nomination will have to be confirmed by consent of the Senate, which is currently evenly divided between Democrats and Republicans. Ms. Abruzzo's road to confirmation could be bumpy given the strong criticism by some Republican Senators of President Biden's unprecedented decision to fire Ms. Abruzzo's predecessor, Mr. Robb, before the end of his term.

Biden Administration Will Push Pro-Union Legislation, Including the PRO Act

Besides the change in the NLRB's General Counsel and the effects that change will have on the development of federal labor policy, the Biden Administration, together with the Democratically controlled Congress, is also planning sweeping legislative changes to the Act with the objective to make union organizing easier for employees. The proposed legislation that employers should pay most attention to is the Protecting the Right to Organize (PRO) Act (H.R.2474 and S.1306).

Specifically, pro-union allies of the Biden Administration are pushing the administration to pass the PRO Act, which would be an overhaul of federal labor law under the NLRA. The PRO Act, which the U.S. House of Representatives passed in February 2020, includes in its current form several controversial and seismic shifts in established federal labor law, including:

- Permitting the NLRB to assess civil penalties against employers, ranging from $50,000 to $100,000, for each unfair labor practice violation, which also includes personal liability for managers of alleged violations;
- Providing employees with a private cause of action against an employer for unfair labor practice violations;
- Permitting secondary strikes by a labor organization to encourage participation of union members in strikes initiated by employees represented by a different labor organization;
- Terminating the right of employers to bring claims against unions that conduct such secondary strikes;
- Superseding state's right-to-work laws, by requiring employees represented by a union to contribute fees to the labor organization for the cost of such representation;
- Expanding unfair labor practices to include prohibitions against replacement of, or discrimination against, workers who participate in strikes;
- Making it an unfair labor practice to require or coerce employees to attend employer meetings designed to discourage union membership;
- Prohibiting employers from entering into agreements with employees under which

employees waive the right to pursue or join collective or class-action litigation;
- Requiring the NLRB to promulgate rules requiring employers to post notices of employees' labor rights and protections and establishing penalties for failing to comply with such requirement;
- Prohibiting employers from participating in any NLRB representation proceedings;
- Requiring employers to provide a list of voters to the labor organization seeking to represent the bargaining unit in an NLRB-directed election;
- In initial contract negotiations for a first contract, compelling employers and unions to mediation with the Federal Mediation and Conciliation Service in the event the parties do not reach an agreement within 90 days after commencing negotiations;
- Compelling employers to bargain with a labor organization that has received a majority of valid votes for representation in an NLRB-directed election; and
- Providing statutory authority for the requirement that the NLRB must set preelection hearings to begin not later than 8 days after notifying the labor organization of such a petition and set postelection hearings to begin not later than 14 days after an objection to a decision has been filed.

President Biden promised during his campaign to sign the PRO Act. This legislation, however, is currently stalled in the U.S. Senate and may face an uphill battle given the Senate's current cloture rule to end a filibuster—which requires 60 votes to cut off debate on most matters. Consequently, to the extent that the PRO Act is subject to a filibuster in the Senate, it is unlikely that the PRO Act will become law in its current form. Nonetheless, all employers should pay careful attention to the PRO Act and its movement through the U.S. Congress.

What Employers Should and Can Do

Given the Biden Administration's priority of encouraging employees to unionize, and with the pro-labor individuals that President Biden has placed in top leadership positions in the U.S. Department of Labor, including the nomination of Marty Walsh, the former two-term mayor of Boston and former union leader, to become the next Secretary of Labor, union organizing activity is likely to increase. To lawfully counter those activities, employers can help ensure that employees are accurately informed about unionization to allow employees to make free and clear decisions without coercion about their rights under Section 7. To do so, employers should make sure that their supervisors are properly trained on how to recognize the signs of union organizing activities and how to lawfully respond to employees' questions about unionization.

As always, the labor and employment law team at O'Neil Cannon is here for employers to answer your questions and address your concerns about the changes to federal labor policy and law under the Biden Administration. We encourage you to reach out with any questions, concerns, or legal issues you may have.

EMPLOYMENT LAWSCENE ALERT: THE BIDEN ADMINISTRATION TACKLES WAGE AND HOUR ISSUES

In this installment of our series discussing the new workplace initiatives under the Biden Administration, we will discuss wage and hour issues that employers should prepare for, including an increased federal minimum wage, updated enforcement priorities, and the proposed Paycheck Fairness Act.

Minimum Wage

The federal minimum wage was last increased in 2009. Since then, multiple states and municipalities have increased their minimum wages. However, the federal minimum wage, as well as the minimum wage in Wisconsin, has remained at $7.25. Organizers and activists have supported the "Fight for $15," particularly in industries like fast food, and the Democratic Party has included support for a $15 minimum wage in its party platform since 2016. President Biden made his support of a $15 minimum wage even more clear when he signed a January 22, 2021, Executive Order directing the Office of Personnel Management to develop recommendations to pay federal employees at least $15 per hour and directing his administration to start the work that would allow him to issue an Executive Order within the first 100 days that requires federal contractors to pay a $15 minimum wage.

The Raise the Wage Act proposes a gradual increase, such that the federal minimum wage would increase in increments on a yearly basis between now and 2025 until it reaches $15 per hour. Thereafter, the minimum wage would index to median wages. The first increase, in 2021, would be to $9.50 per hour. Additionally, the Raise the Wage Act would, by 2027, eliminate the "tipped wage," the "youth wage," and the 14(c) wage, which can be paid to disabled individuals in certain positions. These changes would affect approximately 27 million workers, and the Congressional Budget Office has projected that it would increase the federal deficit and cost 1.4 million jobs as a result of employers scaling back due to increased costs.

However, increasing the federal minimum wage is no simple task. President Biden included a $15 minimum wage in his stimulus proposal, and the House of Representatives has included a $15 minimum wage in its most recent version of the coronavirus-relief package. However, once the bill reaches the Senate, passing an increased minimum wage will become significantly more challenging. Typically, a bill needs the votes of 60 Senators to make it to the floor, and the increase of the federal minimum wage does not currently have that support.

The coronavirus-relief package, including the increased minimum wage, could, however, be passed through a process known as budget reconciliation, which requires only a simple majority of Senators, with ties broken by the Vice President. In order to be considered part of the budget reconciliation process, the Senate Parliamentarian would have to agree that raising the minimum wage has a direct impact on the federal budget. If she does not, Vice President Harris could overrule her. If it gets past these steps, at least 50 Senators would need to vote in favor of it. At this point, it's not clear that 50 Senators would vote "yes" to increasing the federal minimum wage to $15 per hour, even if gradually. Additionally, President Biden has admitted that passing an increased minimum wage as part of the coronavirus-relief package is unlikely at this point.

Acknowledging the challenge of getting a minimum wage hike included in the coronavirus-relief package, President Biden has said that he is prepared to engage in separate negotiations on the matter, and other politicians have discussed their potential support of a lower amount, such as $12 per hour. So, while a $15 minimum wage may not be right on employers' doorsteps, this is not an issue that is likely to go away. Employers should begin evaluating the effect that a minimum wage increase would have not only on the wages of their workers who fall between the current minimum wage and a potential new minimum wage, but also on their ability to retain workers who, while now comfortably over the minimum wage, may end up below, at, or only slightly above it if there is a mandated increase.

Wage and Hour Enforcement Priorities

One of President Biden's campaign promises was to "ensure workers are paid fairly for the long hours they work and get the overtime they have earned." This will assuredly lead to an enforcement push at the Department of Labor ("DOL"). Moreover, the DOL is likely to strictly enforce penalties for non-payment of overtime wages. This new stance can already be seen by the fact that the Biden Administration eliminated the Payroll Audit Independent Determination ("PAID") program. The PAID program was a 2018 initiative that allowed employers to self-report FLSA wage and hour violations, including unpaid or miscalculated overtime. While the PAID program required employers to pay workers 100% of the wages owed, it did not assess the 100% liquidated damages penalty. However, on Friday, January 29, 2021, the DOL announced the immediate end of the PAID program, stating that the program "deprived workers of their rights and put employers that play by the rules at a disadvantage." The DOL added that it "will rigorously enforce the law, and . . . use all the enforcement tools we have available." Employers must make sure that their wage and hour policies and practices comply with the law and should consider performing audits to ensure there are no potential violations. Failure to take these proactive measures could land employers on the wrong side of a time-consuming and costly DOL investigation.

Paycheck Fairness Act

Finally, President Biden supports the Paycheck Fairness Act, which was originally passed in the House of Representatives in 2019 and was recently reintroduced in February 2021. If passed, the Paycheck Fairness Act would expand the equal pay provisions contained in the FLSA and require that any pay differential between sexes be based on “a bona fide factor other than sex, such as education, training, or experience.” Currently, federal law requires that any pay disparity between employees of different sexes performing the same job be based on a “factor other than sex.” The use of a **bona fide** factor would significantly narrow employers’ flexibility in justifying any pay differences. The Paycheck Fairness Act also prohibits employers from restricting employees’ discussions of wage information, requires additional employer reporting regarding compensation, and makes it easier for employees to pursue individual and class and collective actions alleging wage discrimination.

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 regarding wage and hour concerns or new policies or legislation under the Biden Administration.

EMPLOYMENT LAWSCENE ALERT: WORKPLACE SAFETY IS A TOP PRIORITY FOR THE BIDEN ADMINISTRATION

In our series discussing the new workplace initiatives under the Biden Administration, we will first look at the Biden Administration’s efforts on protecting worker health and safety.

Simply, under the Biden Administration, employers should expect to see a more robust Occupational Safety and Health Administration (OSHA), meaning ramped-up OSHA enforcement efforts, including more workplace inspections, more whistleblower protection, and the likely issuance of an emergency temporary standard to address the hazards of COVID-19 in the workplace. In light of the Biden Administration’s concerted focus on workplace safety, it behooves all employers to take notice of OSHA’s new enforcement policies now, and to review and update, if necessary, all health and safety programs before OSHA knocks on your door.

New DOL Secretary and Deputy Assistant Secretary of Labor for OSHA

To lead the Biden Administration’s charge in making workplace safety a top priority, President Biden has nominated Marty Walsh to be the new Secretary of Labor. Walsh is the former mayor of Boston and the former union leader of Boston’s Building and Construction Trade Council, an umbrella group of 20 local construction unions. Many believe that Secretary nominee Walsh will be a strong and ardent advocate for worker safety given his background in the construction industry and his former roles as mayor and union leader where he was a strong vocal proponent for more stringent safety regulations for workers.

During his Senate confirmation hearing, Walsh committed to improving workplace safety by increasing the number of OSHA compliance officers and making sure that OSHA has the tools in place to protect workers during the COVID-19 crisis — Walsh's comments would seem to indicate that employers should expect an emergency temporary standard on mitigating and eliminating COVID-19 hazards in the workplace, a national emphasis program on COVID-19, and increased inspections in workplaces where workers work in close proximity with other workers or customers.

To manage OSHA's new policies and expected emphasis programs, President Biden has chosen James Frederick, the former Assistant Director of the United Steelworkers' Health, Safety and Environment Department to lead OSHA to be the Deputy Assistant Secretary of Labor for OSHA. Fredrick has already commented that OSHA's new guidance on preventing COVID-19 in the workplace is OSHA's "first step" to make it clear "that OSHA is advocating for workers."

President's Executive Order and OSHA's New Guidance on COVID-19 in the Workplace

On January 21, 2021, the day following the Presidential inauguration, President Biden issued an Executive Order outlining his administration's policy on protecting the health and safety of workers from COVID-19. President Biden's Executive Order established a five-step plan to combat COVID-19 in the workplace by requiring the Secretary of Labor, acting through the Deputy Assistant Secretary of Labor for OSHA, to:

1. Issue within two weeks revised OSHA guidance on workplace safety during the COVD-19 pandemic;
2. Consider, by March 15, 2021, whether any emergency temporary standards on COVID-19, including the use of masks in the workplace, are necessary;
3. Review the enforcement efforts of OSHA related to COVID-19 and to identify any changes that can be made to better protect workers and ensure equity in enforcement;
4. Launch a national program to focus OSHA enforcement efforts related to COVID-19 on violations that put the largest number of workers at serious risks or are contrary to anti-retaliation principles; and
5. Coordinate with the Department of Labor's Office of Public Affairs and Office of Public Engagement and all regional OSHA offices to conduct a multilingual outreach campaign to inform workers and their representatives of their rights under applicable law.

On January 29, 2021, consistent with President Biden's Executive Order, OSHA issued a detailed guidance entitled "Protecting Workers: Guidance on Mitigation and Preventing the Spread of COVID-19 in the Workplace." While not legally binding, OSHA, through this guidance, instructs employers on the appropriate control measures that should be implemented in the workplace to help mitigate and prevent the spread of COVID-19. Such measures include: conducting a hazard assessment; identifying a combination of measures that limit the spread of COVID-19 in the workplace (e.g., wearing face masks and social distancing), adopting measures to ensure that workers who are infected or potentially infected are separated and sent home from the workplace; and implementing protections from retaliation for workers who raise COVID-19 related concerns. Employers should consider this guidance as the stepping stone for OSHA to issue an emergency temporary standard on mitigating and eliminating COVID-19 in the workplace — a directive that President Biden’s Executive Order has mandated to be achieved by March 15, 2021.

A COVID-19 National Emphasis Program is Possible

If OSHA issues an emergency temporary standard on mitigating and eliminating COVID-19, employers should also expect that a COVID-19 national emphasis program will come along with it. A COVID-19 national emphasis program will permit OSHA to ramp up inspections and target workplaces where OSHA believes, based on industry and Centers for Disease Control and Prevention (“CDC”) data, that workers are most at risk for COVID-19. Presumably, OSHA will target those places of employment where workers work in close proximity to other workers or are forward-facing with customers and the general public. This can include meatpacking plants, warehouses, fulfillment centers, grocery stores, and other retail stores where workers have close contact with customers. If a COVID-19 national emphasis program is established, employers will be chosen randomly by OSHA for inspection based on program criteria rather than based on complaints or reports of accidents. Most employers believe that if they can prevent workplace accidents and avoid having employees complain to OSHA, they can avoid an OSHA inspection, but employers who fall within a national emphasis program’s criterion must always be mindful that an OSHA inspection can occur at any time. The question for these employers is will they be ready for an OSHA inspection when OSHA comes knocking.

COVID-19 and a Robust OSHA Requires Employers to Be Proactive

Employers should expect that OSHA will take a stronger and more enforcement-oriented approach to addressing COVID-19 in the workplace through new directives, emergency temporary standards, and policy guidelines mandated by the new Biden Administration. This will require employers to formalize, in writing, their COVID-19 response plan in the same manner that other safety programs are written and to also conduct regular training for all its workers to educate them on what actions they can take to help prevent the spread of COVID-19 in the workplace. Such training should include the obvious health and safety controls that can be put in place such as the requirement that all workers wear face masks, maintain social distancing, and that workers who are ill or exhibiting signs or symptoms of COVID-19 are sent home until they are cleared to return to work based on CDC guidelines.

Finally, employers should also note that as the COVID-19 vaccine becomes more widely available, employers should encourage all their workers to become vaccinated. OSHA recommends, however, that the same safety measures that are in place now to combat COVID-19 should remain in place even after workers are vaccinated. That is, both vaccinated and unvaccinated workers should follow the same safety measures, such as wearing masks and maintaining social distancing, because the CDC has not yet determined whether a vaccinated individual can transmit the COVID-19 virus even though they may have immunity based on having received the vaccination. As a result, assuming that an emergency temporary standard on COVID-19 will be issued by OSHA, employers should take note that having a vaccinated workforce may not immune their workplace from OSHA citations if COVID-19 safety measures are not being followed and enforced.

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 regarding OSHA's new policies and directives under the Biden Administration.

EMPLOYMENT LAWSCENE ALERT: WHAT'S A BIDEN PRESIDENCY GOING TO MEAN FOR EMPLOYERS? AN OVERVIEW

The labor and employment law policies and enforcement goals of the federal government rely largely on which party's administration occupies the White House. When inaugurated in January, President Joseph R. Biden made some immediate and significant changes that will affect employers. Also, based on President Biden's statements made during his campaign and the stated goals of others in the Democratic Party, decidedly pro-employee policies, enforcement goals, and legislation are very likely on the way. These changes are all but certain, now, with a Democratically controlled Congress. Over the next five weeks, the OCHDL employment law team will examine five labor and employment areas that employers should know and understand in order to navigate through the new and significant changes that the Biden Administration will likely make in the coming months and years. In the following weeks, we will cover:

- **OSHA**: On January 21, 2021, President Biden signed an Executive Order requiring OSHA to provide guidance to employers on workplace safety during the COVID-19 pandemic. In response, on January 29, 2021, OSHA issued guidance related to COVID-19. This guidance, as well as OSHA's enforcement policies regarding COVID-19, will likely continue to evolve under the new administration.
- **Wage and Hour**: This blog series will also cover potential wage and hour changes such

as an updated federal minimum wage and the proposed Paycheck Fairness Act, which would expand the equal pay provisions contained in the FLSA and require that any pay differential between sexes be passed on "a bona fide factor other than sex, such as education, training, or experience."

- **Labor Law**: We'll discuss the future of the NLRB and labor law under a Biden Administration. Significant changes, including the roll back of certain enforcement guidance and the ousting of the General Counsel, have already occurred, and if campaign promises are to be believed, we could have significant additional changes, including the passing of the Protecting the Right to Organize (PRO) Act, which would be a sweeping overhaul of federal labor law including prohibiting the use of class action waivers in arbitration agreements, making it easier for workers to form unions, limiting the impact of right-to-work laws, and codifying an expanded definition of what constitutes a joint employer.
- **Discrimination**: Then, we'll cover the Biden Administration's potential impact on issues of discrimination, including the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace (BE HEARD) Act, which would require most businesses to provide anti-harassment policies and training and would codify the prohibition of discrimination on the basis of sexual orientation, gender identity, pregnancy, childbirth, a medical condition related to pregnancy or childbirth, and a sex stereotype under Title VII.
- **DOL**: Finally, this blog series will wrap up with potential changes that could come through the Department of Labor, including changes to the independent contractor test, changes to the joint employer test, and expansions of the FMLA.

As always, O'Neil Cannon is here for you. We look forward to expounding on these topics over the next five weeks and providing you with timely and relevant information over the years to come. We encourage you to reach out with any questions, concerns, or legal issues you may have regarding the anticipated labor and employment law changes under the new Biden Administration.

EMPLOYMENT LAWSCENE ALERT: THE ELECTION IS ALMOST HERE—VOTING LEAVE IN WISCONSIN

Tuesday, November 3, 2020 is Election Day. Although early voting is underway and many individuals have already returned their absentee ballots, many people will want to vote in-person on Election Day. All Wisconsin employers are required to provide employees who are eligible to vote up to three consecutive hours of unpaid leave to vote while the polls are open (from 7 AM until 8 PM), and employees must request the time off prior to the election. Voting leave cannot be denied on the basis that employees would have time outside of their scheduled work hours to vote while the polls are open, but employers can specify which three hours an employee is permitted to utilize. Employers may not penalize employees for using voting leave. Although voting leave is unpaid, employers should remember that, under the FLSA, they may not deduct from an exempt employee's salary for partial day absences.

Additionally, all Wisconsin employers are also required to grant an employee who is appointed to serve as an election official 24 hours of unpaid leave for the election day in which the employee serves in his or her official capacity. Employers may not penalize employees for using election official leave. Employees must provide their employers with at least seven days' notice of their need for this leave.

Finally, Wisconsin employers are not permitted to make threats that are intended to influence the political opinions or actions of their employees. Specifically, employers cannot distribute printed materials to employees that threaten to shut down the business, in whole or in part, or reduce the salaries or wages of employees if a certain party or candidate is elected or if any referendum is adopted or rejected.

As always, O'Neil, Cannon, Hollman, DeJong and Laing is here for you. We encourage you to reach out with any questions, concerns, or legal issues you may have.

EMPLOYMENT LAWSCENE ALERT: DOL UPDATES FFCRA LEAVE REGULATIONS

On September 11, 2020, the Department of Labor issued updated regulations regarding the Families First Coronavirus Response Act and leave available under that law. These updates were issued in response to a recent federal district court ruling out of the Southern District of New York that invalidated portions of DOL's original rules under the FFCRA because the agency exceeded its authority in issuing certain portions of its rules. These updated regulations are effective on September 16, 2020.

Most notably, the new DOL regulations update the definition of "health care providers" that are excluded from the FFCRA. The original definition included anyone employed at a hospital, medical school, and a variety of other places where medical services are provided, as well as individuals employed by a business that produced medical equipment. This definition was criticized as being overbroad and including many more workers than the traditional FMLA definition of health care provider. DOL has revised the definition to include both those who meet the traditional FMLA definition of health care provider who can issue an FMLA certification, as well as individuals capable of providing health care services such as diagnostic services, preventative services, treatment services, or other services that are integrated with and necessary to the provision of patient care. Non-medical personnel such as IT professionals, building maintenance staff, human resources personnel, food services workers, records managers, consultants, and billers are no longer considered health care providers, even if they work at a hospital or other medical service provider.

Employers should take notice that the DOL clarified its stance on intermittent leave under the FFCRA. While intermittent leave is still available only with the agreement of the employer, the DOL clarified that if a child is going to school under a school-mandated hybrid model (e.g., in person two days per week and remote learning three days per week), an employee's need for leave only on those days that their child is home engaged in remote learning would not be considered intermittent leave, and, therefore, the employer's agreement for such a leave schedule would not be necessary. On the other hand, the DOL explained that if it is the parent's choice to have the child attend remote learning instead of in person classes, rather than the change being imposed by the school, then the parent would not be eligible for any FFCRA leave because the school is not "closed" due to a COVID-19 related reason. Under those circumstances, the employer could lawfully deny the employee's request for FFCRA leave.

O'Neil, Cannon, Hollman, DeJong and Laing remains open during this time. We encourage you to reach out with any questions, concerns, or legal issues you may have, including those related to COVID-19.

EMPLOYMENT LAWSCENE ALERT: EMPLOYERS MUST IMMEDIATELY DECIDE WHETHER TO IMPLEMENT SEPTEMBER 1, 2020 PAYROLL TAX DEFERRAL

On August 8, 2020, President Trump issued an Executive Memorandum directing the Secretary of the Treasury to defer the withholding, deposit, and payment of the employee portion of the Social Security tax (6.2% of wages) for the period beginning on September 1 and ending on December 31, 2020. The deferral applies for employees whose pre-tax bi-weekly wages or compensation is less than $4,000. On an annualized basis, this equates to a salary not exceeding $104,000.

The IRS recently issued limited guidance on the implementation of the deferral. Open issues and takeaways are summarized below.

Additional Detail

In addition to calling for the deferral of the payroll tax, the Memorandum directs the Secretary to explore avenues for eliminating the taxpayers' obligation to repay the deferred taxes in the future. It should be noted that only Congress, not the Secretary, has the authority to waive taxes.

The Memorandum does not provide detail on how the payroll tax deferral will be implemented. In related interviews, the Secretary commented that, while he hoped that many companies would participate, he couldn't force employers to stop collecting and remitting payroll taxes. In other words, he suggested that the payroll tax deferral would be voluntary—a proposition not included in the Executive Memorandum.

Requests for Clarification

Uncertainty surrounding how to implement the payroll tax deferral resulted in requests from multiple trade groups for clarification, including an August 18 letter signed by 33 trade groups, including the U.S. Chamber of Commerce. The letter, submitted to the Secretary and to the respective leader of the U.S. Senate and of the U.S. House of Representatives, notes that under current law, the Memorandum creates a substantial tax liability for employees at the end of the deferral period.

While the stated purpose of the Memorandum was to provide wage earners with additional available spending money, unless Congress later acts to forgive liability for the deferred payroll tax, the affected earners will owe an increased tax bill next year. As the U.S. Chamber of Commerce letter maintains, the deferral "threatens to impose hardship on employees who will face a tax bill" in an amount of double the usual payroll deduction for Social Security (amounting to 12.4% of employee wages) in the first four months of 2021.

The following chart illustrates the U.S. Chamber of Commerce's assessment of the magnitude of the potential tax bill for employees compared to the immediate benefit of the deferral:

Annual Income	**Bi-Weekly Pay**	**Increase in Take-Home Pay by Pay Period**	**Tax Bill Due in 2021 (based on 9 pay periods)**
$35,000	$1,346.15	$83.46	$751.15
$50,000	$1,923.08	$119.23	$1,073.08
$75,000	$2,884.62	$178.85	$1,609.62
$104,000	$4,000	$248.00	$2,232.00

The U.S. Chamber of Commerce letter further states that many of its employer members would likely decline to implement the deferral, choosing instead to continue to withhold and remit to the government the payroll taxes required by law.

IRS Notice 2020-65

Late in the afternoon on August 28, 2020, the IRS issued Notice 2020-65 to provide guidance regarding the payroll tax deferral. The Notice clarifies that any deferred amounts must be recouped by being collected from employee wages and repaid during the period between January 1, 2021 and April 30, 2021. Interest and penalties begin to accrue May 1, 2021 on any unpaid amounts. While the Notice is silent on the issue, it is presumed, because of the normal operation of payroll tax law, that employers would be responsible for paying any interest and penalties that accrue, in addition to paying any underlying deferred amounts that cannot be collected from employees.

Some questions about how to implement the deferral remain unanswered by the IRS guidance. Specifically, the guidance addresses neither self-employed individuals nor the method for reporting the deferral of taxes on IRS Forms 941 or W2. The guidance is also silent on how to collect deferred tax for an individual who is no longer employed for all or part of the 2021 repayment period. Staffing agencies, in particular, are concerned about employer exposure to the repayment cost in the event that employees for whom taxes were deferred are no longer employed during the repayment period. It is not clear that deducting the amount owed from an employee's final paycheck would be specifically permitted under either federal or state law, or any applicable bargaining agreements.

Decisions, Decisions

While some employers may welcome the ability to offer the payroll tax deferral to employees as a current relief measure, others may view with some reluctance the prospect of exposure to additional payroll tax costs coupled with the need to re-code payroll software effective September 1, 2020, January 1, 2021, and May 1, 2021. Implementing the current deferral and future double collection would also require careful and accurate communication to employees.

The IRS guidance leaves the door open for employers to avoid, rather than to implement the deferral, and to proceed, instead, to process payroll according the normal procedures. In the language of the guidance, an employer may, "if necessary, . . . make arrangements to otherwise collect the total Applicable Taxes from the employee."

O'Neil, Cannon, Hollman, DeJong and Laing remains open and ready to assist you. To discuss how the Memorandum, IRS guidance, and practical considerations relevant to the payroll tax deferral may apply to your business objectives and circumstances, please speak to your regular OCHDL contact.

EMPLOYMENT LAWSCENE ALERT: ACTION REQUIRED BY AUGUST 31, 2020 FOR CERTAIN RETIREMENT-RELATED CARES ACT RELIEF

An August 31, 2020 deadline applies both to individual retirement account participants who want to repay a required minimum distribution received in 2020 and to employer plan sponsors who wish to reduce or suspend certain 401(k) or 403(b) safe harbor employer contributions. Details on each of these special tax relief provisions are summarized below.

Employers and individuals who wish to avail themselves of these special tax relief provisions should take prompt action.

Deadline for Repayment of Certain Waived 2020 Required Minimum Distributions

As we've described previously, tax law generally requires a 401(k), 403(b), or 457(b) retirement plan participant, or IRA owner, to take required minimum distributions (RMDs) annually once the owner reaches age 72 (or 70 ½ under the SECURE Act).

In late March 2020, the CARES Act waived the requirement to take an RMD from a retirement plan or IRA in 2020. For retirement account owners who had already taken 2020 RMDs and did not need them, the CARES Act provided a way to return them. Although RMDs are not usually eligible for rollover treatment, the CARES Act repayment mechanism is to treat the waived RMDs as if they are distributions eligible for rollover. Instead of actually rolling the amount over to a different plan, however, the CARES Act permits a 2020 waived RMD amount to be repaid only to the same account that paid it out. Any repayment, as described in the CARES Act, was required to take place within the standard 60-day window for making a rollover from one tax-favored account into another.

Because the CARES Act was passed in late March, the 60-day repayment period had by then already expired for those who had taken an RMD in early January 2020. The more recent IRS Notice 2020-51 extends the 60-day window period, so that any waived RMDs received on or after January 1, 2020 may now be repaid, provided that such repayment occurs by August 31, 2020.

Employer plan sponsors may also wish to review whether their plan document should be amended by the deadline to accept RMD repayments if their participant population desires to repay previously-distributed 2020 RMDs to the plan.

Employer Deadline to Reduce or Suspend 401(k) or 403(b) Safe Harbor

Contributions

In a separate announcement, Notice 2020-52, the IRS has provided special relief to employer plan sponsors of 401(k) and 403(b) retirement plans who wish to make a mid-year reduction or suspension of safe harbor nonelective employer contributions. The ability to take such action expires on August 31, 2020 and should be properly documented as of that date.

Background

More and more employer sponsors of workplace retirement plans, in recent years, have chosen to adopt a "safe harbor" employer contribution feature. The key advantage of safe harbor status for a tax-qualified retirement plan is that the plan is deemed to treat highly and non-highly compensated employees fairly, with respect to one another. It is therefore exempt from the otherwise applicable annual nondiscrimination testing.

In exchange for safe harbor status and the perk of avoiding complex and sometimes costly nondiscrimination testing, a safe harbor plan must meet certain requirements, including committing to provide a minimum employer contribution or formula, immediate vesting of the contributions, and the provision of an informational notice regarding the contributions before the beginning of the plan year (a safe harbor notice).

The Safe Harbor 12-Month Rule

Typically, once a safe harbor provision is adopted for a retirement plan, it must be in effect for all 12 months of the plan year. This requirement is intended to prevent employers from avoiding nondiscrimination testing if they do not honor the corresponding requirement to contribute to the plan for the benefit of participants.

Generally, there are two exceptions to the 12-month rule that permit a mid-year suspension or reduction of the safe harbor contribution:

1. The first applies if the employer is operating at an economic loss for the plan year.
2. The second applies if the safe harbor notice explicitly reserves to the employer the right to amend, reduce, or suspend the safe harbor contribution during the year.

Under either exception, an additional notice of amendment, reduction, or suspension must be provided to all participants at least 30 days in advance of the effective date of such action. As a result of any mid-year change to a safe harbor contribution, a plan is required to pass nondiscrimination testing in lieu of relying on the safe harbor testing exemption for the year.

Temporary Relief Related to Mid-Year Safe Harbor Nonelective Contribution Changes and Notices

IRS Notice 2020-52 provides special relief under which employers may make a prospective mid-year suspension or reduction of safe harbor nonelective contributions to 401(k) and 403(b) plans after March 13, 2020, for the balance of the year, regardless of whether the employer has satisfied either the requirement of incurring an economic loss or of previously providing a safe harbor notice reserving the right to change contributions.

Additionally, for safe harbor nonelective contribution plans, rather than providing the revised safe harbor notice at least 30 days before the effective date of the suspension or reduction, the notice must be provided by August 31, 2020.

This relief is time-limited, however. To take advantage of these special rules, a plan amendment suspending or reducing the safe harbor contribution must be adopted by August 31, 2020.

Note that the relief provided in IRS Notice 2020-52 does not apply to a mid-year reduction of 401(k) safe harbor *matching* contributions. This is because of the IRS's view that matching contribution levels as communicated to employees directly affect employee decisions regarding elective contributions and should therefore not be changed.

Note also that this article does not address the implications of certain SECURE Act changes to the safe harbor notice requirement, of the impact of IRS Notice 2020-52 thereon.

Conclusion

The temporary relief provided in IRS Notices 2020-51 and 2020-52 will respectively assist individual taxpayers seeking to avoid taking RMDs in 2020, and employer plan sponsors seeking 2020 cost reductions. In either case, action to take advantage of the relief must be taken by August 31, 2020.

The attorneys of the Labor and Employment Group of O'Neil Cannon are actively monitoring COVID-19 developments and are available to assist employers with related employment law and employee benefit plan compliance matters. Please contact us if you need assistance in amending your employer-sponsored retirement plan to accommodate mid-year safe harbor changes or the return of 2020 RMDs.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN FACE COVERING ORDER ISSUED – EFFECTIVE

AUGUST 1, 2020

Today, Wisconsin Governor Tony Evers declared a Public Health Emergency and issued an Emergency Order requiring individuals to wear face coverings. This Emergency Order goes into effect at 12:01 a.m. on Saturday, August 1, 2020 and will expire on September 28, 2020, unless there is a subsequent superseding emergency order.

The Emergency Order applies to all individuals over the age of five when they are indoors or in an enclosed space with anyone outside of their household, other than when inside a private residence. “Enclosed space” is defined in the Emergency Order as “a confined space open to the public where individuals congregate, including but not limited to outdoor bars, outdoor restaurants, taxis, public transit, ride-share vehicles, and outdoor park structures.” Additional guidance included in the Face Covering FAQs states that, even if individuals can socially distance indoors, unless that person is the only person in the room, a face covering must be worn and that the Emergency Order requires face coverings inside businesses and office spaces, unless an exception applies. Exceptions to the face covering requirement include, among other things, the following:

- when an individual is eating, drinking, or swimming;
- when an individual is obtaining a service that requires temporary removal of the face covering, such as dental services; and
- individuals with health conditions or disabilities that would preclude safely wearing a face mask.

Therefore, the Emergency Order will require employees to wear face coverings in most workspaces, unless the employee is in a room and is the only person in that room.

The Emergency Order supersedes local orders that are less restrictive, but those that are more restrictive than the Emergency Order, like that issued by the City of Milwaukee, are not superseded and remain in force. Therefore, it is important to check local guidelines to ensure that all requirements are complied with. The Emergency Order will be enforced by local and state officials, and the penalty for violation of the Emergency Order is a fine of not more than $200.

O’Neil, Cannon, Hollman, DeJong and Laing remains open during this time. We encourage you to reach out with any questions, concerns, or legal issues you may have, including those related to COVID-19.