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.

ATTORNEYS MARGUERITE HAMMES AND GRANT KILLORAN PUBLISHED IN THE WISCONSIN LAWYER

Attorneys Marguerite Hammes and Grant Killoran authored an article in the February, 2021 edition of the *Wisconsin Lawyer* magazine, entitled "COVID-19 Vaccination: Legal Landscape and Challenges." Their article analyzes the authority of Wisconsin public health officials regarding mass vaccination for COVID-19 and the circumstances under which individuals can object to vaccination requirements.

Read the full article here.

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.

TAX AND WEALTH ADVISOR ALERT: WHEN SHOULD YOU UPDATE YOUR ESTATE PLAN?

You will experience various changes in circumstances during your life. Some of these changes will warrant updates to your estate planning documents. Indeed, estate planning is often a lifetime process of implementing the proper legal arrangements in the event of your incapacity and upon your death.

Consider updating your estate plan upon any of the following events:

Tax Law Changes

What might have been a proper estate plan under the tax laws that existed at the time you created your estate plan may no longer be appropriate. For example, the Setting Every Community Up for Retirement Enhancement Act, more commonly known as the SECURE Act, was signed into law at the end of 2019 and provides new provisions that may affect your tax and retirement planning situation. It is a great idea to review your estate plan after there is a change in the federal or state tax law.

Family Changes

You should consider updating your estate plan upon your marriage or divorce, and upon the marriage, divorce, or separation of anyone included in your estate plan. You should also consider updating your estate plan upon the illness, incapacity, or death of anyone included in your estate plan. Finally, the birth or adoption of children or grandchildren may warrant some modifications to your current estate plan.

Changes in Financial Circumstances

Your financial situation has likely changed over the years. For example, your assets may have appreciated or depreciated, or you may have received an inheritance or acquired debt. Depending on your situation, these changes may be grounds for updating your estate plan.

Moving to a Different State

Different states have different laws and ramifications. If you move to a new state, certain documents in your estate plan that are state specific may not be valid in your new state of residence. You should review and update your estate plan anytime you move to a new state, even if you only plan on living in the new state for half the year.

Special Circumstances

There are various special circumstances that may warrant updates to your estate plan or require additional special needs planning. For example, if your child or grandchild has special needs and receives government assistance, you may want to engage in special needs planning to protect those benefits.

If you have experienced any of the above-mentioned changes and would like to update your estate plan, please contact attorney Kelly M. Spott.

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.

TAX AND WEALTH ADVISOR ALERT: WISCONSIN DEPARTMENT OF REVENUE SAYS EXPENSES PAID WITH FIRST ROUND FORGIVEN PPP LOANS ARE NOT DEDUCTIBLE

A little less than a month ago, the IRS reversed its original position, and stated that businesses can deduct expenses paid for with the proceeds of a forgiven Paycheck Protection Program (PPP) loan, as further detailed here. However, in guidance issued on Friday, the Wisconsin Department of Revenue clarified that expenses that are paid with the forgivable PPP funds (in the first round) are not deductible for Wisconsin income/franchise tax purposes and must be added back to Wisconsin income in the year incurred or paid. Therefore, unless the legislature acts, businesses that have received PPP loans may find themselves saddled with unexpected Wisconsin tax liabilities as a result of the Wisconsin Department of Revenue's recent guidance.

The guidance clarifies that both federal and Wisconsin law provide an exclusion from income for forgiveness of debt on the first round of PPP loans and signals Wisconsin's plan to deny

the expense deduction. Additionally, second-round PPP loans (those issued in 2021) are also set to be taxed by the state, albeit in the opposite manner: expenses will be deductible, but the loans are set to be treated as taxable income.

As we previously wrote about here, Wisconsin is a static conformity state, meaning that unlike a "rolling" conformity state where the state's tax code automatically conforms to the changes in federal tax law, a static state conforms to the federal tax code as it existed on a certain date. Wisconsin conforms to the Internal Revenue Code (IRC) as it existed on December 31, 2017, and although the Wisconsin Legislature adopted omnibus legislation on April 15, 2020, A.B. 1038, to address the coronavirus pandemic, the bill did not update Wisconsin's conformity date. Rather, the bill included express language that brings the state's tax code into conformity with several federal tax law changes under the CARES Act, including the CARES Act exception that permits loan forgiveness on a tax-free basis under the PPP from February 15, 2020 through June 30, 2020.

Therefore, absent legislative action, Wisconsin remains set to treat PPP loans and expenses in a complex and confusing manner given the way in which Wisconsin's tax code currently stands in relation to the federal tax code. PPP loans from the first round will not be taxable income, but associated expenses are non-deductible. On the other hand, second-round PPP loans are taxable income, but associated expenses can be deducted. That means small businesses, many of which are struggling from the COVID-19 economic downturn, could have to pay state taxes on their PPP loans unless the state legislature and Governor Tony Evers intervene.

O'Neil, Cannon, Hollman, DeJong and Laing remains open and will continue to monitor federal and state law tax changes. For questions or further information relating to taxation under the CARES Act and the new relief bill, please contact Attorney Britany E. Morrison.

THE WILAW QUARTERLY NEWSLETTER

Newsletter Article Highlights:

- Is Your Hotel Website in Compliance with the ADA?
- Federal Trade Commission and Enforcement of Privacy Law
- The Importance of a Power of Attorney for Health Care
- Vaccine Injury Claims and the Federal Vaccine Court

Firm News:

- Pete Faust Elected Managing Shareholder and President of OCHDL

- In Memoriam: Thomas A. Merkle 1944–2020
- 21 Firm Attorneys Recognized by Super Lawyers
- OCHDL Ranked in 2021 “Best Law Firms”

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O’NEIL CANNON ELECTS KELLY M. SPOTT AND TREVOR LIPPMAN AS SHAREHOLDERS

O’Neil Cannon is pleased to announce that Attorney Kelly M. Spott and Attorney Trevor Lippman were recently elected as shareholders of the firm.

Kelly has been with the firm since 2017. Prior to joining OCHDL, she was an Advanced Planning Attorney at Northwestern Mutual. Kelly assists her clients with estate planning, succession planning, probate administration, trust administration, and inheritance litigation. She is licensed to practice law in both Wisconsin and Florida. Kelly maintains an AV rating from Martindale-Hubbell® and has been selected for inclusion on The Best Lawyers in America: Ones to Watch List.

Learn more about Kelly M. Spott by visiting her full profile.

Trevor has been with the firm since 2013 and is a member of the firm’s Litigation Practice Group. Trevor assists clients in a wide array of personal and business matters with a strong emphasis in litigation relating to wills, trusts, fiduciary disputes, and inheritance disputes. Trevor has recently been selected for inclusion on the Wisconsin Super Lawyers Rising Stars List and The Best Lawyers in America: Ones to Watch List.

Learn more about Trevor by visiting his full profile.

Both Kelly and Trevor are tremendous additions to the shareholder group, and we are proud to have them on our team.

PETE FAUST ELECTED MANAGING SHAREHOLDER AND PRESIDENT OF OCHDL

Pete Faust has been elected as the Managing Shareholder and President of O'Neil Cannon

Faust replaces Dean Laing, who was the firm's Managing Shareholder and President for six years. Laing will remain a member of the firm's Board of Directors, along with Faust. Laing, one of the top litigators in the state, will continue his litigation practice.

"Dean has been an exceptional leader of the firm and set an extremely high standard for all who follow him," Faust said. "His commitment to the firm and his work ethic are unparalleled. We are very grateful that he has agreed to remain on the Board of Directors."

Faust is a corporate attorney who works primarily in mergers and acquisitions and has been the head of the firm's transactional practice.

BRITANY MORRISON PUBLISHED IN STATE BAR'S INSIDETRACK

Attorney Britany Morrison authored an article entitled "Telecommuting: Tax Implications for Employers and Employees," which appeared in the State Bar of Wisconsin's newsletter, *InsideTrack*.

In the article, Morrison addresses a few important tax considerations for employers and employees working remotely. You can read the full article here.

For more information on this topic, contact Britany Morrison at 414-276-5000 or Britany.Morrison@wilaw.com.