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## STRATEGIC PERSPECTIVES—Biden inauguration heralds labor and employment reset

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On what was a tense, unprecedented, and highly militarized Inauguration Day, the nation exhaled. The normally predictable ceremony marking the orderly transfer of presidential power—this time catapulted by tragic circumstances into a red-zone spectacle with few actual spectators—signaled a new beginning like no other.

**What's old is new.** This time, what's new is familiar and reassuring territory: a return to more traditional policies, process, and personalities. Joe Biden's swearing-in as president is sure to usher in a revival of many Obama-era priorities—affordable health care, environmental protections, worker rights, international trade alliances, anticorruption measures, disaster preparedness, corporate accountability, immigration reform, etc.—all familiar Democratic themes in the pre-Trump White House. In short, what's old may well be new again.

Of course, much of what Obama achieved has since been weakened, if not reversed outright, by the Trump Administration. The Biden team's initial efforts will in many ways have to be remedial; a reversal of the reversal. Picking up where Obama left off, much less expanding on it, will take time and tenacity simply to restore the status quo ante. Building on those Obama-era achievements will be harder still, even with slim Democratic majorities in both chambers of Congress.

**Unique challenges.** Then there are the new, all-consuming challenges unique to this moment. President Biden has made clear that his top priority will be to grapple with the COVID-19 emergency and resulting economic crisis.

What, then, to make of the regulatory priorities and realities of the new administration? This report examines the statements and proposals from Biden's campaign and his transition team, the people in key positions—many of them familiar faces with known track records—to discern what's expected in terms of policy goals, priorities, appointments, and regulatory approaches. This analysis also takes sober account of the current, tenuous political environment to temper its assessment of what's possible vs. what's likely from the new White House.

Still, there is much that Biden can accomplish, even in the near term. Using an array of available tools such as executive orders, agency appointments, targeted bipartisan legislation, rulemaking, enforcement, and agency guidance, among others, the incoming administration has many pathways to achieving its policy ends.

This report lays out those likely scenarios and outcomes for the labor and employment practice area.

## **Biden's labor and employment approach**

It's a safe bet that the Biden Administration's labor and employment approach will resemble closely that of the Obama Administration. Biden had tapped familiar faces from the former Obama Administration for his agency review teams, including for the Department of Labor team, which also includes the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, and the National Labor Relations Board (among others). Moreover, about two-thirds of the Biden team's nominees and appointees to date share some ties with the eight-year Obama-Biden Administration.

The "Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions" on the campaign's website had noted three priorities:

- Promote public/private sector unions and collective bargaining
- Protect workers' dignity, pay, benefits, and workplace protections
- Hold corporations accountable for violations of labor law

In labor's eyes, the Trump Administration had done everything it could to dismantle any gains made by traditional labor during the Obama years and largely succeeded, particularly at the NLRB, but also more subtly in recent activities of the Department of Labor and EEOC, and more dramatically in OSHA's failure to take new, enforceable action with respect to COVID-19 workplace protections.

Even so, 2021 is very different from the beginning of the Obama administration, and those differences will be apparent. Controlling the pandemic and addressing the resulting economic crisis must be the priority, and his actions since the election signal a focus on both. Biden also will face pent-up pressure from progressives and his labor constituents to go big on appointments, such as for the Secretary of Labor, as well as in his regulatory and enforcement agenda, noted James (Jim) Plunkett, in an interview with *Labor & Employment Law Daily*. Plunkett leads Ogletree Deakins' Governmental Affairs from the firm's Washington, D.C., office and was previously the Director for Labor Law Policy at the U.S. Chamber of Commerce, where he focused on legislation, regulations, and policy decisions that impact the workplace.

## **Comprehensive legislation doubtful**

In the Senate runoff election in Georgia during the first week of January, the two Democratic candidates prevailed to give Democrats a fragile 50-50 majority tipped by Vice President Kamala Harris' tie-breaking vote. Major legislation may still be difficult, though, at least during the initial years of the Biden Administration.

**American Rescue Plan.** On January 14, the president-elect laid out an aggressive, two-step rescue plan to get the country back on track—out of the COVID-19 pandemic and related economic crisis—and into a solid recovery. Among other things, the “American Rescue Plan” would increase paid leave benefits, boost the federal minimum wage to \$15 an hour— last raised on July 24, 2009, to \$7.25 per hour, the last step of a three-step increase approved by Congress in 2007—and authorize OSHA to give more workers greater protection against the coronavirus.

### **Emergency paid leave plan**

The incoming Biden Administration wants to provide emergency paid leave to 106 million more Americans in order to reduce the spread of COVID-19, according to the American Rescue Plan. The emergency paid leave program created through the Families First Coronavirus Response Act (FFCRA), as amended by the Consolidated Appropriations Act, 2021, which President Trump signed in late December, extended employer tax credits for paid leave through March 2021, but the requirement that employers actually provide leave was not renewed.

Biden is asking Congress to take several measures to expand pandemic-related leave benefits:

- eliminate exemptions for employers with more than 500 and fewer than 50 employees; give healthcare workers and first responders these benefits, too; and close loopholes to extend emergency paid leave to up to 106 million additional workers.
- Provide expanded paid sick and family and medical leave to provide over 14 weeks of leave to help parents with additional caregiving responsibilities when a child or loved one’s school or care center is closed, for people who have or are caring for people with COVID-19 symptoms or are quarantining due to exposure, and for people needing to take time to get the vaccine.
- Expand emergency paid leave to include federal employees, set a maximum paid leave benefit of \$1,400 per week for eligible workers, and provide full wage replacement to workers earning up to \$73,000 annually.
- Reimburse employers with less than 500 employees for the cost of this leave; extending the refundable tax credit will reimburse employers for 100 percent of the cost of this leave.
- Reimburse state and local government for the cost of this leave.
- Extend emergency paid leave measures until September 30, 2021.

### **Legislation will need GOP support**

A signature piece of labor legislation, the Protecting the Right to Organize Act (PRO Act) passed by the House on February 6, 2020, in a 224-194 mostly party-line vote, is often cited by the Biden campaign as central to its labor agenda. However, any legislation likely needs Republican support, and while five House Republicans joined Democrats to favor the bill, seven Democrats joined Republicans to vote against it.

Similarly, neither the PRO Act nor comprehensive immigration reform is likely to gain any traction early in his term, nor will the Biden Administration be able to advance gig worker legislative protections or eliminate employer-imposed mandatory individual arbitration. However, Biden’s Chief of Staff, Ron Klain, said that on day one, Biden will propose immigration legislation to create a path for citizenship for DACA’s Dreamers.

One unknown factor is the potentially greater appetite for bipartisan compromise in the wake of the violent insurrection mounted at the Capitol by Trump protesters on January 6, 2021, attempting to thwart the electoral vote certification that confirmed Joe Biden’s election, and the fallout that continues to register, such as major corporations announcing their intention to cease political contributions to Republican lawmakers who voted against certification. The historic bipartisan vote in the House January 13 to impeach the president a second time may also shift the political winds—but whether towards compromise or deadlock remains unknown.

### **Single-issue legislation**

According to Jim Plunkett, however, there is potential “rifle-shot” or single-issue legislation that may have bipartisan support and could advance, depending on other legislative priorities. Plunkett cited multiemployer pension reform; the Pregnant Workers Fairness Act (H.R. 2695), which passed the House 329-73 in September 2020; the Equality Act (H.R. 5), which passed the House 236-173 in May 2019; and the Fairness for High-Skilled Immigrants Act (H.R. 1044), which passed the House 365-65 in July 2019.

There is also some bipartisan support for federal action on non-compete and no-poach agreements (for example, in 2019, Republican Senator Marco Rubio introduced the Freedom to Compete Act that would prevent employers from using noncompete agreements in employment contracts for certain non-exempt employees).

### **Executive action the most likely, quickest tool**

On January 20, Inauguration Day, President Biden issued a number of executive actions. Some of the most relevant to labor and employment law included:

- An [“Executive Order on Ethic Commitments by Executive Branch Personnel.”](#) under which every appointee in every executive agency appointed on or after January 20, 2021, will be required to sign and be contractually committed to a pledge that is aimed at restoring and maintaining public trust in government. Under the Executive Order, among other things, appointees must agree to “lobbyist gift,” “revolving door,” and “golden parachute” bans for a certain period.
- Three separate actions intended to first freeze and then improve federal regulatory actions: imposing a regulatory freeze pending review, revoking several prior executive orders, and taking steps to modernize the regulatory review process. Chief of Staff Ronald Klain took steps to ensure that the President’s appointees or designees have the opportunity to [review any new or pending rules](#). At the same time, President Biden issued an [“Executive Order on Revocation of Certain Executive Orders Concerning Federal Regulation.”](#) revoking six of the prior administration’s executive orders.

### **Immigration**

President Trump’s Executive Orders and Proclamations with respect to immigration number in the hundreds; some could be rescinded quickly. As vice president, Biden championed the creation and expansion of the Deferred Action for Childhood Arrivals (DACA) program and the

Deferred Action for Parents of Americans (DAPA) program. Some of the immigration-related executive actions the Biden Administration said it would consider include reinstating the DACA program, reversing Trump’s public-charge rule, and rescinding the travel and refugee bans (among others).

**Muslim ban reversed.** Sure enough, on Inauguration Day, the Biden administration [reversed](#) the Trump administration's restrictions on U.S. entry for passport holders from seven Muslim-majority countries, revoking Executive Order 13780 of March 6, 2017 (Protecting the Nation From Foreign Terrorist Entry Into the United States), Proclamation 9645 of September 24, 2017 (Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats), Proclamation 9723 of April 10, 2018 (Maintaining Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats), and Proclamation 9983 of January 31, 2020 (Improving Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats).

**DACA protections preserved.** As widely anticipated, during his first day in office, President Biden took action to reinstate protections for the so-call “Dreamers” under the DACA program. The move came via a [Memorandum](#) to the Secretary of Homeland Security in which the President directed that the Secretary, in consultation with the Attorney General, take actions deemed appropriate and consistent with law to preserve and fortify the DACA program.

## **Employment**

On the employment front, it is likely that Biden will seek to reinstate the Obama Administration’s Fair Pay and Safe Workplaces EO (known by some government contractors as the “blacklisting” rule) and rescind President Trump’s EOs (Nos. 13836, 13837, and 13839) that have limited the rights of federal employees to collectively bargain, made it easier to fire federal employees without just cause, and EO 13957, which created a new class of civil service employees who may be required to demonstrate political “loyalty.”

**Racial equity.** The government contractor community and businesses overall may support the Biden Administration if it chooses to rescind President Trump’s EO 13950 restricting diversity training by federal contractors and incentivizing complaints by employees against their employers. It did so on January 20, issuing [“Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.”](#) The EO notes that “the Federal Government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality. Affirmatively advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our Government.”

**Race and sex stereotyping EO revoked.** Accordingly, the Biden Administration revoked Executive Order 13950 of September 22, 2020 (Combating Race and Sex Stereotyping), ordering the heads of agencies covered by EO 13950 to review and identify proposed and existing agency actions related to or arising from EO 13950 and, within 60 days to consider suspending, revising, or rescinding any such actions, including all agency actions to terminate or restrict contracts or

grants pursuant to EO 13950. In addition, the EO revoked Executive Order 13958 of November 2, 2020 (Establishing the President’s Advisory 1776 Commission).

**LGBTQ discrimination.** There is a potential for the Biden Administration to rescind or otherwise revise some of the former president’s many executive actions that narrowed LGBTQ protections for employees and members of the military, too. And during his first day on the job, President Biden issued an [“Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.”](#) to declare it the policy of his Administration “to prevent and combat discrimination on the basis of gender identity or sexual orientation, and to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation.” The Biden Administration will address overlapping forms of discrimination as well.

The Executive Order directs federal agency heads, as soon as practicable and in consultation with the Attorney General, as appropriate, to review all existing orders, regulations, guidance documents, policies, programs, or other agency actions that:

- Were promulgated or are administered by the agency under Title VII or any other statute or regulation that prohibits sex discrimination, including any that relate to the agency’s own compliance with such statutes or regulations; and
- Are or may be inconsistent with the policy set forth in the EO.

### **Court challenges expected**

Many, if not most, executive actions that President Biden may take are likely to immediately be challenged in the courts. It will be interesting to see whether those courts that have supported executive actions while President Trump was in office, citing the necessity of preserving executive authority, will be as open to Biden executive action.

### **Revamping labor agencies?**

“It will take a while,” Jim Plunkett of Ogletree Deakins notes, for the Biden Administration to remake the agencies in its image. The shift in Senate composition to a narrow Democratic majority and other demanding priorities (COVID-19, the economy, climate change) will determine when and how Biden can begin to shape the agencies with his appointees. The shift in Senate control should make it easier for Biden’s nominees to be confirmed, though.

### **Where do the agencies stand?**

**NLRB.** At the five-Member NLRB, there is currently one vacancy; it will be Fall 2021 before another vacancy and the General Counsel position become open. This means that it could be 2022 before the Board composition and priorities have changed enough—and the appropriate cases get teed up—for a Biden Board to get enough traction to undo the Trump Board’s significant activity, which itself undid the Obama Board’s actions, a time-honored tradition of political ping-pong at the Board.

Except, in an unexpected move, on January 20, the Biden Administration apparently asked NLRB General Counsel Peter Robb to resign or face firing. Following his purported refusal to resign, the Board’s [website](#) on January 21, 2021, reflected that Robb has been replaced with

Acting General Counsel Alice B. Stock. In August 2019, Robb himself named Stock as Deputy General Counsel of the NLRB.

On January 20, President Biden appointed current Board Member Lauren McFerran to serve as Chairman. She is the only Democrat on the currently Republican-majority Labor Board. On July 29, 2020, the Senate confirmed her re-nomination for a term expiring on December 16, 2024.

**EEOC.** With respect to the EEOC, the first vacancy will open up in July 2021, while the Chairmanship opens in July 2022. However, among the many things that President Biden has done since his inauguration on January 20, 2021, is to name Commissioner Charlotte A. Burrows as Chair of the EEOC and Commissioner Jocelyn Samuels as Vice Chair—the two Democrats on the Republican-majority Commission, likely to remain that way until 2022.

As a result, it is unlikely there will be major changes quickly at the Commission, although there might be some action towards rescinding of recently announced EEOC proposed conciliation changes favoring employers.

**DOL.** Meanwhile at the Department of Labor, Biden has nominated pro-union, pro-worker Boston Mayor Marty Walsh. Al Stewart was designated to serve as the Acting Secretary of Labor, effective January 20, 2021. Al Stewart is the Deputy Assistant Secretary for Operations in the Office of the Assistant Secretary for Administration and Management.

At Labor Department subagencies many vacancies still exist. Notable, however, is Jenny R. Yang, who is now listed as the Director of the Office of Federal Contract Compliance Programs, and who was a member and the former chair of the EEOC during the Obama Administration.

## Potential regulatory action

Once the dust settles, however, potential regulatory action, again depending on competing priorities, could include action on joint employment, both at the NLRB and DOL, or a redefinition of “independent contractor” and a revision of the white-collar overtime exemptions, among others, especially given the regulatory freeze announced by the administration on January 20.

Given COVID and criticisms of OSHA’s failure to mandate, rather than merely provide unenforceable guidance, about workplace protections, an OSHA temporary emergency standard or infectious diseases standard is potentially in play. In the American Rescue Plan, Biden signaled he wanted Congress to authorize OSHA to issue a COVID-19 Protection Standard that covers a broad set of workers, so that workers not typically covered by OSHA—such as many of the public workers on the frontlines—will also receive protection from unsafe working conditions and retaliation.

Thus, on January 21, 2020, President Biden issued an [Executive Order on Protecting Worker Health and Safety](#), requiring the Secretary of Labor, acting through the Assistant Secretary of Labor for Occupational Safety and Health:

- to issue, within 2 weeks of the date of this order, revised guidance to employers on workplace safety during the COVID-19 pandemic;
- to consider whether any emergency temporary standards on COVID-19, including with respect to masks in the workplace, are necessary, and if such standards are determined to be necessary, issue them by March 15, 2021;
- to review the enforcement efforts of OSHA related to COVID-19 and identify any short-, medium-, and long-term changes that could be made to better protect workers and ensure equity in enforcement;
- to launch a national program to focus OSHA enforcement efforts related to COVID-19 on violations that put the largest number of workers at serious risk or are contrary to anti-retaliation principles; and
- to coordinate with the DOL’s Office of Public Affairs and Office of Public Engagement and all regional OSHA offices to conduct, consistent with applicable law, a multilingual outreach campaign to inform workers and their representatives of their rights under applicable law. This campaign shall include engagement with labor unions, community organizations, and industries, and place a special emphasis on communities hit hardest by the pandemic.

At the EEOC, the Biden Administration may choose eventually to return the EEOC’s focus to pay equity, as had the Obama Administration, and attempt to revamp or reinstate the Component 2 pay data collection.

**Congressional Review Act.** Notably, under the Congressional Review Act, Trump Administration rules may be revoked via congressional resolution of disapproval within 60 legislative days after they were promulgated. This process conceivably could snag some of the last-minute regulations the Trump Administration has pushed out—for example, over a dozen regulatory actions by employment-related agencies, some major, since December 1, 2020. The catch, however, is that federal agencies are prohibited from later issuing a regulation that is “substantially the same” as the one rejected by Congress.

### Enforcement priorities

One immediate change is likely to be in the new administration’s enforcement priorities. The Biden campaign signaled it would widely apply and strictly enforce prevailing wages, for example, covering every federal investment in infrastructure and transportation projects by prevailing wage protections. There may as well be a renewed emphasis on liquidated damages in agency enforcement activities, which were less of a focus during the Trump era. It remains to be seen whether a new administration will perhaps rely less on voluntary compliance, such as the OFCCP Early Resolution Conciliation Agreements that allow contractors to avoid further compliance reviews for five years.

For a more comprehensive look at what to expect from the new administration, spanning multiple subject areas, see [Biden inauguration heralds regulatory reset](#), published on Inauguration Day itself.

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