

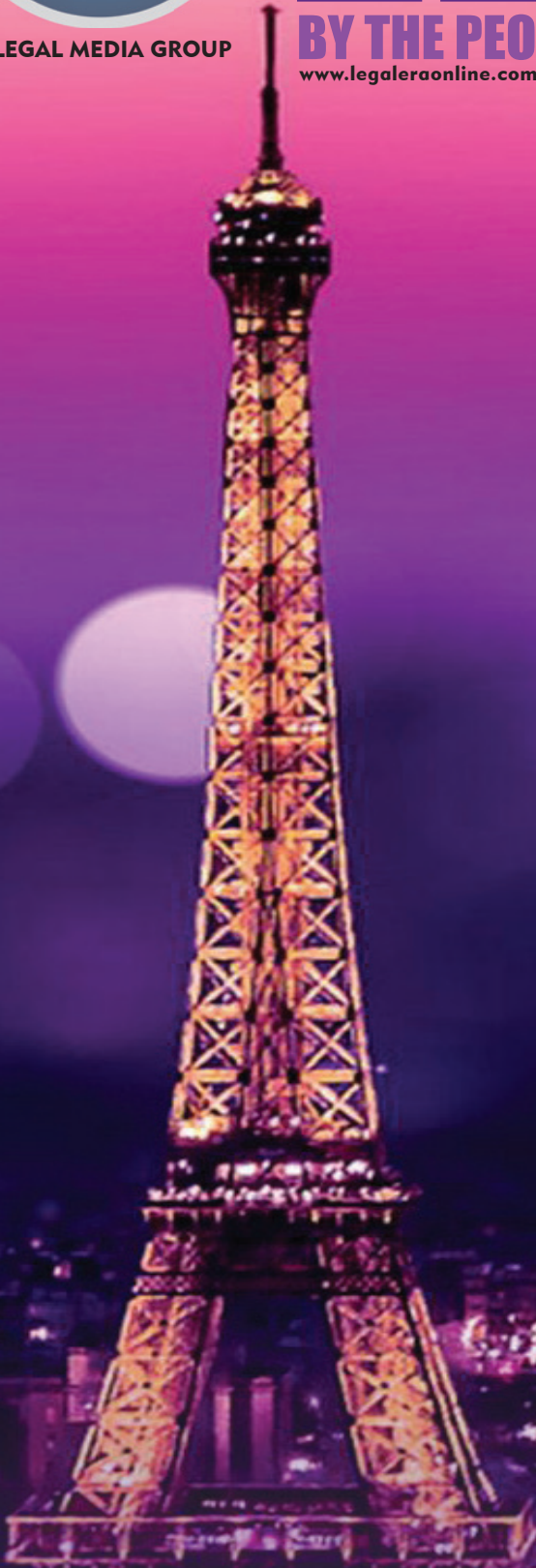


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Biden Administration Shakes Up The Workplace Despite Legislative Stalls

President Joe Biden campaigned on the promise of transforming the American workplace. During the election, then candidate Biden touted an aggressive pro-worker agenda that included executive action and legislative policy. So far, much of Biden's legislative agenda has remained stalled in the Senate. However, on the executive front, President Biden has begun to lay the groundwork for significant change through executive orders and agency action.

This article aims to provide a brief overview of the changes affecting employers almost a year into the Biden Administration.

MOST OF BIDEN'S LEGISLATIVE AGENDA LOCKED IN SENATE

While campaigning, President Biden highlighted several legislative policy goals including: the Equality Act (prohibiting discrimination on the basis of gender identity or sexual orientation); the DREAMers bill (providing immigration reforms); the Paycheck Fairness Act (limiting employer defenses under the Equal Pay Act); and the Workplace Violence Prevention for Health Care and Social

UNITED STATES EMPLOYMENT LAW UPDATE

President Biden's promises of broad changes to America's labor and employment law have hit some roadblocks due to the partisan gridlock in the Senate

Service Workers Act (requiring Occupational Health & Safety Administration ("OSHA") to develop a violence prevention standard for workplaces). Each of these bills has passed the House, but remain in limbo due to the Democrats' slim majority in the Senate.

A similar fate exists for President Biden's signature piece of employment legislation: the Protect the Right to Organize ("PRO") Act. The PRO Act would codify the strict ABC test for independent contractor classification, create a presumption that workers are employees, allow card check drives to replace secret ballot union elections, overturn state right to work laws, and more.

SIGNIFICANT ACTIVITY ON THE ADMINISTRATIVE FRONT

Similar to his Democratic predecessor President Barack Obama, President Biden has had more success pushing his agenda for the American workplace through administrative actions. Through executive orders, administrative appointments, and agency action, President Biden has begun to make his promised changes.

EXECUTIVE ORDERS FOR COVID-19 SAFETY AND MORE

As promised, quickly after taking office, President Biden has begun using executive orders to make a number of changes impacting employers including: ordering a \$15 minimum wage for federal contractors, encouraging the Federal Trade Commission to limit or ban non-compete agreements, and more. Most notably, President Biden has issued executive orders directing OSHA to issue an Emergency Temporary Standard ("ETS") requiring employees of companies with 100 or more employees either get vaccinated for COVID-19 or submit to weekly testing and the "Safer Federal Workforce Task Force," to adopt workplace safety protocols for federal contractors which is also likely to require mandatory vaccination or testing. We are still waiting to learn the full scope of what the regulations will require of employers.

CHANGE THROUGH AGENCY APPOINTMENTS

In a more subtle way, President Biden has begun enacting his agenda through appointing leaders at executive agencies. Personnel changes at administrative agencies can lead to substantial changes in policy. This method is exemplified in the sea change that has taken place



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at the National Labor Relations Board (“NLRB” or the “Board”). Under the Trump Administration, the Board took a pro-employer turn, but President Biden has acted quickly to reverse the Board’s course primarily through personnel decisions.

Shortly after taking office, President Biden took the unprecedented step of firing the NLRB General Counsel appointed by President Trump before his term was over. President Biden then appointed an acting general counsel who rescinded 10 of the previous general counsel’s advise memoranda. Later President Biden appointed Jennifer Abruzzo, previously a union attorney, as the new general counsel. After being confirmed by the Senate, General Counsel Abruzzo began charting a new, pro-employee course at the NLRB. First, General Counsel Abruzzo issued a memorandum requiring cases involving certain legal precedents that had been overturned by the Board under President Trump be submitted to her office for advise. Second, General Counsel Abruzzo instructed the regional offices who prosecute labor violations to seek the harshest possible penalties, including some novel theories about compensatory damages for labor violations.

While this guidance does not automatically become Board policy, it informs prosecutorial priorities and impacts regional officials’ decisions to issue complaints. Changing NLRB law requires a decision by the five member Board. This is where President Biden’s second major personnel change occurred. Right after taking office, President Biden appointed Democratic member Lauren McFerran as the Chairman of the NLRB. Recently, President Biden appointed and the Senate confirmed to two new democratic members to the NLRB: David Prouty and Gwynn Wilcox who are both former union lawyers. This gives the Democrats a majority on the Board and indicates a strong likelihood that the President Biden’s pro-labor agenda will be approved by the Board.

Outside of the NLRB, President Biden has also appointed new personnel at the Department of Labor, OSHA, United States Citizenship and Immigration Services. All of whom are likely to implement policies in line with Biden’s agenda.

DEVELOPMENTS FROM THE DEPARTMENT OF STATE ON IMMIGRATION LAW

The COVID-19 pandemic and partisan gridlock has complicated President Biden’s immigration agenda. The most major recent development relates to bans implemented due to the COVID-19 pandemic.

Currently, the travel bans apply to anyone coming from the following countries: the United Kingdom, Ireland, China, India, Brazil, South Africa, Iran, and the Schengen Countries. In order to enter the U.S. from or through one of these countries, an individual needs to either meet one of the criteria for exemption from these travel bans (being related to a U.S. citizen or lawful permanent resident, on a student or exchange visa, etc.) or go through the lengthy and confusing process of obtaining a National Interest Exception (“NIE”) waiver. To obtain an NIE waiver, an individual traveling from one of the

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countries subject to a travel ban must either make a short request on their local U.S. Embassy’s portal and complete a formal questionnaire, request an expedited appointment with the Department of State appointment booking system, or e-mail their NIE request to the e-mail address specified by the applicable U.S. Consulate depending on the locale they are traveling from.

President Biden announced in

late September that this NIE system will be replaced with strict protocols to prevent the spread of COVID-19 from international travelers and requiring full vaccination. Starting in early November, foreign nationals traveling to the U.S. must instead show proof of a negative test taken within 3 days of boarding a flight, be fully vaccinated and to show proof of vaccination prior to boarding an airplane. It is also expected that the Centres for Disease Control will also issue a Contact Tracing Order mandating airlines collect the contact information from every passenger entering the U.S. and provide such information to the CDC in order to follow up with travelers who have been exposed to COVID-19.

CONCLUSION

As many predicted, President Biden’s promises of broad changes to America’s labor and employment law has hit some roadblocks due to the partisan gridlock in the Senate. However, as noted, President Biden has taken full advantage of executive orders and made significant personnel changes at key administrative agencies that will likely allow him to sidestep Congress to achieve at least some of his agenda.

All employers doing business in the United States are counseled to take notice of these changes and take any necessary actions to update/revise their employment policies and practises. If you are interested in discussing these developments in more detail, do not hesitate to contact us.

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