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Anticipated Changes in Employment Law During the Biden Administration

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OVERVIEW OF TODAY'S PROGRAM

- OSHA Regulations and Actions Regarding Covid-19 Prevention in the Workplace
- Mandatory vs. Voluntary Covid-19 Vaccinations
- Anticipated Changes in Employment Law During the Biden Administration

1/21/21 EXECUTIVE ORDER BY PRESIDENT BIDEN

- Pursuant to the Order, OSHA issued revised guidance to employers regarding Covid-19 prevention on January 29, 2021 (osha.gov).
- OSHA was supposed to issue any necessary **Emergency Temporary Standards** for employers by March 15, 2021.
- OSHA must review and enhance its enforcement efforts related to Covid-19 safety violations.
- OSHA must provide education and outreach to employees regarding their right to work in a safe and healthy work environment.

Source: www.osha.gov

OSHA'S COVID-19 NATIONAL EMPHASIS PROGRAM (NEP)

- Focuses on employers with workers who have experienced increased potential exposure to Covid-19.
- NEP is effective immediately and remains in effect until March 12, 2022.
- OSHA will perform more on-site inspections for investigations stemming from complaints or referrals (stark contrast to Trump administration, which allowed employers to self-investigate complaints and report their findings back to OSHA).
- Directs agency resources to target the following industries for programmed inspections:
 - Health care employers with frontline Covid-19 workers
 - Retirement and assisted living facilities
 - Restaurants
 - Construction sites
 - Meat processing plants
 - Grocery stores
 - Discount department stores
 - Warehousing and storage facilities
 - Prisons and correctional facilities

OSHA'S "ABOUT FACE" ON EMERGENCY TEMPORARY STANDARDS

- Secretary of Labor Marty Walsh was believed to have held up the Emergency Temporary Standards because the “emergency” they were designed to address no longer exists, and the proposed standards did not “reflect the latest scientific analysis of the state of the disease.”
- However, on April 26, 2021, OSHA changed its mind and submitted the draft ETS to the White House for review.
- It is now estimated that the Emergency Temporary Standards will be published no later than June 2021.

NEW CDC GUIDANCE ON MASKS AND SOCIAL DISTANCING

- On May 13, 2021, the CDC issued surprising new guidance stating that fully vaccinated people do not have to wear masks or stay socially distanced indoors or outdoors.
- Fully vaccinated people can also refrain from testing following a known Covid exposure unless they are residents or employees of a correctional or detention facility or a homeless shelter.
- The guidance has caused some confusion in states and cities that currently require everyone to wear masks and engage in social distancing regardless of vaccination status.
- The guidance states that it is subject to government rules and orders, business requirements, and employer policies.
- As of May 17, 2021, 37.5% of the U.S. population was fully vaccinated, which means that 62.5% are not fully vaccinated, and around 40% of the adult population does not plan to get vaccinated in the near future, if ever.

NEW CDC GUIDELINES REGARDING QUARANTINE

- If a person has received two doses of the Covid-19 vaccine and is exposed to someone with the virus, they no longer have to quarantine for 14 days as long as they remain free of symptoms.
- BUT, fully vaccinated people should only skip quarantine if it has been at least 14 days since their second dose.
- Dr. Fauci: Most Americans who want a vaccine will be able to obtain one by June 2021.
- Arizona has opened its vaccine eligibility to anyone age 12 and over, which may increase demand.

OSHA AND FLSA CONSIDERATIONS FOR MANDATORY VACCINES

- OSHA generally requires employers to provide a safe workplace that is “free from recognized hazards that are likely to cause death or serious physical harm.”
- Covid-19 is considered to be a “recognized hazard.”
- No current OSHA requirement for Covid-19 vaccines in workplaces.
- Employees are protected from retaliation if they report safety issues related to a mandatory vaccine program, or the lack of a mandatory program (i.e., whistleblowers).
- Mandatory vaccinations would be “compensable time” under the FLSA.

EEOC GUIDANCE REGARDING MANDATORY VACCINES

- The EEOC issued new guidance regarding mandatory Covid-19 vaccines in late December 2020 and it is still current under the Biden administration.
- Mandatory vaccines are neither prohibited nor discouraged, and employers can request proof of vaccination (i.e., vaccination card) from employees.
- Employers may have to make **reasonable accommodations** for employees with disabilities (pursuant to the Americans with Disabilities Act) or “sincerely held religious beliefs” (pursuant to Title VII of the Civil Rights Act of 1964).
- Covid-19 vaccine does not constitute a prohibited medical inquiry or exam under the ADA, but pre-screening questions could violate the ADA or GINA unless they are “job-related and consistent with business necessity.”
- Interactive process may be necessary for a mandatory vaccine program.

SO WHAT SHOULD EMPLOYERS DO?

- Conduct an individualized assessment of your organization's need for mandatory vaccinations vs. voluntary (or strongly encouraged) vaccinations.
- Survey your employees' interest (or lack thereof) in getting vaccinated.
- Consider the use of incentives to encourage employees to get vaccinated:
 - Educational programs to provide information about the vaccine
 - Pay for the vaccine and time off to get vaccinated
 - Leaders of the organization can obtain the vaccine and inform their employees about their experience and the benefits of vaccination
 - Small cash payments, two hours of pay per shot, gift cards, etc.
 - City of Phoenix is offering \$75 to employees who get vaccinated; other Arizona cities are offering health insurance discounts

EMPLOYEE LEAVE AND ACCOMMODATION OPTIONS

- Employees may be eligible for leave and/or accommodations under any (or a combination of) the following:
 - FFCRA: Families First Coronavirus Response Act (Voluntary through 9/30/21; employees can use **an additional 80 hours** of paid sick leave)
 - FMLA: Family and Medical Leave Act (50 or more employees)
 - ADA: Americans with Disabilities Act (15 or more employees)
 - Arizona paid sick leave law
 - Workers' compensation laws
 - Employer sick leave and PTO benefits
- Requests should be considered and evaluated on a case-by-case basis

ANTICIPATED CHANGES IN EMPLOYMENT LAW UNDER PRESIDENT BIDEN

- Historically closely divided Congress.
- Senate has 50 Democrats and 50 Republicans after Georgia runoffs; Vice President Harris has the tie-breaking vote.
- Senator Chuck Schumer (D) is now the Senate Majority Leader.
- House of Representatives has 222 Democrats and 210 Republicans, and several Democrats left to take positions in the Biden administration.
- Filibuster rule in the Senate that requires a 60-vote threshold to pass legislation may be revisited.
- Budget reconciliation, which requires only 51 votes to pass legislation, may be used by Democrats; can only be used for bills directly related to taxes and revenue.

ANTICIPATED CHANGES IN EMPLOYMENT LAW UNDER PRESIDENT BIDEN

- The American Rescue Plan Act (ARPA) has several employment provisions:
 - Extension of unemployment insurance benefits through September 6, 2021, including a \$300/week federally funded supplement to current UI benefits; first \$10,200 in benefits is tax-free for households earning up to \$150,000.
 - Renewal and expansion of the FFCRA's voluntary paid leave provisions.
 - Six-month subsidies for COBRA premiums for certain terminated employees and covered relatives through September 2021; new notices needed.
 - Extension of Paycheck Protection Program (PPP) loans; businesses have until May 31, 2021, to apply for the loans.

ANTICIPATED CHANGES IN EMPLOYMENT LAW UNDER PRESIDENT BIDEN

- The American Jobs Plan also has several employment-related provisions:
 - Creates hundreds of thousands of jobs upgrading the nation’s infrastructure, including bridges, ports, airports, transit systems, the electric grid, and high-speed broadband
 - Creates jobs building, preserving, and retrofitting affordable housing, commercial buildings, schools, and child care facilities
 - Creates jobs and raises benefits for essential home care workers
 - Creates jobs that pay prevailing wages in safe and healthy workplaces while ensuring workers have a choice to join a union and collectively bargain with their employers

ANTICIPATED CHANGES IN EMPLOYMENT LAW UNDER PRESIDENT BIDEN

- The American Families Plan has several provisions that are related to jobs and employment:
 - Provides free universal preschool to all three- and four-year-olds
 - Provides two years of free community college to all Americans
 - Makes college more affordable for low- and middle-income students
 - Improves teacher training and support
 - Provides direct support to low- and middle-income families so they spend no more than 7% of their income on child care, which could encourage more women to enter the work force
 - Creates a national comprehensive paid family and medical leave (FMLA) program
 - Extends tax cuts for families with children and extends the expanded health insurance tax credits in ARPA
 - Includes \$1.8 trillion in investments and tax credits over ten years

ANTICIPATED CHANGES IN EMPLOYMENT LAW UNDER PRESIDENT BIDEN

- Former Boston mayor Marty Walsh is the new U.S. Secretary of Labor.
- Walsh's nomination was largely supported by organized labor (unions).
- He is known as a consensus builder between labor and management.
- Dept. of Labor has significant regulatory and enforcement authority over wage and hour laws, classification of workers as employees or independent contractors, and worker safety issues.
- Biden's DOL will likely be very employee friendly.



ANTICIPATED CHANGES IN EMPLOYMENT LAW UNDER PRESIDENT BIDEN

- Extensive use of executive orders in areas like immigration.
- Permanent federal paid family and medical leave (FMLA).
- More aggressive enforcement action by the EEOC, especially in the areas of LGBTQ discrimination, racial justice, and pay equity.
- Review of wage and hour laws enforced by the DOL, including employee vs. independent contractor classification, joint employer status, the federal minimum wage, and overtime salary threshold.
- Efforts to reform the National Labor Relations Act (NLRA) and the NLRB to be more employee and labor union friendly.
- Limitations on employers' use of mandatory arbitration agreements and non-competition agreements.

ANTICIPATED CHANGES IN EMPLOYMENT LAW UNDER PRESIDENT BIDEN

- Marijuana legalization:
 - President Biden supports legalizing the drug for medical use and the decriminalization of possession, but does not support full legalization.
 - Biden was the only Democratic presidential candidate to oppose full legalization; he cited “gateway drug” concerns and wants more study.
 - Senate Majority Leader Chuck Schumer plans to move ahead with major changes to federal laws prohibiting the use, sale and production of cannabis products.
 - 70% of Americans currently support full legalization of marijuana.

LIABILITY PROTECTION FOR ARIZONA BUSINESSES

- On April 5, 2021, Governor Ducey signed a new law that protects business and other entities from “frivolous” lawsuits related to Covid-19.
- Senate Bill 1377 applies to health care workers, private businesses, schools, governments, nonprofits, churches and property owners.
- The law states that a person or business “that acts in good faith to protect a customer, student, tenant, volunteer, patient, guest or neighbor, or the public” is not liable for damages based on claims they failed to protect the plaintiff unless it is proven by “clear and convincing evidence” that the defendant’s actions showed “willful misconduct or gross negligence.”
- The law presumes that a person or company “acted in good faith” if the person or company relied on and attempted to comply with public health guidance from a state or federal agency.
- The new liability standard does not affect claims for workers’ compensation that are related to Covid-19.



Questions?

Thank you!