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A Look at Employment Protections in the Biden/Harris Administration

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A LOOK AT EMPLOYMENT PROTECTIONS IN THE BIDEN/HARRIS ADMINISTRATION

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After a fiercely contentious, chaos-inducing, and at times, dystopian run up to the 2020 presidential election, Joe Biden was sworn in as our 46th president on January 20, 2021. A new administration will be poised to implement sweeping policy changes, including greater protections for workers, unions and independent contractors. In this column, we will take a look at what the employment law world can expect from a Biden/Harris administration. Details on the Biden/Harris plan can be found at https://joebiden.com/empowerworkers/#.

I. WORKPLACE DIVERSITY AND DISCRIMINATION PROTECTIONS

Biden supports the Equality Act, which bans discrimination based on sexual orientation and gender identity in employment, education, public accommodations, public facilities, housing, credit and the jury system and would essentially take the Supreme Court decision outlawing this type of discrimination under Title VII of the Civil Rights Act of 1964 and also apply it to non-employment settings. Specifically, the bill defines and includes sex, sexual orientation, and gender identity among the prohibited categories of discrimination or segregation.

A Biden administration would also take steps to bring more transparency to workplace diversity. One proposal would require employers to publish how diverse their workforce is, including upper management. Another proposal mandates that employers reveal the efforts they have made to accommodate prospective and current workers who have disabilities. Finally, federal

contractors would need to show what they have done to diversify their workforce with members from underrepresented groups.

II. NATIONAL PAID LEAVE

Democrats in Congress have been pushing for more comprehensive paid leave for quite some time. Democrats in both the Senate and House of Representatives reintroduced legislation that would create a paid leave program on the national level. Rep. Rosa DeLauro (D-Conn.) and Sen. Kirsten Gillibrand (D-NY) reintroduced the Family and Medical Insurance Leave (FAMILY) Act, which would allow workers to receive up to 12 weeks of paid leave for reasons such as health conditions, pregnancies, childbirth, or to care for a family member. President Biden intends to push for the enactment of the FAMILY Act and the Healthy Families Act. The Healthy Families Act would make it possible for workers to have seven days of paid sick leave. The FAMILY Act would cover workers no matter the size of their employer or if they are self-employed and regardless of their full or part-time status when a serious medical event occurs. It is modeled on state-based programs, creating a permanent fund for all workers providing up to 66% of their average weekly wage for 12 weeks.

III. INCREASING THE FEDERAL MINIMUM WAGE TO $15

One of the major issues that President Biden ran on, in terms of protecting workers, was to increase the federal minimum wage to $15. While some states have increased the minimum wage in their respective states (Pennsylvania has not), many farmworkers who grow our food and domestic workers who care for the aging and sick and those with disabilities are not even earning the minimum wage. The current federal minimum wage is $7.25 an hour and has not changed since 2009. Most states also have minimum wage laws. Employees generally are entitled to the higher

of the two minimum wages. Currently, 29 states and Washington, D.C., have minimum wages above the federal minimum wage of $7.25 per hour.

Moreover, Biden supports eliminating the tipped minimum wage. Tipped workers, who are primarily women, are being left behind. The federal tipped minimum wage has not budged from just $2.13 an hour in 25 years. Federal law and all but seven states allow employers to pay a lower tipped minimum wage to workers who earn tips. Currently, if an employee's tips combined with the employer's direct wages of at least $2.13 an hour do not equal the federal minimum hourly wage, the employer must make up the difference.

Biden will also look to get the Paycheck Fairness Act enacted. This law would tackle the gender wage gap by making it easier for plaintiffs to file class-action lawsuits alleging pay discrimination; stopping employers from punishing employees for discussing their compensation with coworkers; preventing employers from requiring salary history information from job applicants or otherwise using salary history information when deciding on a new hire (subject to a few exceptions); and allowing plaintiffs in sex-based wage discrimination lawsuits the ability to recover the same legal remedies that are available to plaintiffs in other employment discrimination cases.

A. Effect Of Raising The Minimum Wage

Increasing the minimum wage to $15 an hour would reduce the number of Americans living in poverty and boost wages for millions of Americans while adding to the federal debt and joblessness, a new report from the Congressional Budget Office projects.

If enacted at the end of March 2021, the Raise the Wage Act of 2021 (S. 53, as introduced on January 26, 2021) would raise the federal minimum wage, in annual increments, to $15 per

hour by June 2025 and then adjust it to increase at the same rate as median hourly wages. In this report, the Congressional Budget Office estimates the bill's effects on the federal budget.

- The cumulative budget deficit over the 2021–2031 period would increase by $54 billion. Increases in annual deficits would be smaller before 2025, as the minimum-wage increases were being phased in, than in later years.

- Higher prices for goods and services—stemming from the higher wages of workers paid at or near the minimum wage, such as those providing long-term health care—would contribute to increases in federal spending.

- Changes in employment and in the distribution of income would increase spending for some programs (such as unemployment compensation), reduce spending for others (such as nutrition programs), and boost federal revenues (on net).

See "The Budgetary Effects of the Raise the Wage Act of 202," Congressional Budget Office, February 2021 (https://www.cbo.gov/system/files/2021-02/56975-Minimum-Wage.pdf)

The federal deficit would increase by about $54 billion over 10 years if there is an increase to the federal minimum wage to $15, largely because the higher wages paid to workers, such as those caring for the elderly, would contribute to an increase in federal spending, the estimate found.

The report from the Congressional Budget Office cites several positive and negative effects from raising the minimum wage. On the positive, the number of people living in poverty would fall by about 900,000 once the $15 wage is fully in place in 2025. On the negative, the number of people working would decline by about 1.4 million.

B. Which Workers Are Entitled To Be Paid The Minimum Wage?

1. Definition of "Employ"

By statutory definition the term "employ" includes "to suffer or permit to work." The workweek ordinarily includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place. "Workday", in general, means the period between the time on any particular day when such employee commences his/her "principal

activity" and the time on that day at which he/she ceases such principal activity or activities. The workday may therefore be longer than the employee's scheduled shift, hours, tour of duty, or production line time.

2. Application of Principles

Employees "Suffered or Permitted" to work: Work not requested but suffered or permitted to be performed is work time that must be paid for by the employer. For example, an employee may voluntarily continue to work at the end of the shift to finish an assigned task or to correct errors. The reason is immaterial. The hours are work time and are compensable.

Waiting Time

Whether waiting time is hours worked under the Act depends upon the particular circumstances. Generally, the facts may show that the employee was engaged to wait (which is work time) or the facts may show that the employee was waiting to be engaged (which is not work time). For example, a secretary who reads a book while waiting for dictation or a fireman who plays checkers while waiting for an alarm is working during such periods of inactivity. These employees have been "engaged to wait."

On-Call Time

An employee who is required to remain on call on the employer's premises is working while "on call." An employee who is required to remain on call at home, or who is allowed to leave a message where he/she can be reached, is not working (in most cases) while on call. Additional constraints on the employee's freedom could require this time to be compensated.

Rest and Meal Periods

Rest periods of short duration, usually 20 minutes or less, are common in industry (and promote the efficiency of the employee) and are customarily paid for as working time. These short periods must be counted as hours worked. Unauthorized extensions of authorized work breaks need not be counted as hours worked when the employer has expressly and unambiguously communicated to the employee that the authorized break may only last for a specific length of time, that any extension of the break is contrary to the employer's rules, and any extension of the break will be punished. Bona fide meal periods (typically 30 minutes or more) generally need not be compensated as work time. The employee must be

completely relieved from duty for the purpose of eating regular meals. The employee is not relieved if he/she is required to perform any duties, whether active or inactive, while eating.

Sleeping Time and Certain Other Activities

An employee who is required to be on duty for less than 24 hours is working even though he/she is permitted to sleep or engage in other personal activities when not busy. An employee required to be on duty for 24 hours or more may agree with the employer to exclude from hours worked bona fide regularly scheduled sleeping periods of not more than 8 hours, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. No reduction is permitted unless at least 5 hours of sleep is taken.

Lectures, Meetings and Training Programs

Attendance at lectures, meetings, training programs and similar activities need not be counted as working time only if four criteria are met, namely: it is outside normal hours, it is voluntary, not job related, and no other work is concurrently performed.

Travel Time

The principles which apply in determining whether time spent in travel is compensable time depends upon the kind of travel involved.

Home to Work Travel

An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel, which is not work time.

Home to Work on a Special One Day Assignment in Another City

An employee who regularly works at a fixed location in one city is given a special one day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct/not count that time the employee would normally spend commuting to the regular work site.

Travel That is All in a Day's Work

Time spent by an employee in travel as part of their principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

Travel Away from Home Community

Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly work time when

> it cuts across the employee's workday. The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days. As an enforcement policy the Division will not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.
>
> ***Typical Problems***
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> Problems arise when employers fail to recognize and count certain hours worked as compensable hours. For example, an employee who remains at his/her desk while eating lunch and regularly answers the telephone and refers callers is working. This time must be counted and paid as compensable hours worked because the employee has not been completely relieved from duty.

See Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA) (https://www.dol.gov/agencies/whd/fact-sheets/22-flsa-hours-worked)

IV. PROTECTING AND STRENGTHENING LABOR UNIONS

The Biden/Harris administration has also sounded the alarm for organized labor, announcing tremendous support for empowering our nation's unions, increasing employment investigations and passing portions of the Protecting the Right to Organize Act (PRO Act). Biden has announced support for financial penalties against employers that interfere with organizing efforts, which would include personal liability for company executives (and potential criminal liability for intentional conduct). Biden also proposed banning state right-to-work laws and would require employees to pay union dues even if they are not part of a union. Biden also wants to eliminate secret ballot voting for unions and would implement the "card check" process under which votes would be public.

A. Hold Corporations And Executives Personally Accountable For Interfering With Organizing Efforts And Violating Other Labor Laws

Biden supports the Protecting the Right to Organize Act's (PRO Act) provisions instituting financial penalties on companies that interfere with workers' organizing efforts, including firing

or otherwise retaliating against workers. Biden plans to go beyond the PRO Act by enacting legislation to impose even stiffer penalties on corporations and to hold company executives personally liable when they interfere with organizing efforts, including criminally liable when their interference is intentional.

B. Ensure Federal Dollars Do Not Flow To Employers Who Engage In Union-Busting Activities, Participate In Wage Theft, Or Violate Labor Law

Biden will institute a multi-year federal debarment for all employers who illegally oppose unions, building on debarment efforts pursued in the Obama-Biden Administration. Biden will also restore and build on the Obama-Biden Administration's Fair Pay and Safe Workplaces executive order, which Trump revoked, requiring employers' compliance with labor and employment laws be taken into account in determining whether they are sufficiently responsible to be entrusted with federal contracts. He will ensure federal contracts only go to employers who sign neutrality agreements committing not to run anti-union campaigns. He also will only award contracts to employers who support their workers, including those who pay a $15 per hour minimum wage and family sustaining benefits.

C. Penalize Companies That Bargain In Bad Faith

Too many employers pretend to bargain with unions ("surface bargaining") with no intent of reaching an agreement. Biden will give the NLRB the necessary power to force any employer found to be bargaining in bad faith back to the negotiating table, as called for in the PRO Act. Biden will require those companies to pay a penalty, in addition to making workers whole for the time the company stalled negotiations. The Biden/Harris platform also seeks to direct the Department of Labor to work with the National Labor Relations Board, the Equal Employment Opportunity Commission, the Internal Revenue Service, the Justice Department, and state labor agencies to "aggressively pursue employers who violate labor laws." This agency initiative would

also increase the number of investigators in these federal agencies, something these agencies have not seen in quite some time and would be a welcome relief to often overburdened federal employees.

D. Make It Easier For Workers Who Choose To Unionize To Do So

Today, workers face an uphill battle of anti-union intimidation and intense employer opposition when trying to organize a union. Biden plans to:

- Ban employers' mandatory meetings with their employees, including captive audience meetings in which employees are forced to listen to anti-union rhetoric;
- Reinstate and codify into law the Obama-Biden Administration's "persuader rule" requiring employers to report not only information communicated to employees, but also the activities of third-party consultants who work behind the scenes to manage employers' anti-union campaigns;
- Codify into law the Obama-Biden era's NLRB rules allowing for shortened timelines of union election campaigns; and
- Stop employers from stalling initial negotiations with newly formed unions.

E. Provide A Federal Guarantee For Public Sector Employees To Bargain For Better Pay And Benefits

President Biden will establish a federal right to union organizing and collective bargaining for all public sector employees, and make it easier for those employees who serve our communities to both join a union and bargain. He will do so by signing into law the Public Safety Employer-Employee Cooperation Act and Public Service Freedom to Negotiate Act. He will work to ensure public sector workers, including public school educators, have a greater voice in the decisions that impact their students and their working conditions. He will also strongly encourage states to pursue expanded bargaining rights for state licensed and contracted workers, including child care workers and home health care workers. He will look for federal solutions that will protect these workers' rights to organize and bargain collectively.

F. Ban State Laws Prohibiting Unions From Collecting Dues Or Comparable Payments From All Workers Who Benefit From Union Representation

Currently more than half of all states have in place these so-called "right to work" laws, which in fact deprive workers of their rights. These laws exist only to deprive unions of the financial support they need to fight for higher wages and better benefits. As president, Biden will repeal the Taft-Hartley provisions that allow states to impose "right to work" laws.

G. Create a cabinet-level working group that will solely focus on promoting union organizing and collective bargaining in the public and private sectors

Biden plans to create a cabinet-level working group that includes representatives from labor. The group will consider whether there are very specific areas where the federal government could waive preemption of the National Labor Relations Act to allow cities and states to pursue innovative ways to increase union organizing and collective bargaining without undermining current workers' protections, like allowing for neutrality agreements and card check. The group will also be tasked with working with unions and trade associations to further explore the expansion of sectoral bargaining, where all competitors in an industry are engaged in collective bargaining with a single or multiple unions.

H. Ensure Workers Can Bargain With The Employer That Actually Holds The Power, Including Franchisors, And Ensure Those Employers Are Accountable For Guaranteeing Workplace Protections

During the Obama-Biden Administration, the NLRB issued the landmark *Browning-Ferris Industries* decision. If allowed to stand, this decision would allow unions to collectively bargain with the employer that actually controls their wages, benefits and working conditions — which is often not the staffing agency or the franchisee, but a large corporation or franchisor like McDonald's. Biden will enact legislation codifying the *Browning-Ferris Industries* joint employer

definition into law, as called for in the PRO Act, and restoring the broad definition of joint employment to wage and hour law.

I. Ensure That Workers Can Exercise Their Right To Strike Without Fear Of Reprisal

The right of workers to withhold their labor, or to strike, is fundamental to balancing power in the workplace. But too many workers risk reprisal, punishment, or termination when they seek to bring pressure on employers by participating in strikes, picket lines, and boycotts. Low wage workers face especially high barriers to exercising their right to strike. They often have too few resources to sustain long strikes, and instead require short, periodic strikes, or "intermittent strikes," to be able to bring pressure to their employer. Under current law, these types of strikes are not sufficiently protected. And, because low-wage workers often do not have specialized skills, they are more often "permanently replaced" – or functionally fired – while striking. Workers are also often limited in the pressure they can exert on employers because of restrictions on boycotting "secondary" businesses that have influence over their employer. These secondary boycotts are essential for promoting workers' voices. Biden plans to protect intermittent strikes, ban permanent strike replacements, and remove the ill-conceived ban on secondary boycotts once and for all.

J. Reinstate And Expand Protections For Federal Employees

The federal government should serve as a role model for employers to treat their workers fairly. Yet, Trump has gutted the ability of federal employees to collectively bargain, stripped them of their union representation, and made it easier to fire federal employees without "just cause." Biden plans to restore federal employees' rights to organize and bargain collectively, and will direct his agencies to bargain with federal employee unions over non-mandatory subjects of bargaining.

K. Expand Long Overdue Rights To Farmworkers And Domestic Workers

When Congress extended labor rights and protections to workers, farmworkers and domestic workers – who are disproportionately immigrants and people of color – were left out. Still today, millions of these workers are not fully protected under federal labor law. As president, Biden will support legislation, including the Fairness for Farmworkers Act and Domestic Workers' Bill of Rights, that expands federal protections to agricultural and domestic workers, ensuring that they too have the right to basic workplace protections and to organize and collectively bargain.

V. ELIMINATING MANDATORY ARBITRATION CLAUSES, NON-COMPETE CLAUSES AND NO-POACHING AGREEMENTS

In recent years, the U.S. Supreme Court has reinforced the right of businesses to require employees to resolve disputes with their employers through private arbitration rather than in court. The high court also generally has upheld the enforceability of contractual provisions requiring such disputes to be resolved individually rather than through class actions. President Biden is looking to end mandatory arbitration clauses imposed by employers on workers, also called for in the PRO Act. An estimated sixty million workers have been forced to sign contracts waiving their rights to sue their employer and nearly 25 million have been forced to waive their right to bring class action lawsuits or joint arbitration. Biden intends to support legislation to ban employers from requiring their employees to agree to mandatory individual arbitration and forcing employees to relinquish their right to class action lawsuits or collective litigation.

A new administration may also bring about an end to overreaching non-compete clauses and no-poaching agreements that hinder the ability of employees to seek higher wages, better benefits, and working conditions by changing employers. The Biden team plans to work with Congress to eliminate all non-compete agreements, except the very few that are absolutely

necessary to protect a narrowly defined category of trade secrets, and outright ban all no-poaching agreements. Few acts will bring more relief to plaintiff's employment lawyers than to see the complete elimination of restrictive covenants and mandatory arbitration agreements.

Nearly all states permit non-compete agreements in some form, although California has long had an outright ban on employee non-compete agreements and North Dakota and Oklahoma allow them only in narrow circumstances. Several other employee-friendly states have been working to limit non-compete agreements for years. For example, Maine and New Hampshire recently enacted bans on non-compete agreements for low-wage workers. Other employee-friendly states, such as Washington, have severely restricted non-compete agreements, including by requiring independent consideration, a minimum salary threshold, and payment of salary during the restriction period for any terminated employees. However, there are also states that value non-compete agreements and have enacted policies to enforce the agreements where reasonable. Florida and Pennsylvania, for example, enforces non-compete agreements where they are reasonable in scope and supported by an employer's legitimate business interests.

VI. ENDING WAGE THEFT AND WORKER MISCLASSIFICATION

President Biden and Vice-President Harris are also poised to put an end to wage theft and implement measures to protect workers in the "gig economy." According to the non-partisan think tank Economic Policy Institute (EPI), in 2016, the Department of Labor (DOL) strengthened regulations requiring employers to pay workers overtime when they work more than 40 hours a week. The DOL's attempt to restore lost pay to American workers was blocked in the courts by business interests, and on October 31, 2017, the Trump administration made clear in legal proceedings that it would not defend the rule. As president, Biden has pledged to reimplement the

overtime and salary regulations to ensure workers are paid fairly for the long hours they work and get the overtime they have earned.

Independent contractors and those working in the "gig economy" can also expect to see more protection from a Biden/Harris administration. Misclassification of workers as independent contractors deprives these workers of legally mandated benefits and protections, such as unemployment insurance, workers' compensation, health and welfare benefits, and social security contributions. The worker misclassification problem is made possible by ambiguous legal tests that give too much discretion to employers, too little protection to workers, and too little direction to government agencies and courts. Biden has said that he would "work with Congress to establish a federal standard modeled on the ABC test for all labor, employment, and tax laws." A federal "ABC test" would be modeled after California's ABC test which makes it much more difficult for employers to classify workers as independent contractors.

The ABC test requires a hiring entity seeking to classify a worker as an independent contractor to prove the worker is (A) relatively free of the hiring entity's control as to how the work is done; (B) performing work outside the usual course of the hiring entity's business; and (C) customarily and regularly doing work in an established trade, occupation, or business of the same kind being performed for the hiring entity.

The House of Representative passed a federal version of the test last February as part of the "Protecting the Right to Organize Act," (PRO Act). Among other things, the measure would make misclassification of workers as independent contractors a violation of the National Labor Relations Act. Owners and businesses would be subject to fines of up to $100,000 for NLRA violations.

VII. ENFORCING PREVAILING WAGES, INCREASING WORKPLACE SAFETY MEASURES AND PROTECTING UNDOCUMENTED WORKERS

Among other initiatives sought by the incoming administration, Biden and Harris intend to invest in communities by widely applying and strictly enforcing prevailing wages; put an end to unnecessary occupational licensing requirements; increase workplace safety and health by directing OSHA, the U.S. Department of Agriculture, Mine Safety Health and Administration, and other relevant agencies to develop comprehensive strategies for addressing the most dangerous hazards workers encounter in the modern workplace. There will also be expanded protections for undocumented immigrants who report labor violations and become the targets of serious crimes. Biden would reinstate the U Visa program to certain workplace crimes and extend these protections to victims of any workplace violations of federal, state, or local labor law by securing passage of the POWER Act.