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Employment Law and Labor Policy

What To Expect From A Biden Administration

Thomas P. McDonough

Robert J. Guidotti

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Jackson Lewis P.C. • White Plains, New York

thomas.mcdonough@jacksonlewis.com • robert.guidotti@jacksonlewis.com

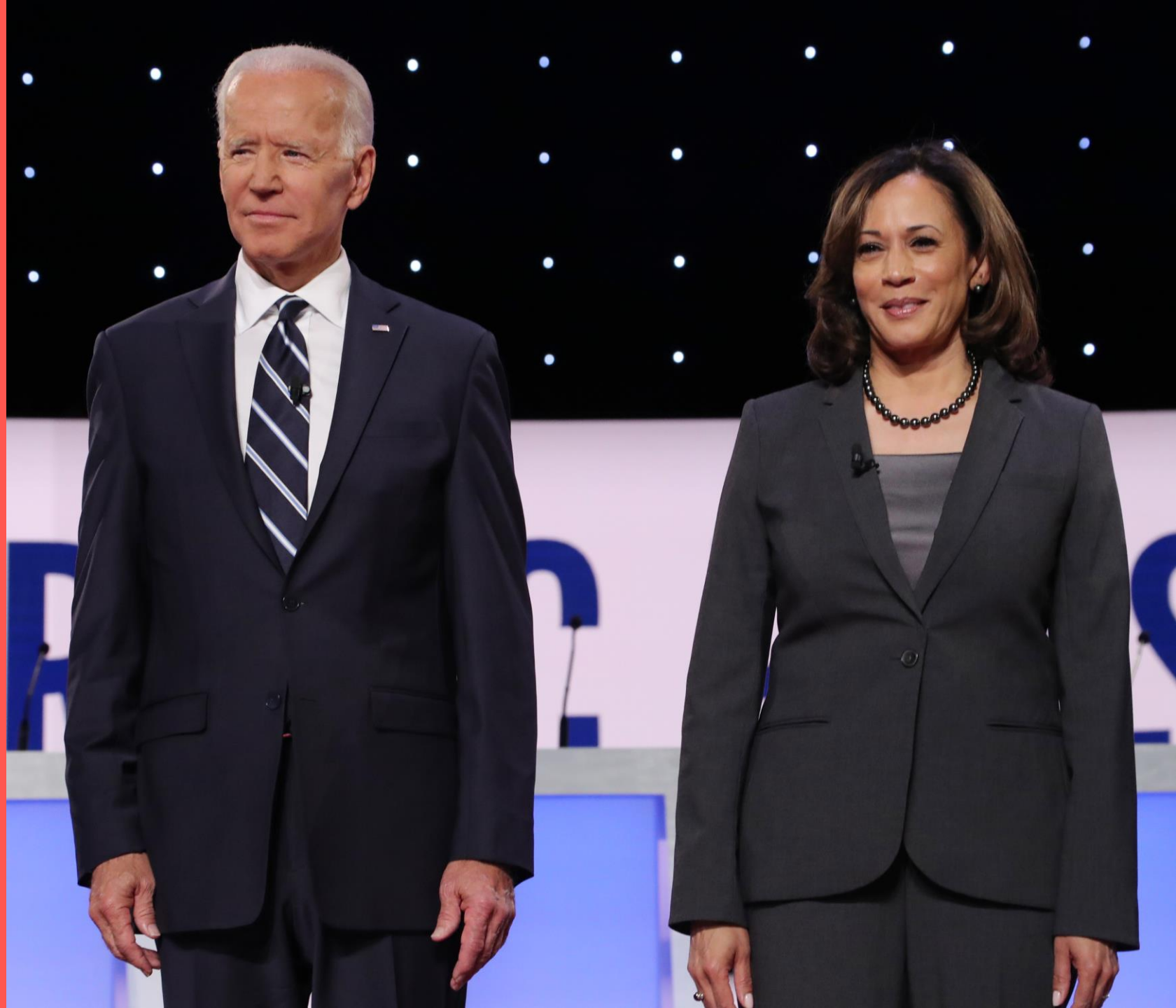


- What to Expect from a Biden Administration
- New York Updates and Developments
- Next Steps

Joe Biden will be the 46th president of the United States

This impacts:

- Health insurance
- Arbitration
- Collective Bargaining
- Unions
- Equal Pay Laws
- Federal Contracts
- Immigration
- Noncompete Agreements
- Paid Leave
- Retirement
- Unemployment Insurance
- Wages
- Etc.



PARTY LIKE IT'S 2008???



“Biden’s agency review team for the U.S. Labor Department, NLRB, and EEOC is packed with senior labor and employment personnel from the Obama years.” – Daily Labor Report

“Biden Is Set to ‘Undo the Trump Years’ With Civil Rights Pivot” – Daily Labor Report

Protecting the Right to Organize Act (PRO Act)

- The PRO Act plans to strengthen unions by
 - Banning employer mandatory captive audience group meetings, where employees listen to anti-union rhetoric;
 - Requiring mandatory immediate collective bargaining within 90 days;
 - Allowing unfair labor practice claims to be brought as civil actions in court, adding fines and liquidated damages as remedies, and adding personal liability for directors and officers;
 - Allowing the NLRB to issue penalties when employers don't bargain in good faith;
 - Instituting federal debarment for employers who illegally oppose unions, engage in union busting activities, participate in wage theft, or violate labor laws; and
 - Protecting intermittent strikes, banning permanent strike replacements, and removing secondary boycott bans.

Collective Bargaining Developments?

Right to Work

Biden administration will consider repealing the Taft-Hartley provisions that allow states to impose right to work laws.

The Persuader Rule

Biden administration will consider reinstating the persuader rule, which requires employers to report information communicated to employees and third-party consultants regarding anti-union campaigns.

Union Elections

Biden administration will consider shortening time period for union election campaigns.

Public Safety Employer-Employee Cooperation Act

Biden administration will consider law granting public sector workers greater voice in working conditions.

Cabinet Group

Biden indicated he wants to create a cabinet-level working group that will solely focus on promoting union organizing and collective bargaining in the public and private sectors.

Independent Contractor Unions

Biden's administration may allow independent contractors to organize and bargain collectively.

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Forced Arbitration Injustice Repeal (FAIR) Act

The FAIR Act prohibits employers from requiring employees to sign pre-dispute arbitration agreements as a condition of employment.

If it passes the Senate, Biden will likely sign this law.

Department of Labor (DOL)

- Biden's administration plans on increasing funding for the U.S. Labor Department's office of federal contract compliance programs and the U.S. Justice Department's civil rights division to increase the number of anti-discrimination investigators, litigators, and enforcement actions.
- Biden states he will direct the U.S. Department of Labor to engage in collaborative enforcement partnerships with the NLRB, EEOC, IRS, Justice Department, state tax, unemployment insurance departments, and state labor agencies.
- Biden's DOL will likely withdraw the Trump administration DOL's proposed independent contractor rule, which clarifies who qualifies as an independent contractor under the Fair Labor Standards Act (FLSA).
- Biden's DOL will likely expand the definition of who qualifies as an employee under federal law.
- Biden stated he will direct the DOL to address misclassifying employees as independent contractors.



Equal Employment Opportunity Commission (EEOC)



- Currently, all five EEOC seats are filled, including the chair. The leadership panel consists of GOP members Keith Sonderling and Andrea Lucas, and Democrats Charlotte Burrows and Jocelyn Samuels. Appointing the chair as a democrat in 2022 will shift the EEOC to a democratic majority.
- In 2019, GOP member Janet Dhillon was sworn in as the Chair of the EEOC. Her term will end on July 1, 2022.
- Issues on the table for the EEOC include rulemaking on conciliation, the ability for employers to offer *de minimis* financial incentives to encourage worker participation in employer-sponsored wellness programs, and joint employer issues.
- Biden's administration plans on increasing EEOC funding.
- Biden's administration will consider expanding the EEOC's information collection program to include data on earnings gaps by race and gender.

Discrimination

Tax Incentives

Biden administration supports tax incentives to employers that comply with the ADA and that hire people with disabilities.

Gender-based pay

Biden administration supports shifting the burden to employers to prove that any gender-based pay gap exists for job-related reasons and business necessities.

Class Action Lawsuits

Biden administration supports making it easier for employees to join in class action lawsuits.

Penalties

Biden administration supports increased penalties against companies that unlawfully discriminate under applicable federal laws.

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BE HEARD Act

Supports the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act (BE HEARD Act), which will provide grants to employers for preventing and addressing employment discrimination, including harassment.

Equality Act

Supports the Equality Act, which protects LGBTQ+ individuals under existing civil rights laws.

Equal Rights Amendment

Biden wants to pass the Equal Rights Amendment, which would end the legal distinctions between men and women in employment and other matters.

Religious Exemptions

Supports reversing Trump's religious exemptions to nondiscrimination laws to address discrimination against LGBTQ+ people.

Equal Pay and Wage Laws

Paycheck Fairness Act

Biden states he supports this Act, which provides remedies to workers retaliated against for discussing wages.

Minimum Wage

Biden has previously called for a \$15.00 federal minimum wage.

Tipped Employee Wages

Biden administration will consider eliminating reduced minimum wages for tipped employees and increasing minimum salaries that qualify as exempt.

FAMILY Act

Biden has voiced support for passing the Family and Medical Insurance Leave Act, which would provide workers with up to twelve weeks of partial income funded through a payroll tax when they take leave for their own serious health condition, pregnancy, and recovery from childbirth.

Domestic Workers' Bill of Rights

Biden plans to establish a general wage and standard board to set fair wage levels and define working conditions for domestic workers.

Paid Leave

Biden administration supports increasing paid leave benefits for employees and granting employees seven days of paid sick leave.

Federal Contractors

Fair Pay and Safe Workplace Executive Order

Biden states he will consider reinstating Obama's Fair Pay and Safe Workplaces executive order, which Trump revoked, which required employers' compliance with labor and employment laws be considered when determining whether employers are sufficiently responsible to be entrusted with federal contracts. If enacted, employers would be required to sign neutrality agreements promising that they will not run anti-union campaigns before being granted federal contracts.

Diversity Trainings

Biden likely will revoke Trump's executive order on Combating Race and Sex Stereotyping that restricts the federal government, federal contractors, and certain federal grant recipients from conducting specific types of diversity and unconscious bias training.

Right of Refusal

Biden likely will reinstate Obama's Right of Refusal executive order which requires federal contractors who take over incumbent's work to give right of first refusal to employees of the predecessor.

Other Laws

Non-Compete Agreements

Biden administration will consider legislation eliminating non-compete clauses except ones that are necessary to protect a narrowly defined category of trade secrets and will ban no-poaching agreements.

Retirement

Biden's tax plan calls for changing the 401(k) plan by ending upfront tax breaks and replacing them with flat-tax credits.

Unemployment Insurance

Biden supports states adopting compensation programs as alternatives to reductions in force. Biden proposes the federal government provide wage differences in the form of unemployment insurance to employees of companies in distress so the company can keep workers employed at reduced hours (e.g., shared work program).

Other Laws

Affordable Care Act

Likely push to strengthen protections and increase coverage options under the ACA, especially for uninsured and underinsured.

Immigration

Expand ability of employers to utilize H1-B and similar procedures to bring in workers from outside the U.S. Move toward a potential points-based immigration system, including expanding the number of high-skilled visas available and eliminating the per-country visa caps. Remove other restrictions.

New York Updates and Developments

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- Salary history ban
- State Sick Leave Law
 - 40-56 hours per year
- Minimum wage increases effective 12/31/20:
 - NYC stays at \$15/hr.
 - LI & Westchester increases to \$14/hr. (from \$13/hr.)
 - Rest of state increases to \$12.50/hr. (from \$11.80/hr.)
- Increased salary requirements for exempt employees
 - NYC stays at \$1,125/week
 - LI & Westchester increases to \$1,050/week (up from \$975/week)
 - Rest of state increases to \$937/week (up from \$885/week)
- Modified harassment standards
- Arbitration agreements

What's Next?

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- Review pay rates and increase/modify as necessary
- Update employment applications
- Update sick leave policies
- Update employee handbooks
- Review independent contractor, arbitration, non-compete, and other agreements