

# After the election: Anticipated changes in labor and employment law

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Over the last four years under President Donald Trump, the federal government has eroded worker protections. The Trump Administration has scaled back Occupational Safety and Health Administration (“OSHA”) enforcement; issued Executive Orders chilling diversity and inclusion training among federal contractors; overturned worker-friendly Obama-era administrative regulations; and implemented new regulations that favor employers.

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The extent to which a Biden Administration can advance a pro-labor agenda depends on whether his party secures control of the Senate. But even with a divided Congress, there are several steps President-Elect Biden can take to protect workers as soon as he assumes office in January 2021.

## OSHA ENFORCEMENT

OSHA enforcement decreased significantly during the Trump Administration, a period that has seen increased workplace fatalities and threats to worker safety, especially during the COVID-19 pandemic. OSHA’s primary enforcement tools are workplace inspections.

During the first three years of the Trump Administration, OSHA conducted approximately 11% fewer “programmed” inspections — inspections that were not prompted by employee complaints, workplace injuries or fatalities, or referrals — than during the previous three years,<sup>1</sup> even though the American workforce grew by 16% during that period.<sup>2</sup>

At the same time, the number of OSHA inspections in response to workplace fatalities increased, reaching a decade high of 941 inspections during Fiscal Year 2018, indicating that American workplaces were becoming less safe as the agency cut back on routine inspections in favor of a reactive approach.<sup>3</sup>

Despite these disturbing trends, the number of OSHA inspectors fell to its lowest level since 1975. As of August 18, 2020, the agency employed just 761 inspectors,<sup>4</sup> down from 952 during the last year of the Obama Administration.<sup>5</sup>

The International Labor Organization recommends one labor inspector for every 10,000 workers; under the Trump Administration, the U.S. has one for every 83,207,<sup>6</sup> and experts estimate that with this few inspectors, it would take OSHA 165 years to conduct just one inspection of each workplace under its jurisdiction.

Since the agency’s budget has remained roughly the same since 2016 — though clearly it was inadequate even then — the 20% decrease in OSHA’s inspector force is attributable primarily to the Trump Administration’s refusal to fill vacancies caused by attrition.

In the absence of a sufficient number of inspectors, the agency could have continued the Obama-era policy of “regulation by shaming”: issuing press releases for workplace inspections that resulted in fines exceeding a predetermined amount.

While there is no substitute for actual workplace inspections, the evidence suggested that the regulation by shaming policy led to workplace improvements in health and safety.<sup>7</sup> But under the Trump Administration, OSHA issued fewer than 50% of the press releases that it issued during the Obama Administration, undermining the deterrent impact of the agency’s enforcement activities.

The Trump Administration’s hands-off approach to OSHA enforcement has been on stark display during the coronavirus pandemic. When many parts of the country entered lockdowns to slow the spread of COVID-19, “essential employees” continued to report to work under newly dangerous conditions.

Yet OSHA inspections plummeted from around 2,000 inspections in February 2020 to fewer than 400 inspections in March 2020.<sup>8</sup> Though that number has rebounded slightly since the early days of the pandemic, the pace of the agency’s inspections remains insufficient to protect workers who continue to perform their jobs in-person.

Indeed OSHA has investigated fewer than 3% of the approximately 10,000 coronavirus-related complaints it has received since the

onset of the pandemic<sup>9</sup> and has issued just three citations under employers' general duty to keep workplaces "free from recognized hazards that are causing or are likely to cause death or serious physical harm."<sup>10</sup>

In addition to reducing already-scant enforcement efforts during the COVID-19 pandemic, President Trump's Department of Labor ("DOL" or "the Department") has failed to promulgate regulations or issue definitive guidance on workplace safety to allow OSHA to enforce compliance through inspections and citations.

Rather, it issued recommendations phrased as optional — for example, encouraging employers to modify workstations to keep workers 6 feet apart "if feasible" — and told employers explicitly in agency guidance that its recommendations did not impose any new obligations on them under the Occupational Safety and Health Act ("OSH Act"), which governs OSHA enforcement.<sup>11</sup>

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Secretary of Labor Eugene Scalia also refused to issue proposed workplace standards on airborne pathogens, like the coronavirus, that were drafted by the Obama Administration in the wake of the 2009 H1N1 pandemic. Though OSHA had placed the standards on its regulatory agenda and planned to issue them as proposals in 2017, the agency scrapped these efforts when President Trump took office.

When President-Elect Biden takes office in January 2021, he can immediately scale up OSHA's inspection infrastructure and reinstate the Obama Administration's policy of "regulation by shaming."

These actions will have an immediate effect on the health and safety of American workers, even though it may take significant time and funding to restore inspector staffing to adequate levels.

The Biden Administration can also direct OSHA to begin rulemaking around the COVID-19 pandemic, imposing heightened obligations on employers to keep their workers safe and positioning OSHA to enforce those obligations by issuing citations to those that are not in compliance.

### EXECUTIVE ORDERS

Another way that President-Elect Biden can make an immediate impact on American workers is by rescinding one of President Trump's most recent Executive Orders, which affected the millions of contract employees across the federal government.

On September 22, 2020, President Trump issued a sweeping Executive Order directing all federal agencies to prohibit their contractors from using certain "divisive concepts" in diversity and inclusion training programs.

A subsequent memorandum from the Director of the Office of Management and Budget, Russell Vought, stated explicitly that these concepts included "white privilege," "intersectionality," "systemic racism," and "unconscious bias."

The Order also instructed the Office of Federal Contract Compliance Programs ("OFCCP") to set up a hotline to receive complaints about workplace trainings in violation of the Order and to request information from federal contractors about their diversity and inclusion training programs.

The penalties to contractors for noncompliance are harsh and may include rescission of a contract and disqualification from future contracting opportunities.

The Order threw the contracting community into confusion and disarray. Given the serious consequences of noncompliance, federal contractors scrambled for legal advice on their existing programs, and some suspended their diversity and inclusion trainings.

The Order also drew near-universal disapproval from the private sector, nonprofits, and civil rights organizations, which argued that it undermined decades of progress toward racial equality in the workplace. Several lawsuits argued that the Order violated federal contractors' First Amendment rights.

President-Elect Biden can rescind President Trump's September 22 Order as soon as he assumes office. Doing so would restore certainty — and sanity — to the federal contracting community regarding diversity and inclusion programming.

More importantly, it would promote progress toward workplace equality by allowing federal contractors to directly address the insidious, sometimes subtle realities of conscious, unconscious, and systemic biases.

### THE CONGRESSIONAL REVIEW ACT: OVERTURNING RECENT REGULATIONS

If Democrats win control of the Senate, the Biden Administration will have another tool at its disposal to protect American workers on day one: the Congressional Review Act ("CRA").<sup>12</sup>

Though the federal rulemaking process can take many years to complete, under the little-known CRA, Congress can overturn a final agency rule by passing a joint resolution within 60 legislative days of the rule's publication in the Federal Register (the "lookback period").

Sixty legislative days can take as many as five or six calendar months, and lookback periods reset at the start of a new Congress. If Democrats control both houses of Congress, the

CRA could be a powerful tool for regulatory change at the beginning of the Biden Administration.

During the first 60 legislative days of the Trump Administration, the Republican-controlled Congress used the CRA to overturn a total of 16 regulations issued during the final 60 legislative days of the Obama Administration, including four DOL regulations.<sup>13</sup>

One of the overturned DOL regulations had required OSHA-regulated employers to maintain accurate records of workplace injuries or illnesses, even if the employer failed to create the necessary record at the onset of its obligation to do so.<sup>14</sup>

Another regulation had limited drug testing requirements in unemployment compensation programs.<sup>15</sup> Rescinding these regulations left employees in dangerous jobs vulnerable, and made it more difficult for jobless workers to receive unemployment benefits.

### The five-member ARB issues final agency decisions in cases arising under the many worker protection laws administered by the DOL.

During the COVID-19 pandemic, rescission of the recordkeeping regulation has precluded OSHA from issuing citations to employers who fail to properly record a case of the virus in the workplace.

The lack of accountability has contributed to inaccurate data regarding workplace infections — information that otherwise could be used to contain the spread of the virus on the job and in communities.

Since the CRA prohibits agencies from issuing a rule that is “substantially the same” as one that has been overturned, the Biden Administration could not simply revive Obama-era regulations through the federal rulemaking process. The Biden Administration could, however, use the CRA to overturn DOL regulations issued during the last 60 legislative days of the Trump Administration.

One likely target is a newly enacted regulation that exempts TRICARE health providers, who serve the country’s veterans, from equal employment opportunity and affirmative action obligations.<sup>16</sup>

Another is a regulation that narrowed worker eligibility requirements under the H-1B visa program, jeopardizing the immigration status of highly skilled, non-citizen workers, including many college professors and others in academia.<sup>17</sup>

In contrast with the years-long federal rulemaking process, overturning these rules using the CRA would enable the Biden Administration to make pro-worker regulatory changes in a matter of months.

### AGENCY RULEMAKING ON JOINT EMPLOYERS AND INDEPENDENT CONTRACTORS

In the long term, and even with a divided Congress, President-Elect Biden could redirect rulemaking in areas where the Trump Administration has favored employers over employees, or has signaled its intention to do so.

For example, on February 26, 2020, the National Labor Relations Board (“NLRB” or “the Board”) issued a final rule on the standard for determining “joint-employer” status under the National Labor Relations Act (“NLRA”).

The rule walked back a 2015 decision in which the Board had held that a business was a joint employer for purposes of the NLRA even if it exercised only indirect control over an employee’s employment. The rule has created obstacles for employees seeking to hold separate but affiliated businesses liable for violations of the NLRA.

Since President-Elect Biden will take office more than 60 legislative days after this regulation was issued, Congress could not use the CRA to overturn the new rule.

But President-Elect Biden will be in a position to fill an existing Board vacancy and appoint a replacement for another Board member when his term expires in August 2021, shifting the balance of power of the five-person NLRB to Democrats and paving the way for revised rulemaking and pro-worker Board decisions on this issue.

More recently, just a few weeks before the 2020 Presidential election, the DOL announced a proposed rule on the classification of workers as independent contractors under the Fair Labor Standards Act (“FLSA”).

This issue has grown in importance with the rise of the gig economy, in which individuals perform discrete tasks for customers on a primarily fee-for-service basis.

The proposed rule lays out a five-factor “economic reality” test to determine whether a worker is an employee or an independent contractor of the business that connects them to their customers.

The test includes two “core factors” that would be given additional weight: (1) the nature and degree of the worker’s control over the work and (2) the worker’s opportunity for profit or loss.

Given the flexibility of task-based work and the fact that gig workers are paid based on the work they perform, the additional weight given to these factors would result in more workers being classified as independent contractors than as employees.

This means that the rule would deprive more workers of the legal protections available only to employees, further insulating businesses from liability under the FLSA.

DOL provided for a compressed notice and comment period of just 30 days for the “economic reality” test rule, which may enable the Department to issue a final rule prior to Inauguration Day. In the event that Democrats take control of the Senate, Congress could use the CRA to overturn the regulation.

If they do not, the Biden Administration nevertheless could direct additional rulemaking to rebalance the “economic reality” test to better account for businesses’ control over gig workers and ensure that workers receive the legal protections to which they are entitled.

### ADMINISTRATIVE REVIEW BOARD APPOINTMENTS

Another way that the Biden Administration can shape labor law in the long-term is by appointing new members to the Administrative Review Board (“ARB”).

The five-member ARB issues final agency decisions in cases arising under the many worker protection laws administered by the DOL. Its members are appointed by the Secretary of Labor and serve two-year terms. All of the ARB’s current members were appointed by the Trump Administration.

Since many whistleblower protection statutes require workers to exhaust the DOL administrative process prior to proceeding to federal court, the ARB can have an enormous influence over this body of law. Under the Trump Administration, the ARB issued several decisions making it harder for workers to bring claims against their employers.

For example, the ARB issued decisions precluding application of the whistleblower protection provision of the Sarbanes-Oxley Act to individuals who work for U.S.-based companies outside the U.S., *Garvey v. Morgan Stanley*, No. 2017-SOX-00030 (ALJ Feb. 13, 2020), and limiting the scope of protected activity that can form the basis of a claim under that same provision, *Bryan Horn v. University First Federal Credit Union*, ARB Case No. 18-0033 (June 18, 2020).

But the Biden Administration can help move the law in a pro-worker direction by appointing pro-worker members to the ARB when its current members’ terms expire. The Administration will have its first opportunity to appoint a new member to the ARB in August 2021.

With other members’ terms scheduled to expire in September 2021 and later in 2022, the Biden Administration can have a significant impact on the direction of labor law in the coming years.

### CONCLUSION

Even without a Democratic Congress, President-Elect Biden can take several immediate steps to reinstate worker protections that were eroded during the Trump Administration. Particularly during the ongoing COVID-19 pandemic, these steps will be crucial to protecting American workers during the first few months of the Biden Administration.

If Democrats win control of the Senate, the President-Elect will have even more tools at his disposal to overturn some of the Trump Administration’s most recent regulatory actions that are harmful to workers.

### Notes

- <sup>1</sup> <https://bit.ly/3kzA0Zt>
- <sup>2</sup> <https://bit.ly/2JnSYE>
- <sup>3</sup> <https://bit.ly/2UB74Wo>
- <sup>4</sup> <https://bit.ly/3IAUeDy>
- <sup>5</sup> <https://bit.ly/3IFQI4G>
- <sup>6</sup> <https://bit.ly/32M30vR> (October 20, 2020).
- <sup>7</sup> Matthew S. Johnson, “Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws,” *American Economic Review* 2020, <https://bit.ly/36DrwMg>.
- <sup>8</sup> <https://bit.ly/36MS0Lo>
- <sup>9</sup> <https://bit.ly/2UyCH2Y>
- <sup>10</sup> <https://bit.ly/2Uuaxq1> (last visited November 11, 2020).
- <sup>11</sup> <https://bit.ly/36FSzGL> (“This guidance is not a standard or regulation, and it creates no new legal obligations.”).
- <sup>12</sup> 5 U.S.C.A. § 801 et seq.
- <sup>13</sup> CRS Report R43992, “The Congressional Review Act (CRA): Frequently Asked Questions,” available at <https://bit.ly/3pxU3LG> (January 14, 2020).
- <sup>14</sup> See Department of Labor, Occupational Safety and Health Administration, “Clarification of Employer’s Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness,” 81 Fed. Reg. 91792 (December 19, 2016).
- <sup>15</sup> See Department of Labor, Employment and Training Administration, “Federal-State Unemployment Compensation Program; Middle Class Tax Relief and Job Creation Act of 2012 Provision on Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants,” 81 Fed. Reg. 50298, <https://bit.ly/3f55q8X> (August 1, 2016).
- <sup>16</sup> Department of Labor, the Office of Federal Contract Compliance Programs, “Affirmative Action and Nondiscrimination Obligations of Federal Contractors and Subcontractors: TRICARE Providers,” 85 Fed. Reg. 63872, <https://bit.ly/2UuJA5x> (July 2, 2020).
- <sup>17</sup> Department of Labor, Employment and Training Administration, “Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States,” 85 Fed. Reg. 39834, <https://bit.ly/32RWcZ3> (October 8, 2020).

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