

LEGAL ALERT

April 2021

THE BIDEN LABOR AGENDA

When former Boston Mayor and construction trades union member and leader Marty Walsh was confirmed as the 29th U.S. Secretary of Labor on March 22, 2021, he became the first union member Secretary since the 1970s.

Walsh's background, priorities and experience point to a significantly more pro-labor agenda than in recent years, and early action on a number of major labor initiatives, including rollbacks of Trump labor regulations.

In February 2021, the Department of Labor (DOL) launched a [COVID-19 Workplace Safety Plan](#) with enhanced Occupational Safety and Health Administration (OSHA) investigations and enforcement, clearer guidance for workplace safety protocols, enhanced in-person inspections and greater enforcement for reported violations.

A month earlier, DOL's Wage & Hour Division withdrew a Trump implemented rule favoring independent contractors and moved to rescind a regulation on joint employers. The Trump administration had expanded the definition of independent contractors and excluded more workers from coverage under the Fair Labor Standards Act (FLSA). With the withdrawal of the rule, the DOL will look to bring more companies and their workers under employment protections and benefits provided for under the FLSA.

Further, the Trump administration had successfully limited joint employer liability for FLSA violations, reversing many years of contrary interpretation of the Act. Going forward, expect a return to the previous standard for evaluating an employer's control over employee decision-making.

The Walsh administration has also cancelled Trump administration plans to implement a December 2020 Final Rule that would have allowed managers and supervisors to share in tip pools traditionally reserved for hourly workers.

Secretary Walsh will also be promoting the [American Rescue Plan Act of 2021](#) (ARPA), an expansive piece of new legislation that focuses on protecting Americans sickened by

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COVID-19 and those who have suffered job loss or have childcare needs as a result of the ongoing economic crisis. The Act extends a number of the Families First Coronavirus Relief Act (FFCRA) provisions enacted in 2020 to supplement state unemployment compensation benefits and protects employees unable to work due to having COVID-19 or having family members with COVID-19.

Among others, ARPA provides for:

- tax credits for businesses with less than 500 employees that provide paid sick or family leave for qualified Covid related illnesses;
- \$300 weekly unemployment compensation supplements and related pandemic unemployment assistance for gig economy workers; and
- a tax credit for employers providing COBRA subsidies to former employees laid off due to Covid.

ARPA also provides new categories of paid leave for employees to receive or recover from vaccine immunizations, to recover from immunization-related illness or to undergo testing for Covid infections.

As for traditional labor-related legislative initiatives:

The House recently passed the [Protecting the Right to Organize Act](#) (the "PRO Act"). The PRO Act would remove a number of barriers for employees seeking to organize a union and gain bargaining power at the table. Major provisions include:

- employees in "right to work" states would no longer be permitted to opt out of paying union dues in an organized bargaining unit;
- employers would be prohibited from engaging in "captive audience" speeches to dissuade employees from voting for a union;
- voting for a union would be permitted in locations outside the employer's property;
- unions would be permitted to seek mediation or binding arbitration in the event of an impasse in negotiating a first contract; and
- corporate directors and officers would be subject to personal liability, similar to provisions found in certain civil rights and employment-based discrimination laws, in the event of unfair labor practices.

Action at the National Labor Relations Board (NLRB):

In February, President Biden appointed holdover NLRB Member Lauren McFerran as Chair. McFerran recently laid out an expansive list of priorities for the Board, most of which will remain on hold until the terms of current Republican holdovers expire later this year.

These include a reversal of the 2019 Super Shuttle decision that allowed businesses using independent contractors to evade union organizing and the 2020 decision in Bethany College, which exempts faculty at religiously affiliated higher education institutions from collective bargaining.

Further, the Board recently withdrew a Trump proposed rule that would have excluded graduate students from the definition of employee and limited their right to organize. This

would have nullified a 2016 Obama Board majority that had allowed a unit of graduate students at Columbia University to organize. The Biden Board is expected to continue to clarify and expand organizing rights for adjunct and non-tenure track faculty.

Board Chair McFerran has also signaled the adoption of more permissive rules for use of employer email systems and workplace uniform and insignia regulations during organizing campaigns.

Continued expansion of minimum wage and wage equality:

In Massachusetts, then Mayor Walsh supported the Legislature's 2018 plan to raise the minimum wage to \$15.00 per hour by 2023, along with implementation of a paid family and medical leave system for workers. It is expected that Secretary Walsh will encourage President Biden to move ahead aggressively to accomplish this on the federal level.

Walsh is also expected to reinvigorate the Labor Department's Women's Bureau, focusing on pay equity and safe work environments, and to move forward with respect to paid parental leave.

One of President Biden's first acts was to rescind Executive Order 13950, which President Trump had issued to restrict training in federal agencies on unconscious bias and systemic racism. Secretary Walsh is expected to move further with respect to these issues.

Clearly, the Biden administration is moving ahead rapidly to undo much of the Trump labor and employment law agenda, both by executive order, administrative change and an aggressive legislative mandate. Employers should consult closely with counsel to keep abreast of developments, to avoid inadvertently running afoul of changes and to best position themselves in a rapidly evolving labor market.

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