

EMPLOYMENT LAWSCENE ALERT: THE BIDEN ADMINISTRATION TACKLES WAGE AND HOUR ISSUES

In this installment of our series discussing the new workplace initiatives under the Biden Administration, we will discuss wage and hour issues that employers should prepare for, including an increased federal minimum wage, updated enforcement priorities, and the proposed Paycheck Fairness Act.

Minimum Wage

The federal minimum wage was last increased in 2009. Since then, multiple states and municipalities have increased their minimum wages. However, the federal minimum wage, as well as the minimum wage in Wisconsin, has remained at \$7.25. Organizers and activists have supported the “Fight for \$15,” particularly in industries like fast food, and the Democratic Party has included support for a \$15 minimum wage in its party platform since 2016. President Biden made his support of a \$15 minimum wage even more clear when he signed a January 22, 2021, Executive Order directing the Office of Personnel Management to develop recommendations to pay federal employees at least \$15 per hour and directing his administration to start the work that would allow him to issue an Executive Order within the first 100 days that requires federal contractors to pay a \$15 minimum wage.

The Raise the Wage Act proposes a gradual increase, such that the federal minimum wage would increase in increments on a yearly basis between now and 2025 until it reaches \$15 per hour. Thereafter, the minimum wage would index to median wages. The first increase, in 2021, would be to \$9.50 per hour. Additionally, the Raise the Wage Act would, by 2027, eliminate the “tipped wage,” the “youth wage,” and the 14(c) wage, which can be paid to disabled individuals in certain positions. These changes would affect approximately 27 million workers, and the Congressional Budget Office has projected that it would increase the federal deficit and cost 1.4 million jobs as a result of employers scaling back due to increased costs.

However, increasing the federal minimum wage is no simple task. President Biden included a \$15 minimum wage in his stimulus proposal, and the House of Representatives has included a \$15 minimum wage in its most recent version of the coronavirus-relief package. However, once the bill reaches the Senate, passing an increased minimum wage will become

significantly more challenging. Typically, a bill needs the votes of 60 Senators to make it to the floor, and the increase of the federal minimum wage does not currently have that support.

The coronavirus-relief package, including the increased minimum wage, could, however, be passed through a process known as budget reconciliation, which requires only a simple majority of Senators, with ties broken by the Vice President. In order to be considered part of the budget reconciliation process, the Senate Parliamentarian would have to agree that raising the minimum wage has a direct impact on the federal budget. If she does not, Vice President Harris could overrule her. If it gets past these steps, at least 50 Senators would need to vote in favor of it. At this point, it's not clear that 50 Senators would vote "yes" to increasing the federal minimum wage to \$15 per hour, even if gradually. Additionally, President Biden has admitted that passing an increased minimum wage as part of the coronavirus-relief package is unlikely at this point.

Acknowledging the challenge of getting a minimum wage hike included in the coronavirus-relief package, President Biden has said that he is prepared to engage in separate negotiations on the matter, and other politicians have discussed their potential support of a lower amount, such as \$12 per hour. So, while a \$15 minimum wage may not be right on employers' doorsteps, this is not an issue that is likely to go away. Employers should begin evaluating the effect that a minimum wage increase would have not only on the wages of their workers who fall between the current minimum wage and a potential new minimum wage, but also on their ability to retain workers who, while now comfortably over the minimum wage, may end up below, at, or only slightly above it if there is a mandated increase.

Wage and Hour Enforcement Priorities

One of President Biden's campaign promises was to "ensure workers are paid fairly for the long hours they work and get the overtime they have earned." This will assuredly lead to an enforcement push at the Department of Labor ("DOL"). Moreover, the DOL is likely to strictly enforce penalties for non-payment of overtime wages. This new stance can already be seen by the fact that the Biden Administration eliminated the Payroll Audit Independent Determination ("PAID") program. The PAID program was a 2018 initiative that allowed employers to self-report FLSA wage and hour violations, including unpaid or miscalculated overtime. While the PAID program required employers to pay workers 100% of the wages owed, it did not assess the 100% liquidated damages penalty. However, on Friday, January 29, 2021, the DOL announced the immediate end of the PAID program, stating that the program "deprived workers of their rights and put employers that play by the rules at a disadvantage." The DOL added that it "will rigorously enforce the law, and . . . use all the enforcement tools we have available." Employers must make sure that their wage and hour policies and practices comply with the law and should consider performing audits to ensure

there are no potential violations. Failure to take these proactive measures could land employers on the wrong side of a time-consuming and costly DOL investigation.

Paycheck Fairness Act

Finally, President Biden supports the Paycheck Fairness Act, which was originally passed in the House of Representatives in 2019 and was recently reintroduced in February 2021. If passed, the Paycheck Fairness Act would expand the equal pay provisions contained in the FLSA and require that any pay differential between sexes be based on “a bona fide factor other than sex, such as education, training, or experience.” Currently, federal law requires that any pay disparity between employees of different sexes performing the same job be based on a “factor other than sex.” The use of a **bona fide** factor would significantly narrow employers’ flexibility in justifying any pay differences. The Paycheck Fairness Act also prohibits employers from restricting employees’ discussions of wage information, requires additional employer reporting regarding compensation, and makes it easier for employees to pursue individual and class and collective actions alleging wage discrimination.

As always, O’Neil Cannon is here for you. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have regarding wage and hour concerns or new policies or legislation under the Biden Administration.