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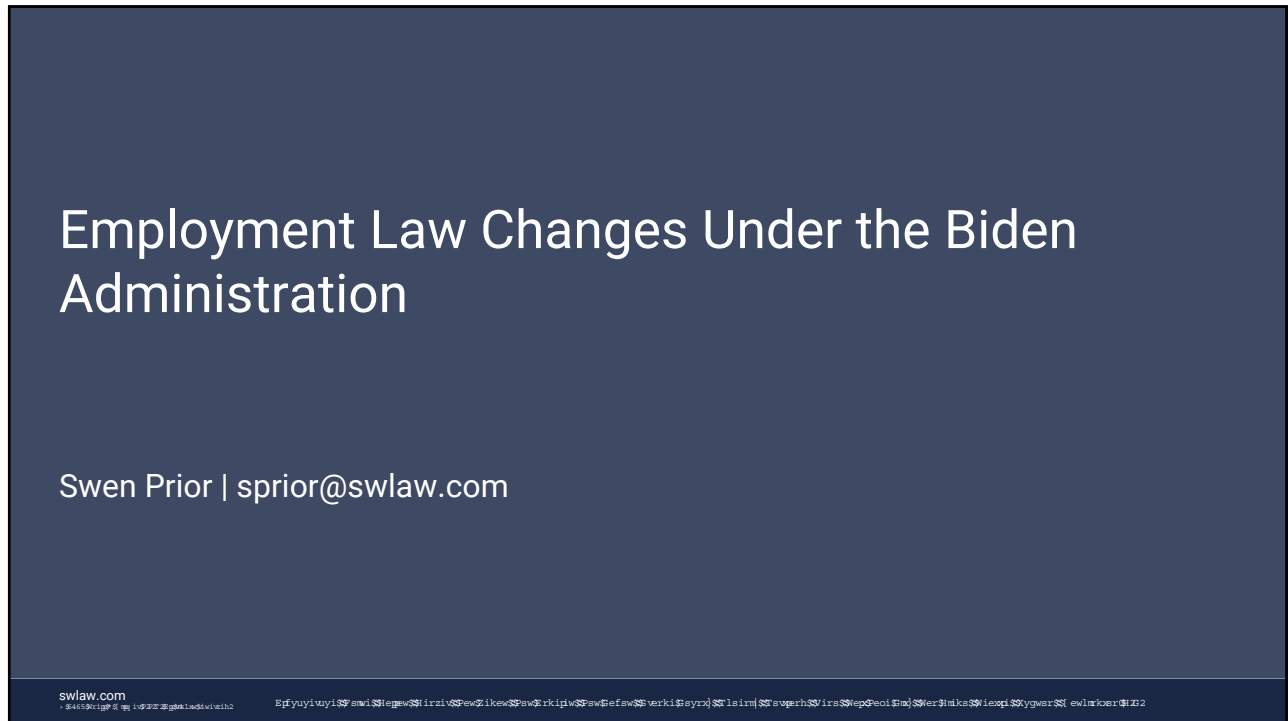
*Thank you for joining us for the 2021
Employment Law Tool Kit Webinar
Series: Understanding Employment Law
Issues Affecting Today's Workplace*

Session 1: Issues for All Employers
November 4, 2021
The webinar will begin shortly.

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Employment Law Changes Under the Biden Administration

Swen Prior | sprior@swlaw.com

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Overview:

The recent transition between presidential administrations is causing seismic upheaval as to the laws governing the workforce.

- General changes under the Biden Administration;
 - Wage and overtime requirements
 - Enforcement of wage laws and changes to rules regarding “Joint employer liability” and independent contractors
 - Non-compete agreements
 - Arbitration agreements
- National Labor Relations Board and union organization; and
- Best practices for hybrid work models and managing a partially vaccinated workforce.

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General Changes Under the Biden Administration



“Former Vice President Joe Biden touted his union bona fides and pledged fierce loyalty to organized labor at a Labor Day AFL-CIO event on Monday, pledging to be the ‘strongest labor president you’ve ever had, and tearing into Trump’s record on organized labor.’”

Solander, Andrew, Forbes, “Biden vows To Be ‘Strongest Labor President You’ve Ever Had’ at Union event” (September 7, 2020)

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Immediate Changes On Inauguration Day

- President Biden froze all regulatory actions in process;
- Re-directed rulemaking activity by federal agencies;
- Began issuing Executive Orders (EO); and
- Fired and began replacing agency leadership.

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Biden Administration and Wage and Overtime

- The Paycheck Fairness Act (PFA) H.R. 7. This Bill aims to narrow the justification for pay disparities and will require employers to establish that pay differences are based on a *bona fide factor other than sex*.
- EO 13985, on Advancing Racial Equity and Support for Underserved Communities through Federal Government. The EO seeks to gather datasets disaggregated by race, ethnicity, gender, disability, income, veteran status and other key areas.
- Collection of EEO-1 Component 2 pay data, which requires that employers report employees W-2 income information disaggregated by gender, race/ethnicity and job category, is not required. However, because of the Biden administration's focus on pay equity and pay data transparency, Component 2 data collection may be revived at some point in the future.

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Biden Administration and Wage and Overtime (cont.)

- The federal minimum wage is currently \$7.25 an hour (same since 2009).
- Wants to substantially increase the federal minimum wage to \$15 by the year 2026.
- On April 27, 2021, President Biden signed another EO requiring federal contractors to pay a \$15-hourly minimum wage.

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Biden Administration: Enforcement (Joint Employer)

- The U.S. Department of Labor (DOL) dramatically shifted its focus once President Biden took office with a renewed focus on investigations.
- On August 2, 2020, the DOL revoked the Trump-era joint employer rule for determining when multiple entities or employers are jointly liable for wage and hour law violations.
- The determination of joint employment will be based on the “economic realities” of the employment relationship. For example, who controlled working conditions, the nature of the work being performed and whether workers were vital to the company’s business.
- This new rule went into effect on September 28, 2021.

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Biden Administration: Enforcement (Joint Employer) (cont.)

- Pursuant to DOL rules that went into effect September 28, vertical joint employment exists under the Fair Labor Standards Act where “an employee has an employment relationship with one employer (for example a staffing agency, subcontractor, labor provider, etc.),” another employer is “receiving the benefit of the employee’s labor,” and “the economic realities show that the employee is economically dependent on, and thus employed by,” the other employer.
- California jury returned a record-setting \$137 million judgment verdict against Tesla for racial discrimination on October 4, 2021. The Black elevator operator was employed by a third-party staffing agency. The workers who subjected him to disparagement were also paid by another company. But Tesla, not the staffing agency, will be the one to pay.

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Biden Administration: Independent Contractors

- The Biden Administration (DOL) withdrew the Trump Administration's independent-contractor rule, which would have made it easier for businesses to classify workers as independent contractors rather than employees.
- The DOL's announcement stated that the “...Rule is inconsistent with the FLSA's text and purpose, and would have a confusing and disruptive effect on workers and businesses alike due to its departure from longstanding judicial precedent.”
- Biden has vocalized his support for potentially making California's ABC Test the federal standard.

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Potential Damages for Misclassification

- Wage and hour – overtime, meal breaks, rest breaks, wage statements, waiting time penalties
- Liquidated damages and civil money penalties
- Fines and assessments
- IRS fines and assessments
- I-9 violations
- Entitlement of misclassified individuals to coverage under the company’s employee benefit plans
- Penalties for violation of state workers’ compensation insurance laws and liability or unpaid premiums
- Penalties for willful misclassification

Biden Administration: Enforcement

- The DOL will likely push harder for liquidated (or double) damages (even “civil money penalties”) when resolving wage audits and disputes.
- The DOL has an increased budget for more investigators.
- The DOL will likely focus on the use of independent contractors.
 - Misclassification errors can be very expensive and time-consuming.
 - The DOL regularly touts that it has ordered or secured employers to pay back wages, benefits, minimum wages and overtime premiums to misclassified workers.

Biden Administration: Non-Compete Agreements

President Biden issued a broad EO on promoting competition in the American economy, which “includes 72 initiatives by more than a dozen federal agencies.”

- One of these initiatives “encouraged” the Federal Trade Commission (“FTC”) “to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.”
- It is expected the Biden Administration will continue to promote and enact legislation restricting the use of non-compete agreements and will also seek to “ban all no-poaching agreements.”

Non-Compete Agreements

- Traditionally, enforcement of non-compete agreements has been left up to the states, and it remains unclear if or how the FTC will issue a ban on non-competes.
- Many states already place restrictions on the enforceability of non-compete and non-solicitation agreements.
- Nevada’s non-compete rules and laws have gone through a turbulent few years with important court decisions and legislative activity. For example, Assembly Bill 47 was recently signed into law. As of October 1, 2021, a non-compete covenant in Nevada can no longer “apply to an employee who is paid solely on an hourly wage basis, exclusive of any tips or gratuities.”

Biden Administration: National Labor Relations Board (*cont.*)

- Among numerous other things, the NLRB will seek to revise the prior administration's test for the legality of an employer's handbook and policies.
- The NLRB also plans to review rulings permitting employers to include in separation agreements confidentiality clauses, non-disparagement clauses and waivers prohibiting employees from participation in third-party claims against an employer.
- Revises definitions of what constitutes "concerted activity"; including use of the employer's email and electronic systems.
- The memo is a heavily laden declaration that the NLRB is charting a new and aggressive course in a pro-labor direction for at least the next four years. The memorandum also tracks the Pro Act. Employers should take heed.

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Biden Administration: Pro Labor

- President Biden has made other changes dealing with the workplace, including supporting various legislative bills such as the Protecting the Right to Organize ("PRO") Act. The PRO Act would essentially take away some of employer's most effective tactics in fighting unionization and give state and local employees in all 50 states the right to unionize. If signed into law, the PRO Act would be the most expansive labor relations legislation in nearly 85 years.
- The pandemic brought multiple paid leave requirements. Many states, such as Nevada, have adopted some type of paid leave programs.
- In his American Families Plan, President Biden added paid leave requirements.
 - The proposal would guarantee 12 weeks of paid leave to new parents; caregivers for a sick family member; survivors of sexual assault, stalking and domestic violence seeking a safe environment; and people who are ill themselves.

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Biden Administration: Pro Labor (cont.)

President Biden ran on a platform of strengthening worker organizing, collective bargaining and unions. He also supports the Protecting the Right to Organize (“PRO”) Act. The PRO Act would essentially take away some of employer’s most effective tactics in fighting unionization by:

- Banning employer mandatory “captive audience” group meetings;
- Compelling mediation where agreement is not reached within 90 days;
- Preempting states’ “right to work” laws;
- Allow “unfair labor practice” claims to be brought as civil actions in court;
- Add significant penalties and liquidated damages as remedies for unfair labor practices; and
- Add personal liability for unfair labor practices for corporate directors and officers.

If signed into law, the PRO Act would be the most expansive labor relations legislation in nearly 85 years.

Biden Administration: Pro Labor (cont.)

- The PRO Act passed the House but has not yet received a vote in the Senate.
- The U.S. Chamber of Commerce says the bill would undermine workers' rights and hurt the economy.
- The Biden administration has released a revised proposal for its Build Back Better plan, which includes elements of the 'Protecting the Right to Organize,' or PRO Act.

OSHA and the Continuing Impact of COVID-19 on the Workplace

Charles P. Keller | ckeller@swlaw.com
Brian J. Mills | bmills@swlaw.com
Kevin M. Brown | kmbrown@swlaw.com

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Overview

- Status of the Emergency Temporary Standards
 - How we got here
 - Implications for California Employers
- Update on Cal/OSHA Citations and Litigation
- Best Practices for California Employers

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I. Emergency Temporary Standards

- Cal/OSHA ETS
 - Went into effect in November 2020
 - Revised in June 2021
- Federal OSHA ETS
 - Not to be confused with the Cal/OSHA ETS
 - On September 9, 2021, Biden Administration charged OSHA to develop
 - Approved by Office of Management and Budget on Monday
 - Released November 4, 2021

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I. Emergency Temporary Standards (cont.)

- Implications for California Employers and the Cal/OSHA ETS
 - Must be approved by Cal/OSHA
 - Applies to
 - Employers with 100 employees or more
 - Federal contractors
 - Vaccination/Testing Requirement
 - Likely Cal/OSHA permanent COVID-19 Standard by Spring 2022

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II. Update on Cal/OSHA Citations and Litigation

- More than 40 COVID-19 cases have settled
- Two COVID-19 cases were tried in September
 - Decisions are pending
- Three were scheduled for hearing in October
- Six scheduled for hearing in November
- Six scheduled for hearing in December and January 2022

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II. Update on Cal/OSHA Citations and Litigation (cont.)

- All cases involved citations of Injury and Illness Prevention Program (IIPP) standard
 - 3203(a)(4): Identifying, evaluating, and inspecting the workplace
 - 3203(a)(6): Methods to correct unsafe conditions
 - 3203(a)(7): Training and instruction
- Documentation is critical
 - Required by IIPP standard
 - Must be maintained for 1 year
 - Must include specific information within the record

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II. Update on Cal/OSHA Citations and Litigation (cont.)

- *Amazon Case*
 - Employee contends that he was not properly trained
 - Had pre-existing conditions
 - Quit because of poor training
 - Filed complaint with Cal/OSHA

III. Best Practices for California Employers

- Comply with essential provisions of the IIPP standard
- Comply with the current Cal/OSHA ETS (June 2021)
 - Develop, maintain, and follow your COVID-19 Prevention Program
 - Conduct the mandatory training
 - Enforce mask policy and follow respirator requirements
 - Document inspections, training, etc.
 - Conduct proper notifications in the event of a workplace COVID-19 Case
- Vaccination Policy
- Prepare for Cal/OSHA Adoption of the Federal ETS
 - Vaccination/Testing Requirements

III. Best Practices for California Employers (cont.)

- Problems we are seeing
 - Have policy, but not enforcing it (COVID-19 fatigue)
 - Failing to create compliant documentation and maintain it
 - Non-vaccinated employees and face coverings
 - Vaccination Exemption Requests/Interactive Process
 - Respirator Issues
 - Failure to conduct proper notifications

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Business Immigration Updates

Rebecca A. Winterscheidt | bwinterscheidt@swlaw.com
Benjamin A. Nucci | bnucci@swlaw.com

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Topics

- Continuing impact of immigration changes under the Trump Administration
- The COVID-19 impact
- Changes under the Biden Administration
- Forecast going forward

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Trump Administration

- “Buy American, Hire American” (Apr. 18, 2017):
 - Rise in the level of visa denials
 - New restrictive interpretations of existing standards
- Policy shift in processing petitions:
 - Deference not afforded to prior approvals (Oct. 23, 2017)
 - Immediate denials of petitions (Jul. 13, 2018)
 - Students accrue unlawful status (Aug. 9, 2018)



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Trump Administration (cont.)



- H-1B lottery changes (FY2021):
 - Electronic registration:
 - **Prior:** Complete whole petition for selection
 - **Now:** Pay \$10 and submit an online registration that requests only a few details
 - **Result:** Employer saves money
 - Shift in selection of Master’s Cap:
 - **Prior:** 20,000 candidates with a U.S. advanced degree selected first in Master’s Cap. Those unselected would drop to main pool with other candidates for selection of remaining 65,000 places.
 - **Now:** Order reversed – 65,000 places selected first (pool includes all Master’s Cap eligible applicants). Then, Master’s Cap folks are selected.
 - **Result:** Slightly increased chance of selection if candidate holds advanced degree

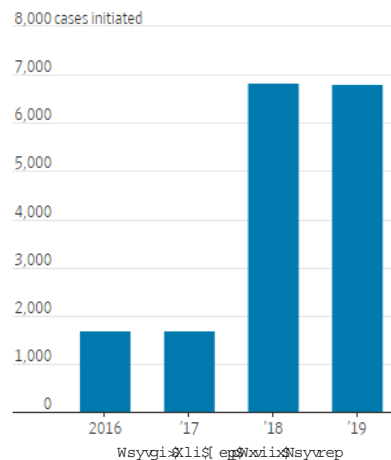
Trump Administration (cont.)





U.S. Immigration and Customs Enforcement

- U.S. Immigration and Customs Enforcement uptick in worksite enforcement:
 - 1,691 cases opened in FY2017; 6,812 cases opened in FY2018
 - 1,360 I-9 inspections in FY2017; 5,981 in FY2018
 - 139 criminal arrests in FY2017; 779 in FY2018
- Increased data sharing between agencies

Worksite enforcement



What About North American Free Trade Agreement (NAFTA)?

- Trade Agreement
- TN status for Canadian and Mexican employees
 - Specific list of professions
 - 3-year work authorization, no codified limit on renewal
 - Streamlined application process
 -  **Canadians:** May apply at a CBP “pre-clearance” station in Canadian airport or at a land crossing.
 -  **Mexicans:** May only apply at US Consulate.
 - Avoid costly filings with USCIS & lengthy processing delays
- NAFTA replaced with United States-Mexico-Canada Agreement (USMCA) – what now?
- **No change!**



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COVID-19

- Border closures:
 - China, Iran, European Schengen Zone, United Kingdom, Ireland, Brazil, South Africa, India
 - Issues abroad – e.g., Australia
- Difficulty securing consular appointments
- U.S. Citizenship and Immigration Services delays:
 - Limited staff and increased scrutiny = longer processing
 - Premium processing not available for all petitions
 - Employment Authorization Documents (students, dependents) wait times increased significantly
- USCIS implemented some measures to assist employers:
 - Changes to employment verification requirements (Form I-9, E-Verify)
 - Permitted scanned signatures
 - Extended times to respond to Requests for Evidence
- Immigrant visa availability – jump in priority dates in October 2020



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Update

- Biden Administration reversal of several Trump Administration policies, executive orders, and proclamations impacting business immigration:
 - Deference to prior approvals vacated
 - Removal of biometrics requirement for some categories
 - Froze midnight changes
- Pandemic-related travel restrictions
- Form I-944 eliminated
- Extension of flexibility measures
- Expansion of Premium Processing service to other categories



Forecast

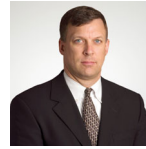
- US Consulates/Embassies slow to clear backlog
- Continued slow USCIS processing of nonimmigrant work visas unless use premium processing
- Continued high demand for H-1B visas. If cap exempt, can avoid lottery.
- Continued high demand for foreign workers, including movement between employers
- Need to look at other work visa options (O-1, E-3, TN, etc.)
- Long term planning is essential

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Swen Prior
Partner, Las Vegas
702.784.5262
sprior@swlaw.com



Charles P. Keller
Partner, Phoenix
602.382.6265
ckeller@swlaw.com



Brian J. Mills
Partner, Orange County
714.427.7484
bmills@swlaw.com



Kevin M. Brown
Associate, San Diego
858.434.5003
kmbrown@swlaw.com



Rebecca Winterscheidt
Partner, Phoenix
602.382.6343
winterb@swlaw.com



Benjamin A. Nucci
Associate, Phoenix
602.382.6315
bnucci@swlaw.com

Snell & Wilmer

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