

New Administration Will Bring Big Changes to the Department of Labor

The U.S. Department of Labor (DOL) will see significant changes under a Biden administration. However, the nature and the degree of those changes will depend heavily on how Biden fills senior roles not only at DOL but also in the White House's domestic policy counsel. Nonetheless, many changes will take time as rescinding regulations and putting new policies in place are huge tasks for any administration.

Independent Contractor Standards Will Change. The DOL agency that will receive significant attention will be the Wage and Hour Division. The top line issue will be to attempt to pull back the current administration's independent contractor rule proposed by the division in September and set to go final by the end of the year. The interpretation has been seen as employer friendly and the new administration will look to make the test harder for employers to designate workers as independent contractors. While the current administration's rule may clear the internal rulemaking process before inauguration day, a Biden administration will have several tools to rescind or weaken its reach. An interesting development, however, arises with the passage of California's proposition providing independent contractor status to app-based ridesharing and delivery drivers. While [Proposition 22](#) would have no direct legal effect on the federal Fair Labor Standards Act (FLSA), employers will try to convince the administration to take note of the complexities associated with the change in status resulting from California's proposition. Employers can also expect changes to the joint employer rule which will likely make it easier for the division to prove joint employer status.

Overall, a push by the Biden administration to change the independent contractor standards could have a large effect on gig economy employers. The changes will likely make it more difficult under the FLSA to establish independent contractor status. To the extent that the administration leaders lean towards progressive ideas, the California test under [Assembly Bill 5](#) will be on the table. However, centrists may seek a middle status that classifies workers as independent contractors but allows them to not trigger employee status if they receive some form of benefits from the putative employer. In any event, as noted above, the current administration's test is likely dead.

The changes, however, will not occur swiftly. The Trump administration used various mechanisms from rulemaking to opinion letters to solidify its agenda. Writing new rules and sub-regulatory guidance will take at least six-to-twelve months. Moreover, the administration's broad use of opinion letters represented a large-scale effort to solidify employer-friendly positions. The administration will not necessarily withdraw all opinion letters. Rather, the new leaders may take a careful approach and some less controversial positions may remain.

Occupational Safety and Health Administration (OSHA) Will Take Front Stage. The pandemic has brought workplace safety to the forefront. The Trump administration has received significant criticism regarding its enforcement of OSHA regulations. The new administration will take a more enforcement-minded approach to workplace safety issues. This will likely entail an effort to hire more inspectors, issue more citations, and seek higher penalties against employers. OSHA's efforts, however, will face headwinds as it will take time to hire more inspectors and instill a more enforcement-minded culture at the agency. Additionally, the OSHA regulations themselves make enforcement in this area difficult. Most coronavirus-related violations would be cited under the vague general duty clause requiring a workplace "free from recognized hazards." As inspectors will take a harder line, this vague standard will present compliance challenges for employers as well as

inspectors.

Office of Federal Contract Compliance Programs (OFCCP) Will Reframe its Compensation Program.

The current administration doubled down on pay compensation cases and obtained large settlements with federal contractors. Notably, most of the large settlements were with technology and financial services companies. At the same time, OFCCP suffered two significant losses related to its approach to enforcing pay discrimination. The high-stakes question for OFCCP and contractors has been whether the government could employ highly aggregated models that included employees who were not similarly situated and then use statistical controls to account for job similarity. The contractor community has long believed that OFCCP cannot mix dissimilar groups. In both cases, the administrative law judges sided with the contractor community which represents a strong repudiation of OFCCP's compensation approach. Several options exist for the agency to move forward including continuing to bring large-scale cases, reducing the size of its cases, or refer its compensation cases to the U.S. Department of Justice (DOJ).

The new administration will likely change or withdraw its Early Resolution Procedures directive. That directive allows the agency to resolve violations with a contractor early in the review process with an agreement to monitoring for five years. While these agreements have resulted in large settlements for the agency, the new administration will likely take aim at the five-year pass contractors receive on reviews.

Persuader Redux? The Office of Labor-Management Standards (OLMS) is tiny compared to other DOL agencies. However, this agency plays a key role in enforcing the reporting and election obligations for unions. In Republican administrations, it tends to increase reporting burdens on unions while those burdens are reduced under Democratic administrations. However, during the Obama administration, this agency took a higher profile with the release of its persuader rule which required employers to disclose how much they pay their lawyers and consultants to respond to organizing efforts. A federal district court judge shot down the rule and the current administration rescinded it in 2018. Nonetheless, as unions played a large role in the election, a chance exists that OLMS will take up the rule a second time.

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