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Biden Administration's Strong Policy and Enforcement the Focus of Employers

The Biden presidency has become a focus of employers who are looking to see what policy and enforcement priorities will come out of the federal Department of Labor. In addition, the pandemic has placed a spotlight on low-wage workers and the policies that affect them. As the administration has passed the 100-day mark, we expect to see a strong focus on wage and hour issues at the federal level as the government ramps up additional resources and hires key personnel to fulfill its objectives. This spring, the administration released its budget outline seeking a 14% increase in funding for the Department of Labor (DOL). Agency budgets are always wish lists rather than solid policy proposals. However, budgets outlines provide significant insight into an administration's priorities. The Biden outline seeks a 17% increase in funding for its worker protection agencies' funding and includes generic guarantees to protect wages and fight employment bias. Notably, the budget specifically directs funds to "address the misclassification of workers as independent contractors." Marty Walsh's path to confirmation as Secretary of Labor was fairly smooth and did not result in many surprises. During his confirmation hearing, Walsh made clear his intent to focus on broad progressive priorities, including increased enforcement by worker protection agencies, expansion of job training programs, and roll back of Trump regulations such as the independent contractor rule. Julie Su, as the nominee for Deputy Secretary of Labor, has encountered a rocky road to confirmation. Her confirmation hearing included tough questions regarding her tenure in California as its labor chief and, in particular, her role in supporting the COVID-19-related lockdowns and other worker rules in California that are often seen as employee-friendly. The key position in the DOL for wage and hour matters is the Administrator, and the administration has selected David Weil to return to the post he held during the Obama presidency. Weil has been an advocate for greater government scrutiny of employment practices of gig economy companies and has publicly taken the position that workers for those companies should be considered employees rather than independent contractors. Based on his public positions, we expect policy changes and enforcement actions aimed directly at making it more difficult to classify workers as independent contractors. Indeed, the combination of Su and Weil suggests that the agency may be looking at importing California's AB 5 test as much as it can into the Fair Labor Standards Act. To date, the main priority of the Biden administration in the first days has been for the wage and hour division to pull back the Trump administration's rule that made it easier to classify workers as independent contractors. A second priority included withdrawing the Trump administration's guidance on liquidated damages. Historically, a major hurdle to resolving wage and hour matters at the federal level was the DOL's insistence on recovering double damages on back wages for violations. Trump lowered this hurdle by allowing department officials some flexibility in imposing these damages. Biden's team reversed this, and employers will be subject to these demands in every wage and hour matter. In addition to these priorities, we expect that federal contractors will face additional labor requirements, such as enhanced paid leave, that will come by way of executive orders from the White House. Executive orders will also likely usher in stricter government contracting requirements and labor union protections related to the Davis-Bacon Act. Moreover, the Fair Pay and Safe Workplaces initiative may arise from the ashes of the Obama years. This executive action required that the government consider a contractor's labor law violations in the contracting processes and threatened to ultimately suspend or disbar contractors who were deemed "non-responsible." This is a high priority for labor unions that continue to press this administration to step up efforts on worker protection. We will continue to update you on the administration's regulatory and policy initiatives.

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