



## Governmental Affairs Update - November 2020

**How a New Administration May Impact HR** - Four years ago, Donald Trump's election had a significant impact on HR professionals, as it kicked off a process in which many federal regulations implemented by the Obama administration were revised and overturned. Employee handbooks and company policies had to be updated and rewritten on a frequent basis in the years that followed, as the Departments of Labor, Homeland Security, Health and Human Services and many others, as well as a range of federal agencies, shifted priorities and reporting responsibilities for employers. President-elect Joseph R. Biden, Jr. Given the election results, analysts expect the new Democratic administration will attempt to change many of those regulations, despite the ongoing pandemic. However, change may be difficult given that the Senate may continue to be led by a Republican majority pending run-off elections in Georgia in January. What follows is an overview of the federal programs most likely to be targeted for change by the new administration, and what HR professionals might expect: **Health Care Insurance:** President-elect Joseph R. Biden, Jr. favors maintaining and expanding coverage under the Affordable Care Act (ACA). He has said he would keep the employer mandate that requires organizations with 50 or more full-time or equivalent employees to provide ACA-compliant health care to their full-time workers—and to comply with the ACA's employer tracking and reporting requirements. Biden also has stated that he would allow employees to receive coverage on an ACA exchange even if their employer offers ACA-compliant coverage, although details about eligibility for government subsidies have not been outlined. Currently, if an employer offers health plans that meet the ACA's requirements for affordability and minimum quality standards, then employees are not eligible for subsidized coverage through an ACA exchange, regardless of their income. The crux of Biden's health plan, however, is his support for a public insurance option similar to Medicare. According to his campaign website, "Whether you're covered through your employer, buying your insurance on your own, or going without coverage altogether, the Biden plan will give you the choice to purchase a public health insurance option like Medicare." A campaign fact sheet explained further: "If you have coverage from your employer but it is inadequate ... Joe would give you the ability to choose a new Medicare-like public option, with the federal government providing enhanced premium subsidies." As with Medicare, the public option Biden supports would cover primary care without co-payments. Biden's website says, "It will bring relief to small businesses struggling to afford coverage for their employees," presumably by allowing them to stop offering coverage. And as a government-run health insurance plan available on the ACA's marketplace exchanges, the public option would compete directly with other qualified health plans. Biden also proposes allowing Americans ages 60 to 64 to enroll in Medicare. In April, he wrote, "Under this concept, Americans would have access, if they choose, to Medicare when they turn 60, instead of when they turn 65. ... This would make Medicare available to a set of Americans who work hard and retire before they turn 65, or who would prefer to leave their employer plans, the public option, or other plans they access through the Affordable Care Act before they retire." Researchers have found that "the strong link between health insurance and employment in the United States may cause workers to delay retirement until they become eligible for Medicare at age 65," suggesting that earlier access to Medicare could prompt more employees to retire sooner. **Paid Leave:** The Families First Coronavirus Response Act (FFCRA), passed earlier this year in response to the pandemic, became the first federal law to mandate paid leave in the private sector. President-elect Biden has called for 12 weeks of paid family and medical leave, and has supported the FAMILY Act, which would provide workers with up to 12 weeks of partial income funded through a payroll tax when they take time for: Their own serious health conditions, pregnancy and recovery from childbirth. The serious health condition of a child, parent, spouse or domestic partner. The birth or adoption of a child. Specific military caregiving and leave purposes. The FAMILY Act would cover workers in all companies, no matter the company size. Under the proposed act, part-time, lower-wage, contingent and self-employed workers would be eligible for benefits. **Labor Relations:** President-elect Biden supports a bill known as the Protecting the Right to Organize (PRO) Act that would significantly change labor relations law, making it more difficult to classify workers as independent contractors and expanding the definition of "joint employer." In fact, Biden would go even further by allowing workers to more easily organize unions through the signing of authorization cards and by imposing criminal liability on executives for "interfering with organizing efforts and violating other labor laws," according to Biden campaign materials. The National Labor Relations Board (NLRB) has used its rulemaking authority during the Trump administration to make substantive and procedural changes, including modifications to union election rules. Democrats likely will eliminate all pending proposals and look to overturn the current administration's rules. **Workplace Immigration:** Joe Biden's plan calls for reversing what President Trump has enacted regarding immigration since 2017, including halting Trump's executive orders and proclamations restricting travel, limiting green cards and guest worker programs, and

eliminating the Deferred Action for Childhood Arrivals (DACA) program, which granted protection to certain undocumented immigrants brought to the country as children. Biden's platform also outlines larger goals to work on with Congress, such as increasing the number of employment-based visas; providing a path to legalization for the 12 million undocumented immigrants in the country; and creating a new, decentralized immigration stream for foreign workers that is based on local and state needs. It's also likely he will attempt to pass through Congress comprehensive immigration reform. Biden supported the bipartisan comprehensive immigration package that passed the Senate in 2013, but could not get approval from the House of Representatives. **Retirement Plans:** President-elect Biden's tax plan calls for changes to the traditional 401(k), ending upfront tax breaks that grow larger as more money is saved and replacing them with flat-tax credits. Current tax benefits for retirement savings are based on savers excluding their retirement contributions from tax in traditional 401(k) plans, and then paying taxes when they withdraw money from their account. "This system provides upper-income families with a much stronger tax break for saving and a limited benefit for middle-class and other workers with lower earnings," according to Biden's website. "The Biden plan will equalize benefits across the income scale, so that low- and middle-income workers will also get a tax break when they put money away for retirement." *Roll Call* reported that Biden's plan would "equalize" the incentive system by replacing tax-deductible contributions with flat-tax credits for each dollar saved. "The campaign isn't saying what that percentage would be, but the Urban-Brookings Tax Policy Center has estimated a 26 percent credit would be roughly revenue-neutral over the first 20 years and beyond, which the Biden campaign is aiming for," *Roll Call* reported. "Under this plan, someone earning \$600,000 would get the same tax break as someone making \$60,000—an identical \$260 tax credit for their \$1,000 retirement contribution." The credit would also be refundable, so employees earning too little for the credit to offset their income tax liability would still receive the full value. **Minimum Wage:** Joe Biden supports raising the federal minimum wage to \$15 an hour by 2026. He also supports ending the tipped minimum wage and the subminimum wage for workers with disabilities. The Democratic-controlled House passed a bill last year that would have raised the federal minimum wage to \$15 by 2025, but it was never voted on and it's not known whether Biden would support such a bill if it is reintroduced in the 117th Congress. **Marijuana Legalization:** The movement to legalize cannabis consumption continued on Election Day as voters in five states approved new laws allowing medical and recreational marijuana use. In Arizona, Montana and New Jersey—where medicinal use is already permitted—voters approved recreational use. Mississippi voters decided to legalize medical marijuana in the state, and South Dakota voters agreed to legalize both recreational and medical use. Although all marijuana use is still illegal under federal law, 35 states now will allow medical use, and 15 of those states and Washington, D.C., also will allow recreational use. **LGBTQ Rights:** Both Joe Biden and Kamala Harris have been strong supporters of LGBTQ and transgender rights. Biden stated during the campaign: "My administration will enact the Equality Act to end legal discrimination against LGBTQ+ people, expand economic opportunities for LGBTQ+ people, reform our treatment of transgender and gender non-conforming individuals in our criminal justice system, ensure access to accurate identification documents, and improve government data collection to better track violence against the transgender community." *Source: SHRM, HR News, 11/7/2020, by Tony Lee, Allen Smith, Lisa Nagele-Piazza, Roy Maurer and Stephen Miller*

**COVID-19 vaccines: Can firms make them mandatory?** - As the feds prepare states to get ready to distribute a potential COVID-19 vaccine in the next few months, firms face a critical decision: Should we require employees to get it? In a letter to governors on Aug. 27, the Centers for Disease Control and Prevention asked states to be prepared to expedite distribution of the vaccines. Three U.S. drug makers – Moderna, AstraZeneca and Pfizer – are progressing with their Phase 3 clinical trials. EEOC's vaccine guidance - Legally, employers can require employees to get the vaccine, says attorney Lindsay Ryan. However, employers may also have a legal duty under the ADA to allow certain high-risk employees to opt out of the vaccine. That's why it's best to simply encourage employees to get the vaccine rather than mandate it, says the EEOC. The agency will likely issue additional guidance for employers once a vaccine is approved by the FDA. Employers contemplating any COVID-19 policy should carefully consider "the threat posed to the health and safety of their employees, the risk of future claims and employee morale," says Ryan. *Source: HR Morning.com, by Lynn Cavanaugh, 11/5/20*

**OSHA Fines for COVID-19 Safety Violations Reach Nearly \$2.5 Million** - Employers have a duty to keep workplaces free from known hazards—including coronavirus-related dangers—under Occupational Safety and Health Administration (OSHA) standards. OSHA announced on Nov. 6 that the agency has cited 179 worksites for coronavirus-related violations and proposed a total of \$2,496,768 in penalties since the pandemic began, through Oct. 29. Although the agency hasn't implemented any coronavirus-specific workplace safety standards, employers still must comply with existing standards that cover pandemic-related safety risks. For example, all employers must provide a work environment that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm," according to the Occupational Safety and Health Act's general duty clause. OSHA has cited employers for failing to take the following coronavirus-related actions: Implement a written respiratory protection program. Provide a medical evaluation, respirator fit test, training on the proper use of a respirator and personal protective equipment. Report an injury, illness or fatality. Properly record an injury or illness. Comply with the general duty clause. **Review OSHA and CDC Guidelines:** Although OSHA hasn't issued any



COVID-19 standards, the agency has released guidelines for limiting workers' exposure to the coronavirus. OSHA recommends that employers periodically check the agency's website, as well as the U.S. Centers for Disease Control and Prevention (CDC) website, for updates. **CDC Says Teleworking Helps:** Traveling to the worksite instead of teleworking may put employees at a greater risk of coronavirus infection, according to a new CDC report. Researchers analyzed a sample of 314 employed adults who took COVID-19 tests at outpatient facilities in July. Employees who worked remotely, either full time or part time, were about half as likely to test positive for the virus than those who said they exclusively went to an office or school in the two weeks before illness onset. "This investigation provides evidence of the potential health benefits of teleworking associated with the COVID-19 pandemic," according to the study's authors. "Allowing and encouraging the option to work from home or telework when possible is an important consideration for reducing SARS-CoV-2 transmission." **Priorities Expected to Shift Under New Administration:** Under President Donald Trump's administration, Labor Secretary Eugene Scalia has taken a business-friendly approach to U.S. Department of Labor (DOL) priorities. President-elect Joe Biden will appoint a new DOL leadership team, and the department may focus on more-stringent workplace-safety standards for employers. The Biden campaign's goals include a robust plan for OSHA to carryout pandemic-related enforcement. **Many States Require COVID-19 Workplace Safety Training:** Employers should review applicable state laws in addition to federal guidelines, as many states now require employers to provide COVID-19 workplace safety training to employees. Even in states where training is not explicitly required, employers should consider providing all employees COVID-19 workplace safety training that is consistent with guidelines from OSHA and the CDC. Employers that provide up-to-date training can demonstrate their concern for employee safety and minimize the risk of government enforcement actions, workers' compensation liability and employee litigation. **6 Contact-Tracing Steps for Employers:** The CDC advises most employers to send employees home when they've had a risk of COVID-19 exposure under the agency's "close contact" definition. Here are the key contact-tracing steps attorneys say employers should take when following CDC guidelines. *Source: SHRM HR Daily Newsletter, Employment Law, by Lisa Nagele-Piazza, J.D., SHRM-SCP, 11/13/2020*

**Unemployment Claims Trend Down, Remain High** - States reported that 709,000 U.S. workers filed for new unemployment benefits during the week ending Nov. 7. New claims continue to slowly come down from a peak of nearly 7 million at the end of March, but have remained much higher than pre-pandemic levels. The total number of workers receiving state unemployment benefits fell last week, to 6.7 million, the lowest level since the onset of COVID-19. The federal Pandemic Emergency Unemployment Compensation program for people whose benefits have run their course has been showing a steady rise in claims however, and is now up to 4.1 million. Another program which allows for additional unemployment benefits after both the regular program and the emergency funds are exhausted, currently has 551,000 claims. An additional 9.4 million people continue to claim unemployment under the Pandemic Unemployment Assistance program providing jobless benefits to workers previously not eligible for unemployment. Many of you are seeing an inordinate number of fraudulent claims for unemployment benefits being filed in the name of your employees as it is a widely-spread not only within Massachusetts but throughout the nation. This is related to the Equifax data breach from several years ago and that the MA UI system is completely under water from dealing with such high claim volume and the fraud. They are slowly taking steps to make the fraud reporting easier for employers. If someone has gotten ahold of your employees' information and filed an unemployment claim in their name please make sure you have notified the state that this is fraud and notify the employee that there are a few steps you would advise them to take in protecting their personal information:

- File a police report with their local precinct
- Report the identity theft to the Federal Trade Commission (FTC) at [www.identitytheft.gov](http://www.identitytheft.gov)
- Report the identity theft to Massachusetts Unemployment - <https://www.mass.gov/forms/unemployment-fraud-reporting-form>
- Take precautionary measures to protect their credit either through credit monitoring or by freezing their credit - <https://www.consumer.ftc.gov/articles/0497-credit-freeze-faqs>

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