

HRW CLIENT ALERT

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Looking Ahead: What to Expect Under the Biden-Harris Administration

COVID Vaccine // Kathleen Berney and Mark Macchi

On December 16, 2020, the Equal Employment Opportunity Commission (EEOC) published guidance on administering COVID-19 vaccinations in the workplace and provided information about religious and medical exemptions to mandatory vaccination programs. Despite this guidance, which suggests that mandatory vaccination programs are acceptable, at least under federal anti-discrimination laws, we may see increased litigation challenging such programs or, maybe more likely, raising claims about employers' failure to grant a reasonable accommodation to those seeking exemptions from a mandatory vaccination program. We may see more prevalence of mandatory vaccination programs (and more litigation on the topic) as the COVID-19 vaccine becomes more widely available to the general public, which, in Massachusetts, according to the Commonwealth's phased roll-out plan, is not expected until at least April 2021.



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Higher Education // Scott Roberts

One of the key actions by the Department of Education under former Secretary Betsy DeVos was the implementation of controversial regulations governing the way colleges and universities adjudicate allegations of harassment and sexual assault under Title IX, including mandating live hearings with real-time cross-examination of the parties. Although former Secretary DeVos touted the new rules as enhancing due process, President-elect Biden has said that the rules aim to "shame and silence survivors," and he promised to put a "quick end" to them upon becoming president. Given Biden's focus on campus sexual assault during the Obama administration, he is likely to take prompt action to address what has become an increasingly polarizing issue, but it is not clear what action he can or will take (e.g., withdrawing or seeking to change some or all of the new rules, de-emphasizing their enforcement). What is clear, however, is that colleges and universities will need to continue working to ensure fairness in their process, while being mindful that the political and legal sands will continue to shift.



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Labor Law Changes // Pete Moser

President-elect Biden has declared that he will be the “strongest labor President you’ve ever had.” We will not see a shift at the NLRB until late 2021 at the earliest, when new Board appointments and a new General Counsel are in place. But eventually we will see the NLRB revert back to pro-labor positions, for example making it easier for unions to organize and re-intensifying scrutiny over employer policies. More drastic labor changes could occur via legislation, now that the key Senate run-off elections in Georgia have yielded a Democrat-controlled Senate. One such change could be passage of the ProAct which would ban right to work laws, codify “ambush election” rules, etc.



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LGBTQ+ Rights // Cathy Reuben

It goes without saying in Massachusetts that neither employers nor the Commonwealth itself can deny opportunities or otherwise discriminate against individuals because of their sexual orientation or gender identity. On the federal level, however, the Trump administration has actively sought to undermine or narrow LGBTQ+ rights in a myriad of ways. Examples include submitting amicus briefs to the U.S. Supreme Court supporting an entity’s “right” to discriminate against LGBTQ+ persons, banning transgender service members from the military, issuing a regulation aimed at allowing federal contractors to claim a religious exemption to terminate workers due to their sexual orientation and gender identity, and permitting emergency shelters to deny access to gender nonconforming persons. (More examples can be found at: <https://www.hrc.org/news/the-list-of-trumps-unprecedented-steps-for-the-lgbtq-community>). We anticipate that the Biden administration will not simply undo these and other executive actions that affirmatively hurt LGBTQ+ persons, but will affirmatively seek to hold employers, federal contractors and schools more accountable for promoting equal opportunity and non-discrimination.



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Minimum Wage // Dave Wilson

President-elect Biden has called for a \$15 federal minimum wage. We also expect his administration will seek to eliminate the reduced minimum wage for tipped employees (i.e., the tip credit) and may seek to increase the minimum salary to qualify as an exempt employee from \$684 up to the \$917 per week previously proposed by the Obama administration.



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Noncompetition Agreements // Max Perlman

Many employers use noncompetition and nonsolicitation agreements as a tool to keep their competitors from grabbing their confidential information and relationships. President-elect Biden has signaled his opposition to these kinds of agreements. "It's simple...companies should have to compete for workers just like they compete for customers," Biden said on the campaign trail in December 2019, "we should get rid of noncompete clauses and no-poaching agreements that do nothing but suppress wages." President-elect Biden may be able to prevail upon Congress to ban

these agreements, now that control of the Senate has shifted, and in any event he may be able to achieve his goal through regulatory action, including through the Federal Trade Commission. If Biden is successful in establishing a statutory or regulatory ban on noncompetes or no-poaching agreements, employers will need to find other ways to protect their trade secrets, confidential information, and goodwill with customers and employees.



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Paid Family and Medical Leave // Janette A. Ekanem

For decades, U.S. lawmakers have debated the efficacy of federal paid family and medical leave legislation. While at one point considered controversial, the COVID-19 pandemic and recent developments in paid leave laws at both the state and federal level have made the possibility of a broad federally mandated paid leave program seemingly possible under the Biden-Harris administration. Recently, Congress passed the Federal Employee Paid Leave Act which provides paid family leave for certain federal employees covered by the Family and Medical Leave Act. Additionally, several states like Massachusetts have enacted their own paid family and medical leave laws. Although the Emergency Paid Sick Leave and Expanded Medical Leave requirements of the Families First Coronavirus Response Act (FFCRA) expired on December 31, 2020, an employer may choose to continue to allow eligible employees to take leave pursuant to FFCRA. When the FFCRA extension expires at the end of March 2021, the Biden-Harris administration, with the help of their new majority in the Senate, may have the social, economic, and political momentum to enact federal paid family and medical leave legislation.



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