

A decorative graphic consisting of a grid of small squares in various colors including blue, teal, purple, red, orange, and yellow, arranged in a pattern that tapers to the right.

A Brand-New Employment Equation?

The Biden Administration 100-Day Report for Employers

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*Why are the **first 100 days** so important?*

It's often said that a president's first 100 days in office are the most critical in their administration, as that's when they have the most political capital – and therefore can attempt to enact the most ambitious changes.

*The first 100 days from a **workplace law** perspective*

The first 100 days of the Biden administration have revealed an extraordinarily ambitious plan to remake the nation's workplace laws. And while some dramatic changes have occurred since January 20, the White House has laid out a blueprint for further change that would completely reshape the employment equation.

The Two Most Significant Developments To Date...

- [Marty Walsh selected to lead the Department of Labor](#)
- [Congress passes Biden's American Rescue Plan](#)



Marty Walsh leads Labor Department

Labor Secretary Marty Walsh, in a nutshell:

- Boston mayor from 2014-2021
- Long and proud history as a union official and “old-guard” labor advocate
- But both a progressive on social issues and flexible leader working with management



Marty Walsh ✓
@MartyJWalsh



Working people, labor unions, and those fighting every day for their shot at the middle class are the backbone of our economy and of this country. As Secretary of Labor, I'll work just as hard for you as you do for your families and livelihoods. You have my word.

5:58 PM · Jan 7, 2021 · Twitter Web App

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American Rescue Plan

- Extended tax credits for FFCRA leave and vaccine-related PTO
- Another round of grants to support struggling businesses and additional funding for further Paycheck Protection Program forgivable loans
- Extended unemployment relief through September 6 and \$1,400 stimulus checks for many Americans

Did NOT INCLUDE

- \$15 minimum wage
- Federal paid leave
- Elimination of tip credit

[A full summary of the American Rescue Plan is available here](#)

The Biggest Storm Cloud on the Horizon...

The Protecting the Right to Organize Act of 2021, aka The PRO Act

- Key part of Biden's campaign platform
- Passed the House on March 9
- Uncertain future in the Senate

[Full summary of legislation available here](#)



The PRO Act is essentially a wish list for unions that would fundamentally alter workplace relations for both unionized and non-unionized businesses

Radical Shift Toward Union Organizing

- Reinstall “quickie” elections
- Ban on captive audience meetings
- Expand pool of potential union members
- Allow use of company email for solicitation
- Facilitate organizing of “micro-units”

Transfers Power to Organized Labor

- Permit secondary boycotts
- Embolden protesting workers by authorizing strikes regardless of duration, scope, frequency, or intermittence
- Expands available penalties and remedial relief

Constrains Unionized Employers

- Block permanent replacements
- Prohibit pre-strike lockouts
- Force union contracts

Shatters Common Workplace Standards

- Broaden misclassification by bringing “ABC” test to national stage
- Expand joint employment definition
- Prohibit arbitration agreements
- Expand legal exposure



Workplace Safety

The Biden administration has signaled that a new day has dawned for workplace safety...but hasn't taken the big plunge (yet).

What's Happened?

- Biden signed executive orders in his first days [ramping up OSHA's enforcement efforts](#).
- [Doug Parker, head of Cal/OSHA, was tapped to lead federal OSHA](#). Once confirmed by the Senate, expect to see a California-like increase in aggressive enforcement tactics and a substantial increase in the number of investigators over the next 18 months.
- [The agency adopted a National Emphasis Program on COVID-19](#) to devote more resources towards virus-related inspections.

What's Next?

- But it has not (yet) launched the big one: [an Emergency Temporary Standard for COVID-19](#) that would require employers to develop a workplace safety plan, potentially subject to government approval.
 - [Originally slated](#) to roll out by March 15.
 - DOL head Marty Walsh [announced a pause in early April](#) to reassess state of affairs given current vaccination rates and declining infections nationwide.
 - On April 26, the DOL sent draft safety standards to the White House for review, but there is no timeline for (or guarantee of) finalization.
- Still on the table: [resurrecting an Obama-era workplace safety reporting rule](#) that would force employers to provide detailed injury and illness information and make such information available to the public.





Employee Leaves

The nation experienced its first (temporary) taste of a federal paid leave program in 2020. Has the genie been let out of the bottle?

What's Happened?

- > While the federal paid leave law that was created as part of the FFCRA expired at the end of 2020, [Congress originally extended tax credits](#) for voluntary paid leave through March 31.
- > [Biden's American Rescue Plan](#) again extended tax credits for paid leave provided through September 30 and provided a new bucket of EPSL benefits.
- > The administration proposed [a permanent federal paid leave law in the American Families Plan announced on April 28](#), which would provide a full 12 weeks of paid leave for a variety of reasons by 2031.

What's Next?

- > Besides the American Families Plan proposal, Congress is considering the [FAMILY Act](#), a federal proposal that would offer wage replacement for FMLA-like reasons but extend coverage to all employers. It would also create a new federal agency to administer the program.





Joint Employment

Expect the administration to cement into place a broad standard that captures as wide a swath of workers and business arrangements as possible into the “joint employer” category.

What's Happened?

- > Biden's Department of Labor proposed to formally rescind a Trump-era rule that was more business-friendly when it came to determining who was a joint employer for wage and hour compliance purposes.
- > Although the rule had been on ice since September 2020 due to court intervention, there is ongoing litigation attempting to resurrect it.

What's Next?

- > Expect the DOL to announce that a new rule is necessary to better reflect a broad interpretation of the Fair Labor Standards Act.
- > The rule will most likely mirror the Obama-era interpretation that aimed to include as many multi-participant arrangements as possible (outside-party management, joint ventures, staffing services, temporary help, subcontracting, certain kinds of “job sharing,” and dedicated vendors or suppliers) as joint employers.





Worker Classification and Gig Economy

All businesses with a contractor workforce – especially those in the gig economy – face a rocky road in the near future.

What's Happened?

- > Biden's Department of Labor [shelved the pending business-friendly regulation](#) that would have made it easier to classify workers as independent contractors.
- > It also [withdrew a 2019 Guidance Letter](#) that assured typical gig economy companies that their workforce was properly classified.

What's Next?

- > Expect to see the Department of Labor issue [a new proposed regulation](#) ratcheting up the pressure for contractor misclassification claims.
- > Business groups have [filed a federal lawsuit](#) to try to block any new rule and resurrect the Trump-era business-friendly regulation.





Immigration

The Biden administration immediately halted many of the Trump-era immigration actions and has begun to streamline and modernize the system – but much work remains.

What's Happened?

- [Biden's team eliminated the wage-based selection process for H-1B visas](#), offered protection for DACA “dreamers,” and [loosened entry restrictions for a variety of workers](#).
- Besides extending the relaxed rules for in-person inspection of I-9 documentation, immigration officials have also [unveiled flexible inspection rules](#) for remote workers hired after April 1.

What's Next?

- Comprehensive immigration reform has been sought by many prior presidents, and the Biden administration will also take a shot at it.
- [The U.S. Citizenship Act](#), introduced in February, would revolutionize the “green card” process, provide an earned path to citizenship, overhaul the E-Verify system, address the root causes of migration and responsibly manage the southern border, and reform the immigrant visa system, among other things.





Other Developments

Employment Discrimination

- The House passed the [Equality Act, a landmark bill](#) that aims to amend several federal laws to prohibit discrimination on the bases of sexual orientation and gender identity.
- If passed by the Senate, it would go further than the [2020 Supreme Court decision](#) that ensured these categories are protected by Title VII, adding protections for purposes of accommodations and education.

Wage and Hour Law

- The Senate has introduced [the Raise the Wage Act](#), which would increase the minimum wage to \$15/hour by 2025 and then tie future annual adjustments to inflation rates.
- The proposed law would also immediately hike the tipped wage from \$2.13/hour to \$4.95/hour, increase it annually to \$14.95/hour by 2026, and completely eliminate it by 2027.


Federal Contractors

- President Biden [signed an Executive Order on April 27 that will increase the minimum wage for federal contractor employees to \\$15 per hour](#) beginning in 2022.

Agency Developments

- The administration broke protocol by [firing the NLRB's chief prosecutor](#) and the EEOC's top lawyer in a bid to wrest as much control as possible as soon as possible. Unless overturned by courts, these moves will result in more ambitious rulemaking and agency decisions on an expedited timeframe.





While these first 100 days have seen an unprecedented whirlwind of activity, we don't expect things to let up any time soon. We believe employers can expect to see further dramatic changes to continue for at least the next two years through the 2022 midterm elections, and we expect the pace of change to increase as Biden administration appointees assert control over the many federal agencies that impact workplace law. To stay up to speed on all these developments, we encourage you to sign up for our [Fisher Phillips Insight system](#) to receive updates directly to your inbox, and reach out to your Fisher Phillips attorney to determine the best course of action you can take to adapt to the new employment equation.

