

Anticipating A Swing In The Pendulum: A Preview Of Workplace Law Considerations Ahead Of The 2024 Election

[Barbara E. Hoey](#), [Mark A. Konkell](#), [Blythe E. Lovinger](#), [Alex J. Seidenberg](#)

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On November 5, 2024, voters will decide the presidential election, and on January 20, 2025, the new president will be inaugurated. Voters will also decide which party will retain control of the House and Senate, a rare occurrence in which the Democrats and Republicans are vying for control of all levels of government.

While uncertainty remains about who will win, there will be significant changes to workplace law.

If Vice President Harris wins, even though a Democratic administration will remain, her presidency will still involve change. And if the Democrats can take control of Congress, we are likely to see a more emboldened, worker-friendly agenda. However, if former President Trump wins, we are likely to see a sea change and total roll back of many of the Biden-era regulations and policy initiatives.

Either way, the new occupant of the Oval Office will set their own priorities for Congress and for administrative agencies. While it may take some time for any changes to take effect, now is the time for employers to be proactive, take stock of how the pendulum might swing, and plan accordingly to ensure a smooth landing for the evolving needs of their business and workforce.

Below are some predictions for possible labor and employment law changes that employers should be on the lookout for.

Transgender Rights

Harris has pledged to fight to pass the Equality Act to provide anti-discrimination protections for LGBTQ+ Americans under existing civil rights law in terms of health care, housing, education, and the workplace. Trump, who opposed the Equality Act in his first term and sought to undo LGBTQ+ protections from the Obama era, will likely seek to roll back transgender rights, such as the U.S. Department of Education's expansion of Title IX federal civil rights rules, which include anti-discrimination protections for students on the basis of sexual orientation and gender identity.

Wage and Hour

Overtime Pay and Minimum Wage

A win for Harris would almost certainly mean that her administration would continue to support the overtime rule put into place during the Biden era that increased the minimum salary threshold to

\$43,888 on July 1, 2024, and then to \$58,656 on January 1, 2025, which is currently being challenged in courts. By contrast, Trump may abandon the new overtime rule all together or issue a new overtime rule, erasing the progress of the Biden administration. At stake is the number of workers who may be eligible to receive overtime pay and the associated costs to employers. As for the minimum wage, Harris has generally supported increasing the federal minimum wage, while Trump's position is not clear. Regardless, states and localities have been implementing their own wage hikes well above the federal minimum wage of \$7.25 per hour.

Misclassification – Employee vs. Independent Contractor

The Biden administration has made it [more difficult](#) for employers to classify workers as independent contractors, rescinding the DOL's final rule that was introduced at the end of Trump's presidency (which, not surprisingly, would have made it easier for employers to classify workers as independent contractors). A Harris victory would likely mean a continuation of the present agenda, while a Trump victory would likely mean a reversal of the same. A Trump win would also likely mean a new Secretary of Labor to carry out Trump's policy agenda. At stake is whether employers will bear the significant costs associated with a worker being classified as an employee.

Paid Leave

Paid leave is front and center in this election cycle. Harris outwardly supports federal paid leave and has repeatedly called for a paid leave program, which is not surprising given that the Biden administration proposed a 12-week program and Tim Walz signed a Minnesota paid leave bill into law earlier this year. While the Trump campaign has stayed silent on this issue, it is possible that a divided Congress would block any federal paid leave legislation. Even if legislation falls through, paid leave is prominent and expanding on the state and local level and is an area that employers will need to continue grappling with.

Organized Labor

Under Biden, labor policies have been extraordinarily "pro-union," meaning it has been easier for workers to collectively bargain with their employers. We anticipate this trend to continue in the event of a Harris victory, who (with Biden) reversed numerous Trump-era policies. In particular, Harris has pledged to sign the Protecting the Right to Organize (PRO) Act if it reaches her desk, which would effectively make it easier for unions to organize and tip the power scales to the employee. Of course, it may not reach Harris' desk, even if she wins, if Congress remains divided (however, a Democratic sweep in Congress would change that). Trump would likely veto the PRO Act and limit the role of unions. It is also likely that a Trump win would usher in a new general counsel of the NLRB, along with a management-leaning majority, to pursue Trump's labor relations agenda. In the case of either a blue or red wave, there could be significant changes to the NLRA.

Artificial Intelligence

The future of AI priorities and regulation is also in flux. Harris would likely continue and build upon the Biden administration's AI executive order, which sets forth a roadmap for protecting workers from privacy, discrimination, and other potential harms presented by AI. In particular, it prompts federal agencies to take action and has set an agenda that sheds a spotlight on employee and labor rights as AI continues to make waves in the workplace. Trump has vowed to repeal Biden's executive order and would likely aim to limit regulations surrounding AI. Trump may also, as indicated by the executive orders in his first term, focus his domestic-focused AI regulations on the federal

government but not private sector employers (unlike Harris).

Regulatory Landscape

Whether Harris or Trump, the winner of this year's election will set the policy agendas of administrative agencies. Under Harris, administrative agencies (such as EEOC, DOL, and NLRB) may be more aggressive in interpreting federal legislation and implementing rules, which would likely be worker-friendly. By contrast, a Trump win would likely usher in an era of deregulation. This landscape is particularly important given the recent decision in [Loper Bright](#), which eliminated agency deference. In the case of a Harris presidency, it may mean that it will be more difficult for agencies to defend challenges to regulations, even if they are more aggressively pursued.

So, what is the takeaway? Employers can expect that a Harris administration will be much more worker-friendly (in tune with the Biden administration) and will make a significant effort to further push the Biden-era agenda (perhaps taking aim at areas that stalled under Biden). However, the success of that agenda will depend on the party composition of the House and Senate. Without a Democratic majority in the House and Senate (or vice versa), don't expect any groundbreaking labor and employment legislation.

The Trump administration will likely seek to roll back the Biden-era agenda, vis-à-vis executive orders, policy changes at the agency level, and to the extent possible, through Congress. Again, changes to labor and employment laws typically do not change overnight. Even still, it is now more important than ever for employers to take stock in the "what if." As for what may actually happen next, check back with us in January 2025.