



THE BIDEN LABOR PLATFORM – THE FIRST 100 DAYS AND BEYOND

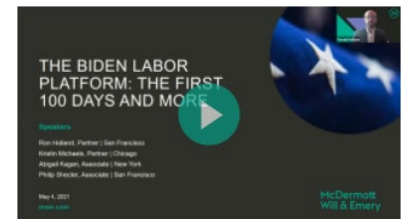
Key Takeaways for Union and Non-Union Employers

President Biden has taken a holistic approach to pushing his pro-labor agenda, using the bully pulpit to make pro-union statements, signing executive orders revealing that the creation of union jobs is one of the administration’s top priorities, coming out in support of pro-labor legislations—namely the Protecting the Right to Organize Act (PRO Act), and integrating labor into its policy proposals.

1. The Biden Administration created a pro-union task force, which consists of 20 cabinet members and heads of federal agencies whose goal is to take a “whole-of-government approach” to empower workers. The task force has 180 days to make a set of recommendations on:
 - How existing policies, programs and practices can be used to promote worker organizing and collective bargaining in the federal government
 - What new policies and regulatory or statutory changes are needed to achieve the task force’s mission
2. While unlikely to pass in its current form, the PRO Act provides a clear idea of what the Biden administration is hoping to achieve. If passed, it would be the first major overhaul of the National Labor Relations Act (NLRA) in more than 70 years and would have far-reaching consequences for union and non-union employers alike.
 - Considering how comprehensive the PRO Act is, we expect to see Republican counter bills in piecemeal fashion, attempting to slowly chip away at the PRO Act’s sweeping calls for reform.
 - Regardless of whether the PRO Act passes, unions are emboldened by the Biden labor agenda, and employers should expect more activism from unions and an increase in unionizing efforts. We also anticipate a rise in “minority unions.”
3. The administration intends to enact a federal standard for making employee-independent contractor determinations based on the stricter “ABC” test. This will likely lead to heightened scrutiny around worker classification.
4. Employers can also expect a broader definition of “joint employer.” Where a joint employment relationship exists, employers can be held jointly and severely liable for wage and hour claims.
5. The American Jobs Plan (Plan, AJP), the \$2 trillion infrastructure bill, is a signature Biden Administration proposal that aims to focus spending on a broad array of sectors, including manufacturing, transportation, energy, healthcare, local government and more. Employers can expect a version of the current plan to pass, which will have the following impact for employers:
 - The Plan provides increased funding for enforcement of its workforce proposals, meaning agencies like the US Equal Employment Opportunity Commission (EEOC) and the Occupational Safety and Health Administration (OSHA) are likely to receive more resources for enforcement activities.
 - Any employer receiving federal investments will have to remain neutral in organizing, which can expose any employer to unionization efforts, especially in today’s climate. Thus, the Plan would prevent employers from responding to signs of union activity.

NAVIGATING CHANGE IN THE US ADMINISTRATION

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May 4, 2021



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Key Takeaways for Union and Non-Union Employers

6. With regard to labor law, the American Jobs Plan calls for the passing of the PRO Act as well as a number of other labor requirements, such as:
 - Neutrality in labor organizing
 - Use of project labor agreements and local hiring
 - Investments in industries with a higher concentration of organized labor
7. From an employment law perspective, the American Jobs Plan will make significant changes to workplaces in the following ways:
 - Require the use of prevailing wages on all projects funded by the AJP bill
 - Raise wages for essential workers
 - Eliminate the sub-minimum wage provision in Section 14(c) of the Fair Labor Standards Act (FLSA)
 - Fund the American Workforce Development Infrastructure
 - Create a dislocated workers program
 - Increase penalties for workplace safety and health violations
8. The Biden Administration has issued a number of executive orders impacting workplaces. These orders have mostly affected government contracts but orders like the Worker Health and Safety Protections Order also impact private employers. Private employers with any interaction with the federal government will want to keep an eye on these orders and take note of the requirements.
9. The National Labor Relations Board's Acting General Counsel Peter Sung Ohr issued a memorandum signaling his expansive view of employee rights to engage in “mutual aid or protection” and “inherently concerted activities.” This opens up questions about whether social justice activities are protected, whether protesting who your employer does business with is protected and whether engaging in speech related to workplace health and safety and racial discrimination issues are protected under the Acting GC’s expansive reading.
10. Considerations for employers:

ALL EMPLOYERS	NON-UNION EMPLOYERS	UNION EMPLOYERS
Evaluate labor-management relations policies with respect to workers and the expanding workplace	Consider pro-employee actions and workplace training for managers that can be taken now to prevent unions from infiltrating the workforce	Consider entering into longer-term CBAs to help contain the potential for additional labor unrest
Review staffing agreements, contractor agreements and third-party vendor arrangements	Consider developing a union-organizing response plan as the time to respond will be very short	Review contracts to ensure they do not encourage non-union organizing
Review 1099 workers to determine if they pass the FLSA contractor test and/or the “ABC” test		Conduct a union vulnerability audit (including comparison of union and non-union workers)
Consider the practical impact of divergent with federal, state and local employment laws (as well as possible loss of right-to-work status)		Conduct training for management teams to ensure the understanding of labor laws (e.g., protected concerted activity; managing in a union environment; how collective bargaining works)
Consider social justice protected concerted activity training for managers		mwe.com