



Employment Law Note

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New Administration, New Rules



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Now that President Biden's Administration ("Administration") has had time to settle in, we are seeing, and will continue to see, a shift in regulations regarding the employer and employee relationship. It appears that the Administration is targeting racial and gender inequities, employee misclassifications, and protections for LGBTQ+ employees. To accomplish this, the Administration is providing substantial budget allocations to the U.S. Department of Labor and signing new Executive Orders ("EO").

Worker Misclassification

Whether someone is an employee or an independent contractor has been a hot topic for many years. The IRS, EEOC, U.S. Department of Labor, and various state agencies all provide guidance on whether an individual can be classified as an independent contractor, or whether they are an employee. Despite the guidance, often times an argument can be made for both sides, making these disputes challenging, time-consuming, and expensive.

This Administration's budget plan, released in May 2021, allocated \$7.5 billion in the upcoming fiscal year to increase worker protection efforts, largely to combat the misclassification of independent contractors. The budget also requested that for fiscal year 2022, Congress approve an award to the U.S. Department of Labor of \$14.2 billion, a 14% increase in annual appropriations. The plan reads, "The Administration is also committed to ending the abusive practice of misclassifying employees as

independent contractors, which deprives these workers of critical protections and benefits." In addition to allocating funds for enforcing current regulations regarding independent contractors, there will be new legislation enacted that makes worker misclassification a substantive violation of law that will carry additional penalties beyond those imposed for other violations.

At this point, the Administration will vigorously enforce the existing laws against misclassifying workers as independent contractors. However, be aware that the existing laws regarding worker classification may be changing soon. In its plan, the Administration endorsed the new California law that established a vigorous new test to qualify for independent contractor status. Although California's standard was not explicitly adopted, we anticipate changes to the federal standard based on the endorsement of California's regulation in the recent plan.

Worker Inequities

Along with allocating additional funds to regulate worker misclassification, President Biden has signed a number of Executive Orders in an effort to combat workplace inequities. For example, in addition to the Supreme Court's June 15, 2020, ruling in *Bostock v. Clayton*, which held that gender identity and sexual orientation are included in the definition of "sex" under Title VII, President Biden has now signed EO 13988, "Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation." This new EO is meant to ensure gender equity in the workplace by adopting an expansive interpretation

that encompasses protections on the basis of gender identity and sexual orientation. This further bolsters the Supreme Court's ruling in *Bostock*. Notably, this protection on the federal level is in addition to protections that already exist in states like Washington and Oregon, where employers are already subject to state laws that include sexual orientation and gender identity as protected characteristics.

As a reminder, this protection brings with it the restroom facility challenge. Employers must allow employees to use the restroom that is consistent with their gender identity, regardless of the sex the employee was assigned at birth and regardless of other employees' expressions of concern or feelings of discomfort. For single-use restrooms, an employer can avoid using "Men" or "Women" signage and instead use a gender-neutral term, such as "Restroom."

In addition to EO 13988, the Administration has initiated a push for pay transparency to close the gender and race pay gap that will likely lead to the reintroduction of the EEOC's pay data reporting requirement; enhanced protection for pregnant and

nursing mothers that will require companies with 15 or more employees to provide reasonable accommodations to workers based on pregnancy, childbirth, or related medical conditions; additional paid leave legislation; and, most importantly, increased enforcement actions made possible by additional funding to the Department of Justice, U.S. Department of Labor, Equal Employment Opportunity Commission, and Office of Federal Contract Compliance Programs.

Key Takeaways for Employers

Regardless of whether there is a new independent contractor test enacted by the Administration, companies using independent contractors should reexamine their classifications now that additional funding has been allocated specifically to target misclassifications and impose new penalties. Further, employers should review their policies and procedures, audit their benefit plans to ensure equity, update as needed their anti-discrimination, anti-harassment, and Equal Employment Opportunity policies, and conduct diversity and harassment training for employees and managers.

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