



## COALITION FOR A **DEMOCRATIC WORKPLACE**

### **Biden Administration Is Pledging Drastic Changes to Labor Policy**

*President-elect Joe Biden has pledged to support almost every policy initiative organized labor has proposed over the past two decades. Yet, many of these initiatives threaten to negatively impact small businesses, the self-employed, or the economy generally and trample on the rights or freedoms of workers and employers. Moreover, many were previously invalidated by federal courts and/or rejected on a bipartisan basis by Congress.*

#### **THE BIDEN LABOR AGENDA**

President-elect Joe Biden has promised to reinstate Obama-era labor policies at the U.S. Department of Labor (DOL) and National Labor Relations Board (NLRB) despite the fact that many of these policies were rejected on a bipartisan basis, widely criticized by the regulated community as unworkable, and rejected by federal courts.

Biden has also promised to enact new regulations aimed at increasing union density, imposing federal control over the workplace, and increasing penalties and federal enforcement. In nearly every policy area of his campaign platform, from his infrastructure proposal to the “Environmental Justice” plan to the “Build Back Better” program on COVID-19 recovery, Biden has pledged that all new policies and/or federal projects will be geared towards the creation of “good-paying, union jobs.” Additionally, Biden has promised to specifically target enforcement against the misclassification of workers as “independent contractors,” including through the creation of a federal and state multi-jurisdictional enforcement initiative focused on the misuse of independent contractors across tax, labor, anti-discrimination, and wage and hour laws. Biden’s campaign platform specifically notes, “Biden will fund a dramatic increase in the number of investigators in labor and employment enforcement agencies to facilitate a large anti-misclassification effort.”

Many of the policy proposals advocated by the president-elect can be implemented via Executive Order or regulatory or sub-regulatory action, paving the way for the Biden administration to push through the changes immediately upon taking over the White House. That said, most administrative actions do not happen or take effect instantaneously, and the Biden administration will face challenges in implementing policy through independent agencies like the NLRB, which will likely remain in Republican control at least until August 28, 2021, the day after Member William Emanuel’s (R) term expires. Additionally, the NLRB’s General Counsel, who largely controls the Board’s litigation positions and what cases to bring before the Board, will continue to be held by Republican Peter Robb through August of 2021.

Below are specific labor relations policy recommendations Biden has pledged to pursue. These policies are broken down into potential administrative actions or policies that require legislative changes. Administrative actions are broken down further into those that can be imposed via Executive Order and those that would be handled by an agency.



# COALITION FOR A **DEMOCRATIC WORKPLACE**

## ADMINISTRATIVE ACTIONS

- Appoint individuals to DOL and the NLRB that will implement policies to support union organizing and strengthen union positions in collective bargaining.

### *Executive Orders*

- Create a cabinet-level working group to promote collective bargaining, likely through an Executive Order or executive memorandum. In the first one hundred days of the Biden administration, the working group would develop a plan to dramatically increase union density as well as identify areas where the government could waive preemption of the National Labor Relations Act (NLRA) to allow cities and states to find innovative ways to increase union density. The working group would also provide insight into ways to expand sectoral bargaining, in which “all competitors in an industry are engaged in collective bargaining” with one or more unions. Both a waiver of preemption and sectoral bargaining would likely require legislation.
- Direct DOL to partner with the NLRB, Equal Employment Opportunity Commission, Internal Revenue Service, Department of Justice, and state agencies to work together on enforcement to stop misclassification of workers as [independent contractors](#) rather than traditional employees. As mentioned above, the campaign website specifically notes, “Biden will fund a dramatic increase in the number of investigators in labor and employment enforcement agencies to facilitate a large anti-misclassification effort.”
- Restore and build on the Obama administration’s [Fair Pay and Safe Workplaces Executive Order](#), which conditioned federal contracts on the company’s record of compliance with federal, state, and local labor and employment laws. Opponents of the Executive Order said it defined compliance too broadly, allowing for consideration of allegations that had not been fully adjudicated. Opponents also noted that existing government contract requirements already have mechanisms in place for the debarment of “bad actors.” The Obama administration did not have the opportunity to fully implement the Executive Order, and the Trump administration formally revoked it in 2017. Portions of the implementing regulations were revoked by Congressional Review Act.
- Require all federal contractors to sign agreements pledging “neutrality” during a union organizing drive. Any such agreement, which would require employers to relinquish rights under the NLRA and the First Amendment, would be susceptible to a legal challenge.
- Direct federal agencies to bargain with employee unions over non-mandatory subjects of bargaining.
- Prioritize Project Labor and Community Workforce Agreements in federal procurement procedures. This may result in a new Executive Order.



## COALITION FOR A **DEMOCRATIC WORKPLACE**

### *National Labor Relations Board*

- Limit use of “captive audience” meetings where employees are required to listen to employer presentations on the union seeking to represent the employees, promises the union may have made, or structural changes that would occur as a result of union representation. This is often the only source employees have for information about the union other than what the union itself has provided. The Board is limited in what it can do with respect to this issue as the NLRA and First Amendment protect employer speech.
- Reinstate the Obama-era [“ambush elections” rule](#), which shortened the time frame between the date a union petitions the NLRB to hold a representation election at a specific workplace and the NLRB holding of that election. Employers opposed the rules, arguing the short time frames robbed them of their due process rights, interfered with their ability to communicate with employees, and did not allow the NLRB to fully settle critical matters before the election, such as the scope of the bargaining unit, supervisory status, and other matters impacting voter eligibility. The Trump-era NLRB has issued [various regulations](#) to reverse or mitigate aspects of the rule. We expect a Biden-appointed Board will move to reverse the Trump-era actions.
- Reinstate the Obama-era NLRB policy permitting the creation of [micro-unions](#), or bargaining units that fracture the workforce into smaller entities in order to avoid and disenfranchise workers who do not support unionization. This was implemented via the NLRB’s *Specialty Healthcare* decision in 2011. The Trump-era NLRB reversed this decision with its 2017 *PCC Structurals* decision. While the original *Specialty Healthcare* standard survived various challenges across federal courts of appeals, the courts significantly cabined aspects of the standard. As a result, the Board may be hard pressed to move forward with another standard as aggressive as *Specialty Healthcare*.
- Reestablish the *Browning-Ferris Industries (BFI)* [joint-employer standard](#) under the NLRA. The joint-employer standard is used to determine when two or more companies are jointly responsible for the terms and conditions of employment over the same group of employees. These terms and conditions include, but are not limited to, having the ability to hire, fire, discipline, supervise, or direct employees. Joint-employers are responsible for bargaining with any union representing the joint-employees and are mutually liable for any NLRA violations either entity commits against those employees. Under the *BFI* standard, nearly every contractual relationship could potentially trigger joint-employer status, from the franchise model to relationships between contractors and subcontractors and suppliers and vendors, needlessly exposing vastly more businesses to unwarranted joint-employer liability. Prior litigation around the *BFI* standard may impact the extent to which the Board can move forward.
- While not discussed specifically in the campaign platform, we expect the administration to push for increased funding for the NLRB.



## COALITION FOR A **DEMOCRATIC WORKPLACE**

- Again, while not specifically mentioned, we expect the Biden administration will reverse Trump-era decisions on [independent contractor status](#).

### *Department of Labor*

- Reinstating the Obama-era [persuader rule](#), which requires employers to disclose expenditures on labor relations matters and effectively and drastically limits small employers' ability to obtain legal counsel during union organizing drives or collective bargaining. The rule was [opposed by the American Bar Association](#), among others, and struck down in 2016 by a federal court in Texas, which issued a [permanent injunction](#) against the rule. A federal court in Minnesota also [issued a decision](#) calling into question whether the rule could survive in court. The Trump administration formally [rescinded the rule](#) in 2018.

### **LEGISLATIVE CHANGES**

- Pass the [Protecting the Right to Organize \(PRO\) Act](#) ([S. 1306](#), [H.R. 2474](#), 116<sup>th</sup> Congress), which is composed of numerous provisions altering labor and employment laws to increase union power. If enacted, the PRO Act would, among other things, codify California's "ABC test" for determining independent contractor status under the NLRA; implement the NLRB's [BFI joint-employer standard](#); eliminate Right to Work laws; protect intermittent strikes; ban permanent strike replacements; remove bans on secondary boycotts; and grant the NLRB authority to force employers to the bargaining table if they are found to be bargaining in bad faith on collective bargaining agreements. The PRO Act passed the House in the 116<sup>th</sup> Congress with 224 votes. It will face an uphill battle in the House in the 117<sup>th</sup> Congress and is unlikely to come to a vote in the Senate.
- Pass other legislation that goes "beyond the PRO Act:"
  - **Personal liability and criminal penalties for company executives.** The campaign states on their website, "Biden will go beyond the PRO Act by enacting legislation to impose even stiffer penalties on corporations and to hold company executives personally liable when they interfere with organizing efforts, including criminally liable when their interference is intentional."
  - **Implement card check as an initial option for unionization**, allowing unions to simply collect signatures from potential members rather than require a secret ballot election for unionization campaigns. While the NLRB could make card check easier, making it an option without employer consent would likely require legislation.
  - **Changes to antitrust laws to give independent contractors the right to collectively bargain** and push states to expand bargaining rights for licensed



## COALITION FOR A **DEMOCRATIC WORKPLACE**

and contracted workers, such as childcare providers and home health care workers.

- **Ban “captive audience” meetings**, as discussed above, where employees are required to listen to employer presentations on unionization.
- Work with Congress to adopt a federal employee classification standard (used to determine if a worker is an employee or independent contractor) modeled off California’s “ABC test” for all labor, employment, and tax laws. The California test has been highly controversial and difficult to implement, resulting in the state legislature adopting over 100 exemptions for various industries and occupations, and voters in the state approved a 2020 Ballot Initiative preventing the test from being used to reclassify gig economy workers, such as drivers for Uber and Lyft, as traditional employees.
- Pass legislation making misclassification of workers as independent contractors a substantive violation of federal labor, employment, and tax laws.
- Make it easier for employees to join together in class action lawsuits.
- Expand funding for agencies to increase the number of investigators, litigators, and enforcement actions.
- Expand labor rights and protections to various workers that do not fall under current laws. This includes:
  - farmworkers via the Fairness for Farm Workers Act ([S. 385](#), [H.R. 1080](#), 116<sup>th</sup> Congress);
  - domestic workers via the Domestic Workers Bill of Rights Act ([S. 2112](#), 116<sup>th</sup> Congress), which was introduced by Senator Kamala Harris (D-CA), Biden’s running mate; and
  - undocumented immigrants who report labor violations via the Protect Our Workers from Exploitation and Retaliation (POWER) Act ([S. 2929](#), [H.R. 5225](#), 116<sup>th</sup> Congress).
- Create a protected right to organize for public employees, including via the Public Safety Employer-Employee Cooperation Act ([S. 1394](#), [H.R. 1154](#), 116<sup>th</sup> Congress) and the Public Service Freedom to Negotiate Act ([S. 1970](#), [H.R. 3463](#), 116<sup>th</sup> Congress).