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Labor/employment policy shifts under Biden administration

Whenever the White House changes hands, particularly when the new president is from a different party than his predecessor, employers can expect to see shifts in how various labor and employment policies are interpreted and enforced.

Based on signals from President Joe Biden and new Labor Secretary Martin J. Walsh, the current administration is no exception, although many of their actions are undoing changes the Trump administration announced on its way out the door.

One area where the administration has already taken action is the issue of compensation for tipped workers under the federal Fair Labor Standards Act. As any employer in the food and hospitality industry knows, an employer may take what's called a "tip credit" and pay tipped workers less than the existing minimum wage based on the expectation that such workers will make up the difference in tips.

Some employers have abused this rule by taking a credit against workers' wages for time they spent doing non-tip-generating tasks (food prep and cleanup). In the past, the Department of Labor urged employers to follow the "80/20" rule, under which an employer could take a tip credit as long as a tipped worker's non-tip-producing "side work" didn't exceed 20 percent of his or her worktime. The Trump administration did not vigorously enforce this rule and announced last winter that it was eliminating it altogether.

But Biden's Department of Labor announced that the rule was being reinstated. What's more, new guidance seeks to bar employers from taking the tip credit altogether for time doing work that does not directly support tip-producing work (i.e., cleaning garbage cans or preparing food) while clarifying that no more than 20 percent of tipped workers' time can be spent on non-tipped side work that does directly support tipped work, like folding napkins or refilling salt-and-pepper shakers.


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Should your newly reopened workplace be pet friendly?


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As much of the nation's workforce went remote during the Covid-19 outbreak, millions of people saw the perfect opportunity to integrate a dog or cat into their family's daily routine.

Fast forward more than a year, and now millions of people returning to the physical workplace are reluctant to leave their new companions behind. That makes this the perfect time to ask yourself if your newly reopened workplace should be "pet friendly." Before you make that decision, there are some practical and legal things to consider.

On the positive side of the ledger, a pet-friendly office could be a valuable tool for employee retention. Having Fido or Fluffy lying at an employee's feet during the workday could make that person feel more valued. A valued employee is a happy employee, who in turn is usually a more productive employee.

Additionally, in some cases employers may even need to allow pets as a disability accommodation. For example, the Americans with Disabilities Act mandates that service dogs be permitted in the workplace as long as it does not create an "undue burden" on the employer. The ADA does not require that employers permit "emotional support animals," but in some cases it may still be worth allowing them as an accommodation if it's going to help employees do their job.

On the negative side of the ledger, however, not every workplace is appropriate for pets. For example, if the layout of your business doesn't allow pets to remain in designated areas, it could make things difficult for those uncomfortable with other people's dogs and cats. Additionally, you would need to find a way to accommodate employees with pet allergies.

It would also be very important to establish a clear, objective approval process. If you subjectively allow some workers to have pets with them while not allowing others, you run the risk of accusations of discrimination. A clear, written policy designating exactly what types of pets can come to work, where they can be and the circumstances that would result in the loss of pet privileges would go a long way toward protecting against such problems.

Beware employment policies involving loss of vacation time

A recent decision by the Colorado Supreme Court should remind employers everywhere to have a labor and employment attorney review their vacation policies to ensure they're not violating the law.

This particular case involved an employer's policy stating that workers who quit without giving two weeks' notice or who were discharged for any reason would forfeit any earned-but-unused vacation time rather than being compensated for it upon departure.

The dispute arose when the employer, grocery chain Clark's Market, terminated longtime employee Carmen Nieto while refusing to pay her any of the $2,344 in vacation time she had accrued but not used. Clark's cited the forfeiture policy as grounds for doing so.

Nieto took the company to court, arguing that the policy violated Colorado's wage act, which defines "vacation pay" as protected wages and compensation. A trial judge threw out Nieto's suit and a division of the state court of appeal affirmed on the grounds that Nieto's vacation pay had "accrued" but not "vested" due to her discharge. The court of appeal also said a worker's vacation pay may never vest at all if he or she doesn't meet the employer's conditions.

But the state supreme court reversed. According to the high court, Colorado employers are not required to offer vacation time to employers, but if they do, any vacation time that is "earned" (in other words, owed in return for services performed, like Nieto's vacation time apparently was) and "determinable" (meaning it's possible to ascertain exactly how much is owed, as Nieto asserted was true of her own benefits) at the time of separation must be paid.

What does this mean for employers? If you're in Colorado and you have any forfeiture provisions in your vacation policy, they'll probably be void. If you combine vacation and sick time, you'll need to take a look at that policy and see how any forfeiture provisions impact it. The case also appears to bar "use it or lose it" provisions where workers forfeit any vacation time left unused by the end of the year.

If you're not in Colorado, it's a very good idea to meet with a lawyer to take a look at your own policies and the state of the law where you live to make sure you're not walking into a wage claim that could leave you paying multiple times the worker's damages, plus their attorney fees.

Arbitration agreements with 'e-signature' raise risks

Mandatory arbitration agreements are contracts between employers and employees under which they waive the right to take each other to court should a disagreement arise between them and agree to have a designated neutral third party resolve the dispute instead. Employers like these agreements because they help reduce the stress and expense of litigation while promoting efficiency.

Employers are also increasingly turning to online tools to have workers — particularly remote workers — sign off on such provisions electronically. This may be fine, but before adopting such a practice you should run your procedures by an employment lawyer to make sure your arbitration agreements and other agreements executed with an "e-signature" will be enforceable. That's because, as a recent California case shows us, sloppy HR practices can result in such agreements being torpedoed in court.

In that case, worker Maureen Bannister sued her employer for wrongful termination. The employer presented Bannister's e-signed arbitration agreement to the court and moved to have the case dismissed and sent to private arbitration.

Bannister countered that the agreement was void and presented evidence that she didn't actually sign or review the agreement herself. According to the employee, a member of the HR team signed it electronically for her during the onboarding process.

The trial judge agreed with Bannister, ruling that the arbitration agreement was unenforceable. The California Court of Appeal upheld the decision,

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pointing to a state law clearly stating that electronic signatures are only valid if it can be shown that they were the "act of the person," which may be proved by showing the e-signature required a unique login and password known only to the employee. In Bannister's case, it wasn't enough for the employer to show that the HR person needed her Social Security number, employee identification information and PIN code to sign the agreement, implying Bannister's consent. The operative fact was that the HR person could have signed the document in her place.

The bottom line is that while e-signatures are typically enforceable, they're also risky and more vulnerable to court challenges than regular, written signatures. So the best bet is to use traditional signatures wherever possible, and where not possible check with an attorney to make sure the process is airtight.

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The Biden administration has also taken action on the definition of "independent contractor" under the FLSA. Trump's DOL had announced an employer-friendly five-part test that largely defined an independent contractor's status based on the level of control and opportunity for profit and loss, which likely would have led to more employees being classified as independent contractors. Biden's DOL, however, announced this change would not be taking effect and that the federal government would be sticking with the more restrictive "economic realities" test that courts have traditionally utilized. Observers also predict that Biden will seek to further narrow the definition of independent contractor.

Meanwhile, Secretary Walsh has stated publicly that he favors raising the salary threshold for "exempt" employees not eligible for overtime under the FLSA beyond the current amount of $35,568 per year. While it's safe for the time being to continue relying on the current threshold, any employee below that threshold needs to be paid hourly.

Lastly, there could be changes on the minimum wage. Biden has publicly supported an increase to $15 an hour, and Walsh supported a $15 minimum wage as mayor of Boston.

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Predictable work schedule is 'essential job function'

A recent decision from a federal appeals court provides guidance on the different ways employers must reasonably accommodate a worker's disability.

In that case, a clinical dietitian at a hospital became legally blind, which her employer accommodated with special magnifying equipment. Unfortunately the worker, Joan Unrein, lived 60 miles away, couldn't drive and had trouble securing reliable transit, so the hospital further accommodated her with a flexible schedule that included limitations to ensure it didn't impact patient care or burden coworkers.

After 15 months, Unrein's performance apparently had declined and the hospital opted to end the flexible scheduling. She asked to telecommute full-time instead but went on medical leave while her request was pending. Seven months later, she was approved for long-term disability benefits and the hospital terminated her employment.

Unrein then sued the hospital, claiming it violated the Americans with Disabilities Act by failing to accommodate her disability. But first a trial court and then the federal appeals court determined that being at work on a predictable schedule was an essential job function under the circumstances, where Unrein's job involved close patient contact.

This doesn't necessarily mean that an employer can demand that every worker be present in person, on a predictable schedule, no matter what. If an employee asks to work remotely because of a medical issue, companies still need to determine in an interactive process whether such accommodation would be reasonable. This is the type of thing for which an employment lawyer can provide useful counsel.