

EMPLOYMENT LAW BULLETIN



A Monthly Report On Employment Law Issues

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GEORGIA ELECTIONS CHANGE OUR FUTURE DRAMATICALLY

As a native Georgian, this writer was surprised at the results of the Georgia run-off elections on January 5, 2021, in which both Democrats won narrow victories over two Republican incumbent U.S. Senators. Many had been saying for the last few years that Georgia was now a purple state, although currently all state office-holders are Republicans, and Republicans have majorities in both state legislative houses. There are reports that some persons did not vote in the run-off elections because they were encouraged to boycott them due to claims the election procedures were not fair. If true, there seems to be no method or purpose to evaluate such claims now.

Regardless of why the Democrats won the two run-off elections, Democrats now control the White House and both Houses of Congress. The implications of this result are enormous. For example, the Trump NLRB was working to enact regulations and get certain NLRB rulings in place over the next year or two, because it would likely take that long for Democrats to fully come into control at the NLRB with a Republican Senate. Now, with a Democrat Senate, Democrats will assume a majority of the NLRB during 2021.

Further, President Biden will be able to appoint not only new NLRB members sooner, but Republicans will not be able to assert much influence in the appointment of Cabinet members and federal judges. Readers should remember that the Democrats opposed almost all of President Trump's Cabinet appointments, as well as his federal judge appointments. In the case of Cabinet and Agency officials, some of the appointments were delayed almost two years, but Republicans will now not have the ability to delay or block those appointments.

So what does all of this mean to the management community? President Biden has promised to be "the most pro-union President you have ever seen." He has publicly endorsed a wide variety of legislative proposals, some of which had been previously passed by the Democrat majority House of Representatives, including the following:

- **The Protecting the Right to Organize (PRO) Act**, and Biden has been an avid supporter of union card-check laws and banning state right-to-work laws.
- **The Paycheck Fairness Act**, a pay-equity bill which would eliminate a defense based on a "factor other than sex" to explain differentials in pay.
- **The Equality Act**, which prohibits discrimination on the basis of sexual orientation and gender identity.
- **The Family and Medical Insurance Leave Act**, which may provide employees up to 12 weeks of paid family and medical leave.

- **The Forced Arbitration and Justice Repeal Act**, which would invalidate individual arbitration agreements, and related legislation which would prohibit employers from seeking class-action waivers.
- Minimum Wage and Overtime Rule changes, which could double the current minimum wage as well as the minimum salary necessary for the white-collar overtime exemption.
- Massive changes at OSHA, beginning with an Emergency Temporary Standard for COVID-19.
- **The Pregnant Workers Fairness Act**, which guarantees pregnant workers the right to accommodations on the job.
- **The Protecting Older Workers Against Discrimination Act**, which would make it easier for workers to prove that employers engaged in age or disability discrimination or retaliation.

The above list is hardly complete, but gives one an idea of the massive changes that could be in store for the management community. What are the chances of these types of proposals becoming law? This writer submits that there are three scenarios that could slow the process of massive change. First, there is President Biden himself. Among Democrats, President Biden was considered the most moderate of all the Presidential candidates. Some believe he supported liberal causes to broaden his base of support and thereby gain the nomination. Some question whether he really supports all of the legislation he has endorsed. There is a remote possibility that the Democratic leadership itself may either "slow-track" or moderate much of the proposed legislation.

Second, there is the filibuster potential for the Senate, which requires 60 votes to stop debate before a final vote on proposed legislation. There has been talk of eliminating the filibuster, much as the Democrats have been eliminating many Senate and House rules that have existed for many decades. Indeed, Speaker Pelosi just this month eliminated the long-standing House rule of allowing the minority party to propose the last amendments prior to a vote on legislation, thus negating the opportunity of the minority party to influence legislation or require votes on controversial issues. A former Senate Majority Leader, Democrat Harry Reid, eliminated the filibuster for many issues a number of years ago, including judicial appointments. Ironically, it seems that every time the majority party attempts to eliminate the rights of the minority party, it has come back to haunt the majority party. This result occurred during the Trump Administration when the President was able to fulfill his campaign promises to appoint conservative federal judges (although currently-appointed federal judges are almost evenly split between Democrat and Republican appointments). In this writer's opinion, it is unlikely that the filibuster will be eliminated, and further, there are a few Democrat Senators that may oppose the Democrat majority, such as Senator Manchin of West Virginia, who just this month indicated he would not support many of the Democrat proposals on pandemic relief. Thus, the filibuster will likely remain a deterrent to some legislation, particularly the **PRO Act**, although there are legislative techniques that can be used to negate the filibuster requirement (i.e., the budget reconciliation process).

The final deterrent to massive changes, at least those at the federal agency regulatory level, pertain to arguments that the changes are "arbitrary and capricious" under the Administrative Procedure Act. Up until recently, in practice it was relatively easy for federal agencies to enact, modify, or repeal various federal regulatory requirements. That result has totally changed in recent years, as both political parties have regularly gone to the courts to challenge regulatory changes as arbitrary and capricious. An example is that during the Obama Administration, regulatory change to double the minimum salary level necessary for white-collar exemption from overtime, was challenged in court, and a federal district court judge invalidated the change. This type litigation and the potential for similar results has become more and more widespread. Judicial attacks on the regulatory process have intensified particularly since the litigants can find a judge that seems to support their result, and thus "cherry pick" for the right judge. Further, such judges often issue injunctions that are nationwide in effect. Thus, we can expect to see widespread judicial attacks on regulatory changes by federal agencies.

FIRST STEPS TO BE TAKEN BY BIDEN ADMINISTRATION

Many of the Cabinet nominees made by President Biden are veterans of the Obama Administration. The management community is always interested in who is running the Department of Labor (DOL), and the appointment of Boston Mayor Marty Walls is relatively uncontroversial. Walls is an old friend of the President and, like the President, has a reputation as a pragmatist and consensus-builder. He comes from the building trades that are perhaps the most moderate of all labor unions, and indeed, many of the leaders of the building trades are privately Republican-oriented.

On Inauguration Day, President Biden is expected to issue a memorandum to the heads of all executive departments and agencies temporarily halting all non-emergency rule-making activities that are not yet official. The process of rolling back already effective regulations generally requires either a new rule-making effort or a resolution of disapproval under the Congressional Review Act for recently-issued rules. Efforts were made by the Trump Administration to issue new regulations in a manner it to be harder to overturn them, but the surprise election results in Georgia affects the future of these "midnight regulations."

By far the most important of these "midnight regulations" is the DOL rule making it easier for business to classify workers as independent contractors rather than employees entitled to overtime and minimum wage protections. This rule was published in the Federal Register on January 7, 2021. This rule adopts a simpler and shorter test for when a worker may be legally classified as an independent contractor. President-Elect Biden's press secretary has already cited this regulation as one of the "midnight rules" that the new Administration will likely try to keep from taking effect. The new rule proposes five factors to determine whether a worker is economically dependent on an employer and thus an employee. The two factors given the greatest weight are the nature and degree of an employer's control over the work and the worker's opportunity for profit and loss based on personal initiative or investment.

The new administration may either try to delay the new rule or use the Congressional Review Act to overturn it. This law allows the Senate and House of Representatives to overturn regulations finalized by the Executive Branch in the previous 60 legislative days using a fast-track process that requires a simple majority vote.

CHANGES FROM NEW PANDEMIC RELIEF BILL

The \$900 billion pandemic relief that passed Congress in December was a compromise measure aimed at improving economic recovery. Some of its most important features are as follows:

- The Bill provides \$600.00 stimulus payments for individuals making up to \$75,000.00 per year and \$1,200.00 for married couples making up to \$150,000.00 per year, as well as a \$600.00 payment for each child dependent.
- Federal unemployment insurance benefits for COVID-19 will be extended to March 14, 2021, with a \$300.00 supplement payment each week, similar to the extra \$600.00 supplement that expired last July. The Emergency Unemployment Compensation that provided up to 13 additional weeks of jobless benefits was extended as well.
- Business expenses paid for with forgiven PPP loans are deductible, in addition to the forgiveness being non-taxable income.
- Businesses are eligible for a second round of funding if they have 300 or fewer employees and can prove they experienced a 25% drop in revenue during one quarter of 2020 compared to the previous year.
- There is a continuation and expansion of the Employee Retention Credit. This allows PPP loan recipients to use the credit, increases the credit from 50% to 70% of qualified wages, with the cap on credit increased to \$28,000.00.

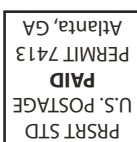
The business must experience more than a 20% reduction in gross receipts when comparing a calendar quarter to the same quarter in 2019, or from the immediately preceding quarter.

- There is an extension of refundable payroll tax credits for paid sick leave and family leave, through March 31, 2021. The mandated paid sick leave and family and medical leave ended on December 31, 2020, but employers may voluntarily provide the paid leave and take the tax credit associated with the leave taken through March 31, 2021.

**LAST DAY TO FILE FOR REFUND OF PAID LEAVE
AND EMPLOYEE RETENTION TAX CREDITS**

The March 2020 CARES Act allows employers to reduce their quarterly federal employment tax deposit obligations in certain situations. One of those is called the Employee Retention Credit, and another is called the Paid Leave Credit. For employers who have claimed, or intend to claim, the employee retention credit or the paid leave credit that were part of the CARES Act, the deadline to file for advance payment of the credit for 2020 wages is approaching. Taxpayers filing a Form 941, Employer's Quarterly Federal Tax Return, may submit a Form 7200, Advance Payment of Employer Credits Due to COVID-19, up to the earlier of February 1, 2021, or the date they file the Form 941 for the fourth quarter of 2020.

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