

# Gauging the Impact on Employers of the 2020 Presidential Election - A View from the Nation's Capital

October 06, 2020



The 2020 election is shaping up to be historic on a number of fronts, potentially resulting in a change of control in the White House, Congress, or both.

Among the issues at stake for employers is whether, how, and/or to what degree the outcome of the election will impact workplace law, policy, and regulation.

Moderated by Carlton Fields Shareholder Rae Vann, this webinar features two of the nation's leading experts in federal labor policy and government relations, Josh Ulman and Jennifer Ortega of Ulman Public Policy and Federal Relations.

Josh and Jennifer share their thoughts on what employers might expect from a second Trump term or a new Biden administration regarding:

- Possible post-election executive action
- New regulatory or de-regulatory mandates from the EEOC, DOL, and NLRB, including pay data collection requirements, joint employer obligations, and union organizing rules
- New federal contractor compliance obligations, such as revival of the Clinton-era "blacklisting" rules
- Changes to the Senate filibuster and other congressional rules affecting the legislative process and more

## Transcript:

**Rae Vann:** Good afternoon, everyone, and welcome to today's program entitled "Gauging the Impact on Employers of the 2020 Presidential Election." My name is Rae Vann and I am a shareholder with Carlton Fields in the firm's Washington, DC office. I am so thrilled to be serving as moderator for today's program. We have some great guests here.

Before I introduce them, though, let me cover very quickly some housekeeping matters. First, this webinar, including the Q&A and discussion session is being recorded for educational and training purposes. We plan to post the recording on the Carlton Fields website as soon after the conclusion of our program today as possible. I also want to draw your attention to the Q&A box located in the toolbar at the bottom of your screen which we'll be using to field as many of your questions as we're able during our time together.

Now it's my great pleasure to introduce today's speakers, Josh Ulman and Jennifer Ortega. Josh Ulman is the founder of Ulman Public Policy and for 20 years or more Josh has been assisting businesses, associations, governments, and coalitions in developing and implementing strategies for achieving their legislative and regulatory objectives. Throughout his career, Josh has represented a wide range of industries and interests on many diverse issues and has been a key player in important legislative and regulatory initiatives. Immediately prior to founding Ulman Public Policy in 2006, Josh

was an attorney and lobbyist at a law firm based here in DC and also previously served in a number of legal policy and government relations roles at the US Chamber of Commerce. In addition, Josh's experience includes serving as Director of Government Relations for both an association of human resource executives from primarily Fortune 500 corporations and for the 300 attorney labor employment and employee benefit section of a large international law firm. Prior to coming to DC, Josh practiced labor and employment and education law in Providence, RI. He received his undergraduate degree from Vassar College and his law degree from the George Washington University Law School.

With Josh today is Jen Ortega who is a senior associate with Ulman Public Policy. She joined the firm back in 2013 and since that time has represented clients before both federal and state legislatures as well as regulatory agencies. Part of her work includes conducting extensive research and analysis on various issues and policy priorities, many of which we'll hear about today, including but not limited to labor relations, workplace safety, cybersecurity, firearms permitting, data privacy, higher education, and healthcare. Jen is a veteran of Capitol Hill where she previously worked for Representative Todd Rokita of Indiana and while they're focused her work on legislative initiatives and constituent relations. Before coming to the Hill, Jen worked on the New Jersey senate campaign for Senator Joe Carrillo and she holds a degree in political science from Colgate University.

So, Josh and Jen, thanks again for joining us. We have so much to discuss today including recent potentially monumental developments that have taken place since we first planned our agenda a few weeks ago, including but not limited to a small, little debate that happened last night. In addition to that, though, one of the developments obviously that we want to talk about to the extent relevant to your presentation, obviously, is the death of Justice Ruth Bader Ginsburg and the recent nomination of Federal Appeals Court Judge Amy Coney Barrett, developments that are likely to have major implications, right, both in Washington and elsewhere for years if not decades to come. So with all of that said, Josh and Jen, go ahead and take it away.

**Jennifer Ortega:** Thank you very much, Rae. So everybody here is our agenda for the afternoon. Josh and I are going to be discussing how the results of the November elections will impact Berkley's policy over the next few years. As you know, we have two presidential candidates who are very different and have very different views on the workforce and the potential policies we'll see from either administration are going to impact the entire community in very different ways. So equally important, though, is who is going to be controlling Congress over the next two years. So we are going to begin our presentation here. Next slide, please.

So in both chambers of Congress, the party with the most members sets the agenda for committee hearings and decides which bills will come to both the committee level vote and before the entire chamber. Currently, Democrats hold the majority of seats in the House of Representatives with 232 of the 435 members. Next slide, please.

The Senate, on the other hand, is controlled by the Republican Party. They hold 53 seats while Democrats hold 47. That includes the two Independents who caucus with the Democrats. Next slide, please.

So Democrats are likely to retain a majority in the House. They only need 218 seats to do that, and as of right now 214 are already projected in their favor. That's with 20 races viewed as likely to be won by the Democratic candidates and 14 viewed as leaning Democratic. There are 31 seats considered toss-ups at this point in time. Next slide, please.

**Josh Ulman:** Who will win a majority in the Senate, however, is much more difficult to call. There are currently 8 toss-up races, all but one of which is currently held by a Republican. One real possibility is that the Democrats will win the White House, a majority in the House, and a majority in the Senate, setting up the party with complete control of the legislative and regulatory agenda, at least until the next two years. Next slide, please.

Yet, even if that were to happen, Democrats are likely to only obtain a few vote majority in the Senate. This is not enough to pass legislation under the current rules of the Senate, which require 60 votes to end debate on a bill before it can come to a vote on the Senate floor. Thus, Republicans could prevent a bill from coming to a vote by filibustering and refusing to end debate on the bill. The Democrats could change the rules in the Senate if they want if they win. So you can actually change the filibuster rules to change it from a 60 vote threshold to a simple majority threshold by just changing the rules. But it is a big deal. In that case, the current Senate Minority Leader, Chuck Schumer from New York would become the Majority Leader. Schumer would face a great deal of pressure to change the rules if the Democrats win the White House, House, and Senate and the only thing standing between them and passing their legislative agenda is the filibuster. Increasing the pressure on Schumer is the fact that he is up in 2022 and could face a challenge on the left in a primary.

Moreover, this would not be the first change to the filibuster rules. We're going to talk about this a little bit later and implications of it. In 2013 the Democrats under Senate Majority Leader Harry Reid eliminated the filibuster for votes involving presidential nominees other than the Supreme Court. In 2017, the Republicans under Republican leader Mitch McConnell eliminated the filibuster for votes on nominees to the Supreme Court. In addition, former President Obama recently called the filibuster a Jim Crow relic, obviously making it much easier for the Democrats to dispose of the procedural rule.

The debate over the filibuster may involve decisions also around statehood compromises for Puerto Rico and DC and the additional members of Congress that statehood would grant those two commonwealths right now.

**Rae Vann:** So, Josh let me ask you a question that I believe is somewhat related to this filibuster discussion. There's been talk variously, including last night, right, of expanding the Supreme Court and, obviously, as well as eliminating the filibuster, are these new issues or are they things that we've heard about over the years? And what is the likelihood that Congress would move forward with either expanding the court or, how it was described last night, packing the Court in a way that, you know, benefits one party over the other?

**Josh Ulman:** Right. Well, I think on both issues, and they're kind of inter-related as we look at the building pressure to move those, they're both huge, monumental changes. Moving the filibuster is less so than changing the composition of the Supreme Court as far as numbers. But, with respect to the filibuster, I think we would see changes if there was enough pressure to do so. So that would really be if the Democrats put forward certain pieces of legislation and those legislations were held up by a Republican filibuster. I think what you'll have is a change in the threshold. At some point, there will be enough pressure to do it. Now those would be major bills. So the first one kind of out of the gate will be either what we would COVID 4 depending on if we have some sort of relief package in the next month or not. So if they don't have it then it'll be COVID 4 probably in January. If they do do something now there will still be another COVID package probably in January and that would be COVID 5. So, the next COVID relief package will be #1 out of the gate and then we'll start to look at things like, you know, Biden's first 100 days. You know, are we looking at taxes, are we looking at environmental changes and whether those are filibusters and whether there is any way for compromise on it or what happens. And that could obviously fuel the change.

With respect to the Supreme Court, that idea is not new. We've had that floated at various points. I think the most notable historical example is during the Great Deal. Roosevelt had floated it, being very frustrated that many of his proposals had been knocked down as unconstitutional. I really don't see that happening, you know, without at least, again, pressure would have to build a series of decisions calling for a need to do so. The sheer makeup of the Court right now without decisions moving through that drive both public outrage and kind of inspire the senators to make the change, would not - and Congress to make the change - would not really be enough. I mean, I think you just can't have it until there's really stark decisions and the public says it's time to change that. Obviously, the issues that might fuel that the most would be probably the hot button social issues, not our business issues, such as reproductive rights and Second Amendment. You know, I could see decisions involving them really kind of driving down whether there needs to be a change there.

**Rae Vann:** So Vice President Biden last night made clear that he is the leader of the Democratic Party right now. What can you glean from that fact that he declined an invitation to weigh in on this very issue?

**Josh Ulman:** I think that's more of a political decision. I don't think Biden is particularly enamored with changing the makeup of the Supreme Court. But there's obviously aspects, you know,

constituents within the Democratic Party that are very concerned that he wouldn't do that if he needed to. So answering that question in the negative would commit him to a course of action that could be problematic and alienate voters when he really needs them right now.

**Rae Vann:** OK, thanks.

**Josh Ulman:** OK, let's jump to the next slide. Thanks, Rae.

So let's turn to the race for the White House. With the election a little over a month away, the latest polls showed Biden in the lead in all categories. But as you may remember from 2016, the election came down to a few battleground states and the majority of polls did not forecast a Trump victory. To me, the most interesting number here is the spread between the polling in 2020 and 2016 for the top battleground states. That number is only a 2.3% difference. In short, while the overall numbers may show Biden in the lead, the race is very tight in the states that count. As we talk about the - I'm going to go a bit off-script here - when we talk about the debate last night, I think we've got to keep an eye on the fact that, you know, whether the President won or lost or whether Biden won or lost really has to do with changing that 2.3% number in battleground states. So, even if you shift the overall number, it really doesn't matter. It really focusses on that 2.3% number in battleground states, and that's important to keep in mind as you read through the analysis of the debates and everything. I think focusing on that will probably give you the most incite as to where we're going, you know, as 2016 showed it's very hard to predict things right now.

**Rae Vann:** So President Trump suggested, again, as recently as last night that he believes that the election ultimately is going to be decided by the Supreme Court. So my question to you and Jen is, you know, how does a 4/4 court rule and on what? You know, what is the issue? And maybe you can draw upon our experience having lived through the Bush/Gore situation in answering that question.

**Josh Ulman:** Yeah, I mean, we're all hopeful that by early January there will be a decision on who has won the election. And we're all hopeful that states do their very best, given the situation, to make sure we don't have, you know hanging Chads or anything along those lines that we went through, you know, in the Bush/Gore. But, I mean, a lot of this is going to revolve around mail-in ballots and the quality of mail-in ballots, you know, and whether there's any evidence of voter fraud. You know, historically, we haven't seen lots of evidence of voter fraud in this country, not the way we've seen it internationally. I think the President will have an uphill battle even if we've got a majority of Republicans in the Supreme Court even if he, you know, confirms the current nominee or, you know, the Senate confirms the current nominee. You know, it's as you know, Rae, the Court is independently nominated and while they may stick to policy issues, you know, and political issues, they tend to come down on stability on these types of things and I think we would see, you know, them coming down on stability. And the President has a real uphill battle with respect to challenging, you know, the election, I think. Again, though, it'll really tie into not only states but those battleground

states and what happens there with respect to their elections. As you remember, Florida was the big item. You know, it wasn't anywhere else; it was Florida. So, you know, we'll hope that the states that matter the most and get down to the real wire are the states where we've got the soundest election policy.

**Rae Vann:** Thank you, Josh.

**Josh Ulman:** OK, let's go ahead to the next slide.

**Jennifer Ortega:** So in the case that a Biden administration does take over in January, it's important to note that they won't automatically gain control over all of the key labor and employment agencies. Both the National Labor Relations Board and the Equal Employment Opportunity Commission are both independent agencies where the members actually serve staggered terms. Currently, the Board has one vacancy and they have a 3-to-1 Republican majority through August 2021. So a Biden administration could only place one Democrat onto that Board. The EEOC on the other hand has a full quorum. They have a 3-to-2 Republican majority until June 2022. Next slide.

**Josh Ulman:** Oh, we lost you, Rae. I see you were asking a question.

**Rae Vann:** Sorry. Before you go on to the next slide, Jen, we have one question that I want to answer from the audience, but also with respect to the EEOC, so a President Biden would get to, as you said, appoint a chair, right? And the chair controls the agenda. What about the GC? So the EEOC's general counsel also is Senate confirmed to a shorter term, a 4-year term, right? What happens if the current GC Sharon Fast Gustafson stays on through 2023 through the end of her term under a Biden EEOC? What does that mean for EEOC enforcement and litigation?

**Josh Ulman:** I'll field this one. I think, you know, the authority over litigation is shared authority at the EEOC. The chair certainly has quite a bit of authority but much of it is delegated to the general counsel. So it'll be interesting to see the pull and push of that authority if that does come down. We're in a different time and really a whole new universe with respect to nominees at independent agencies staying past the presidents that appointed them. In the past, because we had filibusters for nominees and we had a more functional recess appointment process, the Supreme Court really tightened up on recess appointments, which the president could make a temporary appointment to an agency or what would normally be a Senate-confirmed appointment for about one year - and the rules kind of differed - to carry over, you know if there was a vacancy when Congress was on recess. In the Noel/Cannon decision in the Supreme Court narrowed the circumstances under which the president could make these recess appointments. In doing so, you know, that's kind of what led somewhat to the filibuster removal of nominees. But now what we're seeing is, historically in prior administrations you'd get one chance to get your nominees in early in your term. But as you got

closer to the end of the term and those nominees, their own terms expired, you would use recess appointments to kind of fill vacancies to the end of your administration.

What we've seen here without the filibuster is a Republican Senate has been able to confirm appointees right up until the end. We just had a handful of EEOC nominees confirmed last week. With that, we're seeing obviously the holdover that could take place if Vice President Biden wins the election. But one of those will be the general counsel, and it will be interesting to see how it plays out because we've really never experienced quite that level of overlap between a nominee from a different party...

**Rae Vann:** Right.

**Josh Ulman:** ... controlling things such as litigation.

**Rae Vann:** Yeah, the former general counsel under the Obama administration, David Lopez, as you know, he left fairly early, fairly far, you know, ahead of the election. So point taken. Let me just ask this question from the audience before we go too further afield. The question is, do you believe that a strike down of the ACA, the Affordable Care Act, would cause enough for a Democrat-controlled White House and Senate to add two more justices, or would it require something more?

**Josh Ulman:** You know, I think that the ACA may not be enough. It depends what is left in place and whether it's a complete strike down, a partial strike down, and where things kind of lie as far as that and whether, you know, whether there are things done along the way with a Democratic Congress to fill in the gaps or address possible vulnerabilities to the constitutionality. It's possible but I don't think it's probably enough, you know unless we see if people start losing health insurance - yes. But my guess is there will be intervening measures to prevent that from happening.

**Rae Vann:** Thanks, Josh.

**Josh Ulman:** OK. So let's talk a little bit about the policy agenda for workforce issues and what they'd look like under a Trump second term. So here are some top-line items we would expect out of Trump's second term: the continuation of deregulatory activity, a national paid family leave program, a focus on independent contractor status, and then a focus on workforce development.

**Rae Vann:** So what about, Josh, executive action such as, for instance, Trump's recent executive order which really targets diversity training that impacts federal contractors and federal funds recipients. You know, given all the criticism coming especially from the contractor community, does this president double down on this type of executive action, or do you see it easy up or working itself out in some other way in a second term?



**Josh Ulman:** Yeah, obviously that executive order has caused a lot of concern for a variety of folks. We do some work in higher ed and we've heard quite a bit from them. As far as overall - I'm going to break that in two parts - as far as overall executive action, the President has kind of moved through a lot of his executive actions to date, so I don't think we're going to see an onslaught if he wins a second term. On the other hand, you know, if we saw a Vice President Biden win, there would obviously be immediately a lot of executive action because he would be reversing Trump's executive action and putting in his own. So that's #1.

But #2 is on these particular issues, you know, obviously, there's a lot of concern about the executive order impacting existing training programs. You know, we read it through, we talked to clients. I know you're taking a close look at it, Rae, for your clients. You know, it is an executive order full of kinds of exemptions and very broad statements. And I don't think we'll have a good understanding of its full impact other than as a political statement, which, you know, obviously that was a good part of the intent there, but its impact beyond a political statement until we see the regulations and how they're going to be implemented. And, you know, we'll all be focused on that. And the question of whether he doubles down on what he's done here will be, you know, I don't think we'll know until we see those regulations and have a chance to comment on it. But as we've seen in the past, you and I have watched this kind of go through with blacklisting and other things, your ability to shut down national defense over a training program, it's not a feasible option. OK? So I think there will have to be a balance here with respect to how you handle those things. You know, you've got large government contractors that are building key items, getting lots of money both on the software side and in military apparatus to protect the country. And there's a lot of subcontractors involved and there's a lot of people doing a lot of things. And the government tries to do its best to keep track of them, but you also can't just shut down operations that would put national security at risk or functions at risk, you know, critical functions of the government. So, you know, I do always tend to take these, you know, both with a lot of fear that they could do that and then with a grain of salt that they're probably not going to.

**Rae Vann:** And a lot of it's going to depend, too, right, on who comes in as labor secretary because the OFCCP director position is appointed; it's not confirmed, right?

**Josh Ulman:** Correct. Right. Yeah. And that'll have a lot of influence. I do think, you know, with respect to this stuff I certainly would advise everyone to take a close look at your training programs and everything else and make sure you're, you know, you're not doing anything that would be in blatant violation of the EO. I think if you look at the EO carefully and your training programs carefully, if you're being responsible, I don't think there's anything in there that would be a problem anything, despite kind of the overall tone of some of the language in the EO. But, yeah. I mean, we're just going to have to take a very careful look moving forward with respect to that stuff.

**Rae Vann:** Thank you.

**Josh Ulman:** OK. Let's talk about the continuation of deregulatory activity. Every six months, once in late fall and again in June - and this is not guaranteed but it happens most of the time - the federal government publishes what they call a regulatory agenda where every single agency in the government reveals what they have planned for the next few years as far as regulations and sometimes sub-regulations and projected time tables. Based on that information we think that - sorry, setting myself up - we think that the issues laid out on this slide will be top priorities for Trump's second term. Just last week the Senate confirmed two Republican EEOC commissioners, which I spoke about before, giving the Republicans a majority on the EEOC, which should allow them to move forward with a joint employer standard, which will likely mirror one that was also released by the National Labor Relations Board last year as the two statutes rely on the same definition of employer. The NLRB's effort was designed to draw clear lines between contractors and sub-contractors and franchisors and franchisees with respect to who is liable for the employment decisions or unlawful acts against workers or for collective bargaining. During the Obama administration, there was an effort to make contractors legally responsible for the employment decisions of their sub-contractors and for franchisors to be responsible for the employment decisions of the franchisees. So we do think they'll be kind of, again, be able to use the NLRB as a model and there will be brighter lines that will make it easier for these business models to continue without the fear of liability or bargaining obligations.

We also think the EEOC will tackle to the extent to which they can offer incentives for participating in wellness programs without running afoul of the Americans with Disabilities Act or the Genetic Information Nondiscrimination Act. With respect to the NLRB we are waiting on final action with respect to a rule addressing employer concerns with the NLRB Obama-era union representation election rule which shortened the timeframes for elections and in the process made it harder for employers to communicate with the employees prior to an election. Many employers have also said that the Obama-era election rule deprived them of due process. For example, one of the biggest issues we've heard complaints on from the employer community is under the Obama election rule that they did not know exactly who would be in the bargaining unit before the election was held. So that can be a real problem particularly with respect to supervisors, you know, and whether a particular employee was a supervisor or not. And there are legal ramifications for how a supervisor can be treated, whether they are management or employee. So it was an important issue to get resolved beforehand. And under the Obama rule, many employers complained that they did not have resolution on that prior to the election.

We also expect the Board will issue a proposed rule on the extent to which unions may access employer property physically or electronically for a union organizing.

**Jennifer Ortega:** So now we'll talk about paid family leave under the Trump administration. Since the 2016 campaign, President Trump has expressed support for establishing a paid parental leave program, more generally speaking paid time off for workers after the birth or adoption of a child. The

President's daughter, Ivanka, has made this a priority for her. The Department of Labor's Women's Bureau recently released a request for information on how best to implement a program essentially setting up the administration to pursue a paid leave program in a second term. There's a possibility that a broader program would be proposed, including caregivers for serious illnesses. Importantly, public support for a national paid leave program is growing, including from some center-right organizations. There seems to be a growing consensus among outside stakeholders that the best way to fund a program would be through a payroll tax. It's unclear if the Trump administration would support that option.

**Rae Vann:** Jen, could I ask a quick question here? So I know some early iterations of paid leave proposals sought to include some type of preemption language that would essentially address multi-jurisdictional employers' concerns about having to keep track of various state and local paid leave requirements. What's the status of that sort of in the context of this national family leave program that you're talking about?

**Jennifer Ortega:** If I'm not mistaken - Josh, please correct me - but I believe any Republican proposals that have been discussed at this point would involve preemption for the federal level. Josh, please step in if I'm misstating.

**Josh Ulman:** Yeah, I mean, there are a couple - Jen's absolutely correct that Republicans are looking at some sort of preemption or at the very least, you know, there would not be overlap between state programs such as California and a federal program. There would be one or the other. So if California decided to continue to run their program I think the Republicans would look at, you know, that would be an opt-out almost like kind of the way OSHA is set up right now where there would be a state plan and then there would be a federal plan with respect to that stuff. So we would not expect, you know, I'm not sure preemption is the right word for that. With respect to what SHRM had advocated for quite some time and then recently abandoned I think in the last year or so where if you provided paid leave of some sort, you would be exempt from state and local laws. That really did not get off the ground the way they had hoped. They put some, you know, muscle into advocating on it and I don't think they got the traction they wanted and they seem to have abandoned that under their new leadership, at least in the last few years. So I don't expect they'll be pushing kind of that overall preemption. But with respect to the leave, the kind of paid leave program that Jen's talking about, yeah, it would not be something where you would have a state and federal program running concurrently. At least that would be, you know, my understanding of the talks that have gone on.

**Rae Vann:** Thank you.

**Jennifer Ortega:** You can go to the next slide. We'll likely see President Trump continue his efforts to protect and promote independent contractor status in a second term. This is essentially the issue of determining whether workers are traditional employees or independent contractors with the

flexibility and autonomy over their work. The Trump administration's Wage and Hour Division issued an opinion letter back in 2019 clarifying how app-based companies like Uber and Lyft can rely on independent contractors without violating federal wage and hour laws. Earlier this year, the agency issued a proposed rule on the issue. The department is promising to issue a final rule before the end of the year, so a second Trump term will likely go forward with implementation of that rule.

Additionally, Republican policymakers think gig economy companies are working on ways to establish a portable benefit system for independent contractors. Essentially, this would provide independent contractors with the benefits and protections that are currently offered to traditional employees but without actually tying those benefits to a specific occupation or employer. A second Trump administration would likely try to work with Congress to develop that option.

**Rae Vann:** OK, so a question here as well and maybe Jen or Josh you can answer this. So what, if any, of this is subject to action under the Congressional Review Act?

**Jennifer Ortega:** So if a final rule is issued in the next few months, if Wage and Hour issues that final rule that would be susceptible to the CRA. We're under the impression that the timeline begins somewhere around May 20<sup>th</sup>, so any final rules that have been issued since May 20<sup>th</sup> would be susceptible to CRA challenges. At the same time, we could see if for whatever reason the Republicans lose control of the Senate at the elections, we could see them try to run the clock. So before the new session of Congress begins, you'll actually have enough legislative days to prevent CRA challenges to any final rules that were issued in the past year.

**Rae Vann:** Very interesting. Thank you.

**Jennifer Ortega:** Not a problem. Another priority for the Trump administration is going to be continued expansion of and support for apprenticeship programs. The DOL has had a registered apprenticeship program for years, but employers often complained that the system was very burdensome and that it favored unionized companies. The Trump administration tried to rectify this by creating industry-recognized apprenticeship programs or IRAPs. These essentially allowed entities like trade association, nonprofits educational institutions to establish standards for and create apprenticeship programs rather than having to through the red tape of the department of labor. We expected the Trump administration would lead into these programs and potentially included in any plans on the economic recovery following COVID. Next slide.

**Rae Vann:** So, a question from an audience before you get into the Biden agenda. "Do not these ideas result in an even more inequality and lower wages and less power for labor"?

**Jennifer Ortega:** Are you referring to - is this referring to the industry-recognized apprenticeship programs or is that something previous.

**Josh Ulman:** ...or just generally that Trump...

**Rae Vann:** ...generally. Yeah, generally. [*simultaneous speaking*]

**Josh Ulman:** I mean, that's - that's generally the criticism that the Republican policies and the Trump policies will exacerbate problems we've seen with respect to inequality. Certainly, COVID has exacerbated a variety of problems we got on inequality. Though not evenly, just because the nature of what industries are booming once industries are failing with respect to it but yeah, there is widespread criticism on the left that the Trump policies will exacerbate a lot of that and do nothing to improve the status - declining status of unions. So, I think there is certainly quite a bit of criticism on that side as we saw last night on the debate and we kind of seen a discussion, the push back from the Trump administration is, yeah, but "we've got the economy rolling in a way that no one else has" and as a result, you know, we saw the find - the biggest boost with respect to low wage - low wage earners that we've seen in quite some time. So we've got that tension of those two arguments moving forwards and that's really where it is but certainly, those are the prospective we're getting on those policies and as we move into the Biden policies I think we will see - you know, again, this is our approach to addressing inequality certainly runs through it. The question is, which of these policies really gets to fixing it or not, which is - you know... our ongoing debate here in Washington.

**Rae Vann:** Thank you!

**Jennifer Ortega:** So, now we are going to move on to a potential Biden administration. If President or if Biden gets to the White House we're expecting him to focus his attention on reversing Trump-era policies, reinstating Obama era proposals and increasing enforcement efforts against employers, and trying to expand Union density numbers. Next Slide.

**Josh Ulman:** When we talk about - let's jump to the NLRB, which is, you know, one of the biggest issues. We expect that Vice President Biden if he becomes president would appoint to the NLRB would look - appoint union-friendly members to the NLRB and those members would look to kind of tackle some of the issues that we've talked about already a bit here which would expand the definition of joint employer so, as we're talking about the EEOC rule would follow the old NLRB role and kind of make it easier for contractors to hire subcontractors without being liable for their labor practices.

The Biden administration would kind of look to make contractors more responsible for the - or more liable for the labor practices of their subcontractors and franchisors for the practices of their franchisees so that would kind of be - we would expect a hard push on that. I mean, that has been consistent on the Biden talking point, were consistent in Obama administration on talking points and definitely kind of a thrust driven by union who see both declining labor standers they say result from these fractured workplaces and actually just did while the former wage-hour administrator during

the Obama administration wrote a whole book on this... So, we would expect, certainly that you're an employer but the Board would also reverse several decisions... a Biden Board would reverse several decisions made by the Trump Board with respect to independent contractors in an effort to tighten who can qualify for what we call IC or Independent Contractor status. So, we also expect that the NLRB would reverse the changes the Trump administration has made to it by union representational rule, we kind of went through that and talked about it, that we had issues with Republicans and employers concerned with the election rule, we would expect that a Biden administration in their perspective on the election rule is that the longer the election is the more employers can attack unions during that period and make it harder for employees to support unionization. So, their point is there should be a short election time period so employees can move through this process and don't have to be subject to employer-backed propaganda with respect to unions. So, there's this tension, one is we want to communicate - employers said we want to communicate with employees about unionization and disadvantages of it possibly and the problems with the union that might be seeking to represent the employees, and the union said, "Look, the longer election time period is just a chance for employers to scare employees and push their propaganda." So we've got the tension about what is the sweet spot for ensuring that employees have the right facts, and yet the election is done in a quick period, and there's tension on the policy issue thereon who thinks which way we should go with respect to that.

Lastly, during the Obama administration, the board issued a case called Specialty Healthcare which gave unions far more control over who - which employee is essentially would be in the proposed bargaining unit so, it would allow them to shape and propose a bargaining unit. Employers said, however, and the union said this - we need this to kind of maximize employees' free choice with respect to union representation so they can shape the unit that's appropriate for them. Employers said this allows the union to kind of gerrymander the election, so we have that tension there - you know, how much control should a union have over the bargaining unit that they propose versus what fits within existing business structures and makes sense from a business structure prospective of dividing up the bargaining unit, and the tension there over the law. I know we're kind of really getting into finely diced stuff in the NLRB but there's just been years, and years, and years of case law that's where we are. Though we expect obviously the Biden Board would kind of push them, you know towards unions with respect to deciding how to structure this bargaining unit.

**Rae Vann:** And that's not, that's not terrible unusual, is it for the NLRB we see quite a bit of flux from one administration to another, don't we?

**Josh Ulman:** Yes! You know, and part of that has been historically the NLRB has made most policy through adjudication so, you know, there are always these opportunities as the cases come up to flip things over and it's been a widespread criticism of the NLRB since the 1970's that you know, we're flip-flopping back and forth. With that said, I do think a lot of the flip-flopping is done on things that people who are well versed and the board see as in big and radical changes in those are kind of in the

general population - I'm not sure they have the impact that those who very close to it think they do. But yeah, these flip flops are very - very, very, very innate to the board process and they have tried to move toward rulemaking more in the last administration in think in hopes of changing that, we'll see if that actually results in kind of a more steady policy perspective from the agency. With the respect to EOC, we don't have a lot of insight into what a Biden Administration or a Biden controlled EOC would do with respect to policy, except, we know they would reinstate the EEO-1 pay data collection, which has been - was fairly controversial. It requires employers to report wage data across gender and race with far more detail. It was controversial I should say from the employer perspective in that, you know, employers really were concerned with respect to their ability to collect this data, disclosure of this particular data, and misuse of the data. So, right now the current EEOC is going to pull back on it and we would expect the Biden administration would double down on the Obama EEO-1 pay data collection. Other things we've seen kind of generally from a Biden administration but it's hard to put any concrete policies around it. There has been a lot of talk about strengthening the rules and laws with respect to access for people with disabilities but how that translates the EEOC policies is not - we haven't got a clear sense from the Biden campaign what that would mean but they're certainly a lot of talk in the paper and on the trail with respect to this particular issue.

At DOL we expect the Biden administration would expand the definition of joint employer under the Fair Labor Standards Act, I'm not going to beat you with joint employer again but it is a huge issue and they would be tackling that and greatly restrict who would be considered to be an independent contractor. We've just seen a lot of talk out of the Biden Administration about the independent contractor issue and you know, and we expect a real focus on that - under the Fair Labor Standards Act. Right now, we talked about the Trump Administration having roles there - we expect the Biden Administration will be fairly aggressive with respect to this and crackdown in a mere - to the extent, they could as close to California has with their AB5 so, we expect an aggressive stance from them on that. We also expect a Biden DOL would reinstate the Obama era rule on tracking workplace injuries and illnesses and revoke the Trump industry-recognized apprenticeship programs which Jan referenced earlier. Next Slide, please.

As mentioned earlier, one key focus in a Biden administration would be to increase union density overall, which now sits at 6.2 % of the private workforce, down from a high of 35% in the 1950s. So we've seen a precipitous decline in union density across the decades. There's a lot of reasons cited for this. Employers tend to say that it has to do with the evolving workplace protections that have eliminated the need for unions in certain areas, such as the development of OSHA, and other things that have intervened over the last 80 years. They also point to the decline in manufacture and things that are a natural fit for unionization here in the United States. Or more natural fit than some of the service-based economy jobs that we've seen rise. Unions obviously their position is that the law has been stacked against them since the 1947 change called the Taft-Hartley Act. And, that has led to the decline in unionization overtime, and they are seeking changes with respect to the law on that front.

So, Biden plans to convene a cabinet-level working group, aimed at increasing union density and has also promised to support in congress, a variety of labor support measures, including the Pro Act which is a massive bill containing 20 years' worth of - kind of - union-backed legislation proposals. The Biden Administration is also - would also go beyond - promise to go beyond the Pro Act of the Biden campaign. In support of other measures including replacing secret ballots for union elections with the petition-style card check method that was so controversial in 2008 when it was pursued then, under the Employee Free Choice Act. They would also look at legislative proposals that would allow employees to unionize across industry sectors. Called Sectorial Bargaining, rather than individual companies and that is particularly something that has been looked at for the gig economy. But all these changes will require legislation and given the partisan nature of labor issues we would expect that would require a change in the filibuster rules.

For the sake of time, I am not going to go through all the Pro Act provisions, but I mean - just real quick. Joint employer standards, we've talked about speeding up elections, we've talked about the impact on due process rights for employers, we talked about attorney-client privilege - is a real issue that's been fought out with respect to what's in the Pro Act. There's a provision there that's been knocked down by a couple of courts that would require attorneys to disclose some information in union avoidance campaigns. That has to date been considered an attorney-client privilege. You know, there's some stuff on secondary boycotts, which would allow unions to target not only the employer they're trying to unionize but anyone that does business with that particular employer. And, various other provisions including and eliminating right to work provisions. OK, let's jump to the next slide.

As mentioned before, the Biden campaign has made it very clear if it wins the White House, it intends to increase enforcement efforts. If the Democrats also keep the house and win the Senate, they will be able to use the appropriation process to increase the budget for enforcement. So, that would certainly help. The Biden campaign also said it would back legislation to increase penalties for wage discrimination violations. Making it easier for legislation that would make it easier to file class action suits and legislation that would impose criminal penalties on corporate officers and business owners for violations of labor and employment laws. Again, we think these proposals would probably require, you know, those that require legislation such as the criminal penalties and class actions - we expect would require legislative change and a change to the filibuster rules.

As we discussed earlier, the issue of the independent contractor and misclassification has become a highly partisan issue. In part, because of California adoption of AB5 and ABC Test, under its own state wage and hour law. Which has made it very hard for businesses relying on ICs to operate. In fact - you know - as California has dealt with AB5 in different manifestation legislation tackling. They've had to exempt a lot of industry because - just - it is a very hard test to meet. And greatly favors employment status instead of IC status.



The Biden campaign has promised to crack down, one of their main focuses is to crack down on misclassification. By coordinating across federal and state agencies - federal and state agencies that enforce the various labor employment tax laws - kind of a coordinated effort on incorporating that ABC Test, that I talked about, and wherever they possibly can, and tightening up the rules with respect to classifying workers instead of independent contractors. The Biden administration obviously sees that there is an opportunity here to tighten things up. The ramifications, however, may be fewer opportunities in a gig economy.

The Biden campaign has also promised an increase in the federal minimum wage, elimination of tipped, and subminimum wages for workers with disabilities. Moving the overtime exemptions salary threshold up to the Obama rule levels. Which will probably be around \$60k now. So, you will have to make over \$60k to be exempt from overtime. Imposing nationwide predicted scheduling law, pass a bill called the Paycheck Fairness Act, which will require employers to provide much better justification for any gender-based discrepancies that they have. Other than increasing the overtime exemption out of this list. These changes will require legislation, but unlike kind of the previous things we talked about where we could - at least from my perspective- there will need to be a filibuster change to really move forward with a lot of the legislator proposals like the Pro Act and making it easier to file class actions. Things that have really been partisan.

I think the issues here, I can see Democrats garnering some of the Republicans support for some of these measures. To some extent or another at least being able to move through a filibuster...possibly. You know the minimum wage hasn't been increased in a long time. I don't see it being indexed, but certainly, I do see the opportunity for a wage increase.

**Jennifer Ortega:** OK, so I know that we're at the hour. So, I'll just kind of scoot through, or hold off? Keeping going, Rae?

**Rae Vann:** Yeah, let's just wrap up, you know, want to be conscious of everyone's time, but I appreciate you talking through these last couple slides, sure.

**Jennifer Ortega:** So, the Biden campaign is supporting a variety of Civil Rights proposals these include encouraging adoption of ban-the-box policies, at the state and local levels. Which essentially prohibits employers from inquiring into job applicants' criminal pasts. Biden's also advocating for banning salary history inquiries prohibiting employers from asking job applicants for information on past salaries. Which Biden and the left both believe exacerbate wage discrimination. It's possible these initiatives could pass with bipartisan support, even the Republicans control the Senate or without elimination of the filibuster.

The Biden campaign is supporting two separate proposals for paid leave. The first is aimed at providing paid family and medical leave through a public program. The program would be based on

the Family Act and would provide 12 weeks of leave for workers to care for their own serious health conditions, that of a family member, the birth or adoption of a child, or certain caregiving responsibilities for a Military service member.

The second proposal is aimed at providing earned paid sick leave. Modeled on the Healthy Families Act it would allow workers to earn one hour of leave for every 30 hours worked. This initiative may also achieve bipartisan support. As I mentioned before, public support for paid leave programs generally is growing and it may have increased appeal next year as we recover from the pandemic.

So the Biden campaign is pledging a lot of new obligations for companies that want to contract with the federal government. The most controversial is the Black Listing Executive Order. We kind of touched on this before, but under the Black Listing Executive Order contractors who allegedly violated any of 14 federal employment and labor laws for their state equivalence could be barred from working with the government. It's important to note that before the executive order, which was issued under the Obama Administration, federal law had processes in place for barring entities that were considered repeat offenders. The Democratic administrations have wanted to strengthen that requirement. The contractors on the other hand have argued that this robs them of the due process rights, by evaluating them on charges that have not been fully adjudicated. Essentially, only allegations of wrongdoing. The proposal has been rejected by federal courts in the past though, so a Biden administration may face hurdles in reinstating the policy.

Another controversial proposal on the list is that Biden is planning to require entities that want to contract with the federal government to remain neutral in any union organizing campaigns at their workplaces. The Supreme Court has rejected state attempts to do this, and it's likely those decisions will apply to the federal space as well.

Lastly, the Biden campaign has pledged to make sizable investments in workforce development. This includes apprenticeships, pre-apprenticeships, and partnerships with community colleges in the business community. They're particularly focused on pushing access to union jobs through these programs, increasing union density. [*simultaneous speaking*] That's it for our slides. Sorry Rae, go ahead.

**Rae Vann:** I was going to say let's give you guys the last word and wrap this up, we're at about 4 after. Two, I just want to thank you all very much again for all your insight and wisdom on these issues. Any parting words Jen or Josh?

**Jennifer Ortega:** Just thank you! It's been a pleasure working with you guys. I hope everybody found this very interesting and helpful and Josh and I are here to help with anything. Any questions people may have.

**Josh Ulman:** Thank you very much!

**Rae Vann:** Thank you again! And, this concludes our webinar today. Any questions and discussion items we were able to get to, we certainly invite you to continue to ask about, contact anyone of us and we will follow up immediately. Or as soon as possible after this webinar. Thank you all very much.

**Jennifer Ortega:** Thank you all.

## Related Practices

[Labor & Employment](#)

[Government Affairs and Lobbying](#)

©2024 Carlton Fields, P.A. Carlton Fields practices law in California through Carlton Fields, LLP. Carlton Fields publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information and educational purposes only, and should not be relied on as if it were advice about a particular fact situation. The distribution of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship with Carlton Fields. This publication may not be quoted or referred to in any other publication or proceeding without the prior written consent of the firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our Contact Us form via the link below. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm. This site may contain hypertext links to information created and maintained by other entities. Carlton Fields does not control or guarantee the accuracy or completeness of this outside information, nor is the inclusion of a link to be intended as an endorsement of those outside sites.